Runaway Train - The Retaliation Scene After Burlington Northern v. White

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Runaway Train—The Retaliation Scene After
*Burlington Northern v. White*

I. INTRODUCTION

Mr. Smith is the CEO of Alphabet Corporation. One day at the Utopia Country Club, Mr. Smith sees two of his employees who also happen to be members of the same club. Feeling confrontational, he approaches Stephanie, an employee of Alphabet Corporation, and punches her in the face for being a woman. He then finds John, another employee of Alphabet Corporation whom he knows complained to the company’s grievance department about sexual harassment of women in the workplace, and punches him in the face because of his complaint.\(^1\) The former scenario is not within the scope of Title VII\(^2\) as it is not work-related and thus does not alter Stephanie’s “terms and conditions of employment.”\(^3\) The latter scenario, however, could possibly be actionable under the United States Supreme Court’s recent interpretation of the anti-retaliation provision of Title VII. Seems counterintuitive, doesn’t it?

Under Title VII, employers are prohibited from retaliating against an employee who participates in Title VII processes or who opposes workplace discrimination protected under the statute.\(^4\) In order to make out a prima facie case of retaliation, the plaintiff must show that: (1) he or she engaged in protected activity; (2) he or she experienced some adverse employment action; (3) the employer knew about the employee’s protected activity; and (4) a causal link existed between the protected activity and the adverse employment action.\(^5\)

Over the years, the courts have struggled with how to define “adverse employment action.” The courts eventually adopted three

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3. *Id.* at 41.
4. § 2000e-3(a).
standards: (1) an "ultimate employment decision" such as "hiring, granting leave, discharging, promoting, and compensating,"\(^6\) (2) a "materially adverse change in the terms and conditions" of employment,\(^7\) and (3) materially adverse treatment that might well have "dissuaded a reasonable worker from making or supporting a charge of discrimination."\(^8\) The majority of courts, regardless of the standard adopted, agreed that the employer's adverse action needed to be employment-related to be actionable.

The Fifth Circuit Court of Appeals, in addition to Louisiana state courts, adopted the strictest standard of the three—the "ultimate employment action" standard.\(^9\) In 2006, the Supreme Court, in *Burlington Northern & Santa Fe Railway v. White*, decided that the appropriate standard for the adverse employment action prong is any materially adverse action that might well "have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'"\(^10\) In addition to adopting the most lenient standard of the three, the Supreme Court decided that the adverse treatment need not be employment-related at all. The Court also indicated that the "reasonableness" requirement has both subjective and objective elements.\(^11\)

The Court was reasonable in its interpretation of § 704(a) of the Civil Rights Act of 1964; however, the statute is now too broad. Because the standard recognizes that retaliation can come in many forms and thus requires a case-by-case analysis, it will be virtually impossible for employers to gauge their behavior. It will be difficult to deter employers from retaliating if they have no indication as to what is and what is not considered prohibited behavior. Because even relatively minor actions by an employer could deter a victimized employee from complaining, summary judgment will virtually be eliminated and the costs of litigation

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9. See, e.g., Mattern, 104 F.3d at 708; Berry v. City of Bossier City, 911 So. 2d 333, 342 (La. App. 2d Cir. 2005); Alcorn v. City of Baton Rouge, 851 So. 2d 1194, 1203 (La. App. 1st Cir. 2003).
11. Id. at 2409, 2415.
will rise dramatically. Furthermore, the *Burlington* standard will likely be applied beyond the Title VII arena as courts tend to look to Title VII decisions for guidance on how to interpret anti-retaliation provisions in other contexts. Finally, such an interpretation makes the anti-retaliation provision much broader than the underlying discrimination provision—the heart and soul of Title VII. Such a result provides more protection to bystanders who simply complain or oppose the Title VII protected behavior than those who actually experience discrimination based on “race, color, religion, sex, or national origin.”

Part II of this Note discusses the background of Title VII leading up to the 2006 decision in *Burlington*. Part III provides a brief summary of the relevant facts and reasoning surrounding the *Burlington* majority and concurring decisions. Part IV discusses the gradual broadening of Title VII retaliation, the reasonableness of the Court’s interpretation of the anti-retaliation provision, and the ramifications of the Court’s decision on the business world and on present day litigation. Part V contains suggestions on how to temper the broad interpretations adopted in the *Burlington* decision and other retaliation cases. Part VI concludes by recommending that Congress amend § 704 of the Civil Rights Act of 1964 to clarify what type of “discrimination” is within the scope of the provision.

II. THE RETALIATION SCENE PRIOR TO *BURLINGTON*

Title VII’s main provision prohibits an employer from discriminating against an employee because of the employee’s “race, color, religion, sex, or national origin.” However, Title

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14. Section 2000e-2(a) provides:
   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
VII also prohibits employers from retaliating against employees that have opposed discriminatory behavior protected under the main provision.\(^1\) Any claim in retaliation begins with alleged conduct that is protected under the main provision—§ 703(a).\(^2\) Next, an employee decides to protest the discrimination in some way—either formally or informally.\(^3\) After an “employee has ‘opposed’ unlawful discrimination in the workplace or has ‘participated’ in any process or investigation directed against such discrimination,” Title VII prohibits an employer from retaliating against that employee.\(^4\) Therefore, the anti-retaliation provision (§ 704(a)) ensures that an employee’s rights under the main provision of Title VII are fully protected.\(^5\)

A. Proving Discriminatory Intent

In order to prevail on a claim of retaliation, an employee must prove discriminatory intent on the part of the employer. The plaintiff can establish this intent by direct or circumstantial evidence.\(^6\) In cases involving direct evidence, the plaintiff must simply establish a prima facie case of retaliation. In order to

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1. Section 2000e-3(a) provides:
   It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.
3. O’Brien, supra note 16, at 744. An example of a formal complaint is filing a charge with the EEOC. An example of an informal complaint is complaining about the discrimination directly to the employer. Id.
4. Id. at 745. The two clauses of the anti-retaliation provision are referred to as the “opposition clause” and the “participation clause.”
5. Id. (“Protecting employees from employment discrimination, after all, would be meaningless if an employer could simply fire an employee who sought to protest discriminatory behavior.”).
establish a prima facie case of retaliation, the plaintiff must show: "(1) a statutorily protected conduct; (2) an adverse employment action; and (3) the adverse action was causally related to the protected conduct." Further, all circuits require the plaintiff to prove that the employer knew of the employee's protected activity; however, some circuits explicitly list this as a fourth element to the prima facie case. Very rarely is direct evidence of discriminatory intent available. As a result, courts have adopted the burden-shifting approach created by the Supreme Court in *McDonnell Douglas Corp. v. Green* to assist in weighing circumstantial evidence of intent.

First, the plaintiff must make a showing of a prima facie case of retaliation. If the plaintiff's showing is sufficient, the burden shifts to the defendant to articulate a legitimate, non-retaliatory reason for the adverse action taken against the plaintiff. If the defendant articulates such a reason, the burden shifts back to the plaintiff to prove that the stated reason for the adverse action is actually a pretext for retaliation.

Thus the establishment of a prima facie case of retaliation results in a presumption of discriminatory intent, which the employer is able to rebut if the employer succeeds in providing a legitimate, non-retaliatory reason for its action.


23. 411 U.S. 792.


26. Raney v. Vinson Guard Serv., Inc., 120 F.3d 1192, 1196 (11th Cir. 1997).
B. Dispute in the Circuits over the Proper "Adverse Employment Action" Standard

Over the past four decades, the federal circuits have struggled with interpretation of the anti-retaliation provision. Even though "the anti-retaliation clause on its face contains no requirement that the discrimination be with respect to terms, conditions, or privileges of employment," most circuits have interpreted § 704 to require an adverse employment action. However, the circuits varied greatly as to what was considered severe enough to constitute an adverse employment action. Unfortunately, the legislative history of Title VII provides little guidance other than the idea that "[management] prerogatives . . . are to be left undisturbed to the greatest extent possible." Because of the unclear statutory language and the negligible legislative history surrounding the scope of Title VII's anti-retaliation provision, the federal circuits adopted three different interpretations of adverse employment action.

The most conservative of the circuits provided redress only where the employer's actions met the level of "ultimate employment action." An ultimate employment action is limited to actions such as "hiring, granting leave, discharging, promoting, and compensating." The Fifth and Eighth Circuits are the only two that have utilized this standard. The majority of circuits did not accept this view because it allowed "too much latitude to employers to retaliate against employees in ways that are not as easily cognizable as a hiring, firing, or demotion."

30. Id. (quoting Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997)).
31. Id. Louisiana state court decisions also adopted the "ultimate employment standard" of the Fifth Circuit. See, e.g., Berry v. City of Bossier City, 911 So. 2d 333 (La. App. 2d Cir. 2005); Alcorn v. City of Baton Rouge, 851 So. 2d 1194 (La. App. 1st Cir. 2003).
32. Rusie, supra note 12, at 400. That is, employers knew they could retaliate as long as they did not act in a way that could be considered an
The majority of circuits required there to be a "‘materially adverse change in the terms and conditions of employment.’"\(^{33}\) Under this standard, an employee can recover for employer actions that fall short of ultimate employment actions, but are still significant enough to limit employer liability.\(^{34}\)

The final standard, based on the EEOC’s recommendation, had two variations. In both the Seventh Circuit and District of Columbia Circuit, “the plaintiff must show that the ‘employer’s challenged action would have been material to a reasonable employee [and that] it would likely have ‘dissuaded a reasonable worker from making or supporting a charge of discrimination.’”\(^{35}\) The Ninth Circuit adopted the slightly broader EEOC standard which states that “the plaintiff must simply 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.’”\(^{36}\) While the wording of these two standards differs, the consequences of their application is similar, if not identical.\(^{37}\)

In order to decide the appropriate “adverse employment action” standard, and thereby resolve the circuit split, the United States

\(^{33}\) DeAngelis v. El Paso Mun. Police Officers’ Ass’n, 51 F.3d 591 (5th Cir. 1995), the court found that an office newsletter containing articles ridiculing an employee because of her complaints to the EEOC was not an adverse employment action.

\(^{34}\) Burlington, 126 S. Ct. at 2410 (quoting White v. Burlington & Santa Fe Ry. Co., 364 F.3d 789, 795 (6th Cir. 2004)).

\(^{35}\) Rusie, supra note 12, at 389.

\(^{36}\) Burlington, 126 S. Ct. at 2410–11 (quoting Washington v. Ill. Dep’t of Revenue, 420 F.3d 658, 662 (7th Cir. 2005)).

\(^{37}\) Id. at 2411 (quoting Ray v. Henderson, 217 F.3d 1234, 1242–43 (9th Cir. 2000)).

\(^{37}\) In fact, the EEOC cited cases from the Seventh and District of Columbia Circuits when it indicated that the retaliation provision prohibits “any 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.” Margery Corbin Eddy, Finding the Appropriate Standard for Employer Liability in Title VII Retaliation Cases: An Examination of the Applicability of Sexual Harassment Paradigms, 63 ALB. L. REV. 361, 376 (1999) (quoting EEOC COMPL. MAN. (CCH), GUIDANCE ON CURRENT ISSUES OF SEXUAL HARASSMENT 6513 (1990)).
Supreme Court granted certiorari in *Burlington Northern & Santa Fe Railway v. White*.

III. STATEMENT OF THE CASE

Sheila White was initially hired by Burlington Northern as a track laborer, a physically demanding job. After beginning her employment, she filled an open position as forklift operator. Around September 16, 1997, White complained to the company about sexual discrimination by a foreman. After an investigation, the company suspended the foreman without pay and ordered him to attend sexual harassment classes. On the same day that the foreman was suspended, one of the supervisors reassigned the former forklift worker to his old job and returned White to the position of track laborer. Burlington admitted that they made this assignment because male employees had complained of White receiving preferential treatment. Brown, the supervisor that returned White to her former job, stated that he knew of the co-employees' complaints prior to White’s complaints of sexual discrimination; however, he did not transfer White until she had complained. The testimony of Burlington and supervisor Brown was inconsistent. Burlington blamed the change on union problems while Brown indicated that he could place anybody he wanted into the forklift operator position.

On October 10, 1997, White formally complained to the EEOC about sexual discrimination and retaliation by Burlington. The EEOC mailed the October 10 charge of discrimination to Brown on December 8, 1997.

Only three days after Brown received notification of White’s discrimination claim, one of White’s supervisors removed White from her position for insubordination. The incident leading to the insubordination involved a dispute between the supervisor and

39. This position involves “removing and replacing track components, transporting track material, cutting brush, and clearing litter and cargo spillage from the right-of-way.” *Burlington*, 126 S. Ct. at 2409.
41. Id. at 448.
White over which vehicle White would ride to a work location. The foreman contacted Brown for his guidance on how to handle the situation; Brown then requested a fax describing the incident. After receiving the foreman’s fax, Brown indicated that White’s behavior justified her removal from the job. Burlington Northern suspended White for thirty-seven days without pay during which she invoked internal grievance procedures. The results of the company’s investigation indicated that White had not been insubordinate. As a result, Burlington reinstated White and awarded her thirty-seven days of back pay.

White proceeded to file a Title VII claim against Burlington in federal court in which she claimed that “(1) changing her job responsibilities, and (2) suspending her for thirty-seven days without pay—amounted to unlawful retaliation in violation of Title VII.” The district court found for White on both claims of retaliation. The Sixth Circuit panel first reversed, then, en banc, reinstated the district court’s decision. However the en banc court could not agree on the appropriate standard to apply for the “adverse employment action” prong of the prima facie stage.

The Supreme Court then took the matter on certiorari in order to decide the scope of the anti-retaliation provision—what is considered an “adverse employment action” for purposes of a retaliation claim? The court concluded that:

the anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace . . . . [T]he provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant. In the present context that means that the employer’s actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.

42. Id.
43. Burlington, 126 S. Ct. at 2409.
44. Id. at 2410.
45. Id.
46. Id. at 2408. The Supreme Court’s opinion was unanimous, with Justice Alito filing a separate concurring opinion.
47. Id. at 2409.
In reaching its decision, the Court went through the four standards utilized by the federal circuits and concluded that the Seventh Circuit's and District of Columbia Circuit's interpretation was the most loyal to both the language and spirit of Title VII.\textsuperscript{48}

Burlington and the Solicitor General's argument that § 703(a) and § 704(a) should be read in pari materia did not persuade the Supreme Court. Since the anti-retaliation provision does not have the same limiting language found in the anti-discrimination provision, Congress probably intended for the courts to construe the two provisions differently.\textsuperscript{49} The Court then clarified that the purposes of the anti-discrimination and anti-retaliation provisions differ. In order to satisfy its objectives under the anti-discrimination provision, "Congress did not need to prohibit anything other than employment-related discrimination."\textsuperscript{50} However, the primary purpose of the anti-retaliation provision is to protect the employee's rights under the anti-discrimination provision. If the anti-retaliation provision was limited to employment-related actions, many forms of retaliation would be allowed.\textsuperscript{51}

Burlington then argued that the anti-retaliation provision should not provide greater protection to victims of retaliation than those individuals "whom Title VII primarily seeks to protect."\textsuperscript{52} The Court dismissed this argument by referring to other similar statutes, such as the National Labor Relations Act. Neither the statutes themselves, nor the jurisprudence surrounding the NLRA and the Title VII provisions contain any indication that the anti-retaliation provision is limited to the activity described in the primary discrimination provision.\textsuperscript{53}

\begin{itemize}
  \item 48. \textit{Id.} at 2410–11, 2415.
  \item 49. Section 703(a) makes it unlawful to "discriminate against an individual with respect to his compensation, terms, conditions, or privileges of employment ...." 42 U.S.C. § 2000e-2(a) (2006) (emphasis added). Section 704(a), on the other hand, makes it unlawful for an "employer to discriminate against any of his employees or applicants for employment." 42 U.S.C. § 2000e-3(a) (2006) (emphasis added).
  \item 50. \textit{Burlington}, 126 S. Ct. at 2412. "The substantive provision's basic objective [is] 'equality of employment opportunities' and the elimination of practices that tend to bring about 'stratified job environments ....'" \textit{Id.} (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973)).
  \item 51. \textit{Burlington}, 126 S. Ct. at 2411–12.
  \item 52. \textit{Id.} at 2414.
  \item 53. \textit{Id.}
\end{itemize}
After making it clear that the anti-retaliation provision is broader than the anti-discrimination provision of Title VII, the Court concluded by adopting the standard set forth by the Seventh Circuit and District of Columbia Circuit. The Supreme Court preferred this standard to the EEOC standard adopted by the Ninth Circuit because the former has both a materiality requirement and a reasonableness requirement. The "material adversity [requirement] . . . is important to separate significant from trivial harms." An objectively reasonable employee standard is necessary to ensure that the standard is judicially administrable. Even though the Court adopted an objectively reasonable standard, it followed this by stating that context matters—implicitly indicating that there is a subjective element to the reasonableness test. Finally, in determining whether a reasonable employee would be deterred, the "standard does not require a reviewing court or jury to consider 'the nature of the discrimination that led to the filing of the charge.'" Instead, the only thing to consider is the retaliatory conduct itself.

After applying the standard to the facts of White's case, the Court concluded that both the job reassignment and the thirty-seven day suspension with back pay were sufficient to state a claim in retaliation.

In his concurrence, Justice Alito agreed that the two actions by Burlington constituted retaliation; however, he thought § 703(a) and § 704(a) should be read together. While he admitted that his interpretation was not the most obvious choice, he felt that it was

54. Id. at 2414–15 (expressly rejecting the "ultimate employment" standard of the Fifth and Eighth Circuits).
55. Id. at 2415 (explaining that if an action is not materially adverse, it is unlikely that it would have deterred an individual from complaining).
56. Id. (discussing how a "schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children").
57. Id. at 2416 (quoting id. at 2420 (Alito, J., concurring)).
58. Id. Even though Burlington paid Ms. White back pay, the Court still found her claim to be actionable. The Court explained this decision in reference to the Civil Rights Act of 1964, which allows for both compensatory and punitive damages. The Court felt that it would "undermine the significance of that congressional judgment . . . to conclude that employers could avoid liability" by paying back pay. Id. at 2417. The Court went on to state that "an indefinite suspension without pay could well act as a deterrent, even if the suspended employee eventually received backpay." Id.
much more reasonable than the approach taken by the majority. Instead of adopting an interpretation that is true to the language of the statute—allowing any difference in treatment to be actionable—the majority adopted an interpretation that has no basis in the statutory language. Justice Alito also criticized the practical consequences of the standard. First, if courts are not supposed to consider the underlying discrimination, as the majority explicitly provides, how can a jury decide whether a reasonable employee would be deterred from complaining about a given discriminatory act? Second, what does "reasonable worker" mean? The majority states that the standard is objective; however, it then proceeds to discuss subjective elements such as age and gender, which the courts may also consider. Just how many individual characteristics would the Court allow?^{59}

IV. RETALIATION LAW: A RUNAWAY TRAIN

The following section discusses the gradual broadening of Title VII retaliation, the reasonableness of the Court's interpretation of the anti-retaliation provision in *Burlington*, and the ramifications of the Court's decision on the business world and on present-day litigation.

A. The Gradual Broadening of Title VII Retaliation

Broad interpretation in the retaliation area is not limited to the "adverse employment action" standard; the courts have stretched almost every element needed to establish a prima facie claim in retaliation to its limits.^{60} The following gives a brief overview of retaliation standards that the courts have broadly interpreted in the past. These areas are still hotly debated and could possibly be considered by the Supreme Court in the future.

\footnotesize

59. *Id.* at 2419–21 (Alito, J., concurring).

60. *See supra* Part II.A.
1. Protected Activity

Section 704(a) recognizes two variations of protected activity.\(^{61}\) The provision prohibits an employer from retaliating against an employee: "because he has opposed 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]."\(^{62}\)

The former clause is often referred to as the "opposition clause," while the latter clause is referred to as the "participation clause."\(^{63}\) Thus, if an employee can show that he complained about discriminatory conduct to his employer (opposed) or filed a claim himself (participated), there is little question that the employee meets the protected activity prong of the prima facie case. However, not all employee actions fall perfectly into one of these two scenarios.

The opposition clause generally protects a broader array of employee activities than does the participation clause. For example, if an employee pickets or writes an article to the newspaper complaining about their employer’s actions, he has “opposed” discrimination for purposes of Title VII.\(^{64}\) However, the “employee must have a good faith belief that the opposed employer conduct was discriminatory,” which ensures that not just anybody can “oppose” for purposes of Title VII recovery.\(^{65}\)

While it has long been understood that the opposition clause provides a broad range of protection, the same was not always so for the participation clause. Many thought that to “participate” for purposes of Title VII, an individual either had to file a claim with the EEOC himself or had to testify voluntarily in support of another employee’s claim. At least one case has cast this belief into doubt. In \textit{Merritt v. Dillard Paper Company}, Mr. Merritt sexually harassed a woman and was later called to give deposition

\(^{62}\) \textit{Id}.
\(^{64}\) Savage, supra note 28, at 222.
\(^{65}\) \textit{Id.} See also Gilooly v. Mo. Dep’t of Health & Senior Serv., Div. of Senior Serv., 421 F.3d 734, 742 (8th Cir. 2005).
testimony in her sexual harassment case. His truthful testimony helped the plaintiff's case; however, Mr. Merritt was adverse to the plaintiff's cause the entire time. The court read the statutory language literally and found that "participated in any manner" included involuntary deposition testimony.

Even in cases where an employee has not yet filed a claim with the EEOC, but the employer retaliates in anticipation of the employee doing so, courts have found that the employee "participated" for purposes of Title VII.

In addition, some courts have found that a claimant need not be in good faith in order to "participate" within the meaning of Title VII. In other words, a claimant could file a completely fraudulent or frivolous claim of discrimination and still be protected. Fortunately, most courts reject this expansive view.

For example, the Seventh Circuit requires the same good faith standard under both the opposition and participation clauses of Title VII.

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66. 120 F.3d 1181, 1182 (11th Cir. 1997).
67. Id.
68. Id. at 1186; 42 U.S.C. § 2000e-3(a) (2006). However, the facts indicate that the employer fired Mr. Merritt because of his damning testimony, not because he sexually harassed a co-employee. Merritt, 120 F.3d at 1183.

While the court indicates that its decision would have been different if the employer had fired the employee because of the harassment and not the deposition testimony, this provides little consolation. Employers will be much more reluctant to fire a sexually harassing employee once that individual has given deposition testimony out of fear that their actions will look retaliatory. Id. at 1188-89.

69. Sauers v. Salt Lake County, 1 F.3d 1122, 1128 (10th Cir. 1993); Croushorn v. Bd. of Trs., 518 F. Supp. 9, 24 (M.D. Tenn. 1980). This result clearly goes against the language of the statute. The employee has done nothing that could be construed under the statute as "participation."

70. Gilooly, 421 F.3d at 742 (Colloton, J., concurring in part, dissenting in part).
72. Gilooly, 421 F.3d at 742.
73. Id. If the statute protects fraudulent complaints, employees could immunize themselves by filing successive complaints with the EEOC. Id. at 742-43.
2. Prima Facie Causation

Courts have grappled with the issue of what kind of evidence is required in order to establish a prima facie case of retaliation. Most courts agree that in some cases, temporal proximity between the employee’s protected activity and the employer’s adverse action alone is sufficient to establish prima facie causation or lack thereof. However, many courts disagree on how strong a role temporal proximity should play in deciding whether to infer causation. Some circuits adopt a strong proximity rule that views temporal proximity as highly probative of causation. Even in the face of other evidence, these courts tend to hold that temporal proximity alone is sufficient to establish prima facie causation if the employer acted “close on the heels of [the employee’s] complaints.” Other circuits adopt either a weak proximity rule or a case-by-case approach. In either of these approaches, other evidence is often required, and thus the courts afford less deference to temporal proximity. While it is reasonable to consider a period of one day or one week indicative of causation, some courts have gone as far as inferring causation when the adverse action occurred fifteen months after the protected activity.

74. While one commentator stated that “[t]he [Supreme] Court held that very close temporal proximity alone could be sufficient evidence for a prima facie causal connection,” O’Brien, supra note 16, at 750, this interpretation of the decision in Clark County School District v. Breeden, 532 U.S. 268 (2001), is misleading. The Court instead stated that in cases where timing has been enough for the plaintiff to establish prima facie causation, the temporal proximity must be “very close.” Id. at 273 (quoting O’Neal v. Ferguson Constr. Co., 237 F.3d 1248, 1253 (10th Cir. 2001)). Along those lines, the Court concluded that a twenty month period alone is not enough. Id. at 274.

Despite the Court’s discussion of temporal proximity, the Clark holding really seems to hinge on the fact that the employer had no knowledge of the protected activity before taking the alleged adverse action. See generally id. Thus the Court’s discussion on temporal proximity is merely an application of the underlying circuit’s chosen standard, not a “holding” of the Supreme Court on the appropriate causation standard.

76. Id. at 751–53. See, e.g., Mitchell v. Baldridge, 759 F.2d 80, 86 (D.C. Cir. 1985).
78. Ray v. Henderson, 217 F.3d 1234, 1244 (9th Cir. 2000).
3. Employer Knowledge

In order to recover under Title VII, the plaintiff must prove that
the employer was aware of the employee's protected activity.81
Most courts, regardless of their temporal proximity stance, require
a separate showing of knowledge in order for the plaintiff to meet
his prima facie burden.82 However, some jurisdictions, including
the Eleventh Circuit, do not always require a separate showing of
employer knowledge.83 In such cases, temporal proximity has a
dual purpose—"it raises an inference of causal connection" and it
"imputes knowledge of protected activity to an employer."84 Such
an approach makes the knowledge requirement virtually non-
existent.

4. Pretext

After the plaintiff makes out a prima facie case in retaliation,
the burden then shifts to the employer to bring forth a legitimate,
non-discriminatory reason for its action. If the employer succeeds
in proving that its action was legitimate, the burden again shifts to
the plaintiff to show that the employer's purported legitimate
reason was a mere pretext.85 While the pretext stage of the above
McDonnell Douglas analysis is completely separate from the
plaintiff's initial prima facie burden, it too has been broadly
interpreted by the courts. Surprisingly, commentators spend very
little time analyzing the pretext stage and its role in retaliation law.
What many seem to overlook is that both the burden on the
plaintiff at the prima facie stage, and the burden on the defendant

81. Clark County Sch. Dist. v. Breeden, 532 U.S. 268 (2001). See also Dey
82. O'Brien, supra note 16, at 765. This is true even if only three elements
of a prima facie case are listed. The courts just view the knowledge requirement
as an implicit one.
83. Id. at 766. See, e.g., Bass v. Bd. of County Comm'rs, 242 F.3d 996,
1015 (11th Cir. 2001).
85. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); see supra
Part II.A.
at the legitimate reason stage, are not onerous; thus the only stage remaining to make or break a retaliation claim is that of pretext.\textsuperscript{86}

Showing that the employer’s explanation is a pretext requires “essentially a second showing of causation,” though courts and commentators differ as to what is required to meet this second causation standard.\textsuperscript{87} Most courts require “evidence that the adverse action would not have occurred but for the plaintiff’s protected activity.”\textsuperscript{88} Courts tend to differ, however, on the evidence required to meet this burden.

The stance courts adopt for pretext is often intimately tied to the standard adopted for prima facie causation. Some courts with strong proximity rules have declared that temporal proximity is sufficient to establish causation both at the prima facie stage and at the pretext stage.\textsuperscript{89} Other courts adopting a strong proximity approach give significant weight to temporal proximity, but “consider [it] more in the context of other evidence in the record.”\textsuperscript{90} Finally, courts with weak proximity rules consider temporal proximity alone insufficient to establish pretext. The plaintiff must come forth with additional evidence of pretext in order to survive the defendant’s motion for summary judgment.\textsuperscript{91}

B. The Court’s Interpretation of “Discriminate Against” in Section 704(a)

In \textit{Burlington}, the Supreme Court continued the trend of broadly interpreting the anti-retaliation provision by adopting a

\begin{footnotesize}
\footnote{86. Tex. Dep’t of Cmty. Affairs, 450 U.S. 248, 253 (1981). \textit{See} Cude & Steger, \textit{supra} note 63, at 380. The pretext stage is the last hurdle a plaintiff must overcome in order to defeat a motion for summary judgment.}
\footnote{87. Essary, \textit{supra} note 71, at 121. \textit{See} St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502, 515 (1993).}
\footnote{88. Essary, \textit{supra} note 71, at 121. \textit{See} Cude & Steger, \textit{supra} note 63, at 382 (“[T]o prove pretext, and thereby prevail on the merits, a plaintiff must show ‘both that the reason was false, \textit{and} that the discrimination was the real reason’ for the adverse employment action.” (quoting \textit{Hicks}, 509 U.S. at 515)). \textit{Hicks} was a disparate treatment case, but courts have seized upon the pretext standard in the retaliation context as well. \textit{Id}.}
\footnote{89. O’Brien, \textit{supra} note 16, at 761 (“These courts have held that temporal proximity can create a genuine issue of material fact for the jury by raising an inference of pretext.”). \textit{See}, \textit{e.g.}, Passantino v. Johnson & Johnson Consumer Prods., Inc., 212 F.3d 493, 507 (9th Cir. 2002).}
\footnote{90. O’Brien, \textit{supra} note 16, at 762.}
\footnote{91. \textit{Id}. at 763.}
\end{footnotesize}
case-by-case approach to the “adverse employment action” prong of a retaliation claim. Was the Court’s decision reasonable, or was it an unwarranted expansion of an already untethered area of law?

1. Did Congress Intend for Section 704(a) to be Broader than Section 703(a)?

In the Burlington decision, the majority decided that courts should construe the anti-retaliation provision more broadly than the anti-discrimination provision. The Court thereby dismissed Burlington’s argument that the two provisions should be read together (“in pari materia”). In other words, Burlington argued that employer conduct actionable under § 704(a) should be “limited to conduct that ‘affects the employee’s “compensation, terms, conditions, or privileges of employment.”’

The majority gave two main reasons why the anti-retaliation provision is not limited to retaliatory actions in an employment setting. First, the Court noted that if Congress had intended the sections to apply to the same employer actions, it could have easily put the same language in both provisions. Instead, Congress left the qualifying language of § 703(a) out of § 704(a). In such circumstances, the Court “normally presume[s] that, where words differ as they do here, ‘Congress acts intentionally and purposely in the disparate inclusion or exclusion.”’ Second, the Court stated that the underlying purpose of the two sections differs, further justifying the broader interpretation of § 704(a). The goal of the anti-discrimination provision is to provide “equality in employment opportunities.” Thus, the provision is limited to employer conduct in the workplace. On the other hand, the goal of

93. See supra note 14 for statutory language of § 703(a). See supra note 15 for statutory language of § 704(a).
95. Id. at 2412.
96. See supra note 49 for information on sections 703(a) and 704(a).
98. Id.
99. Id.
the anti-retaliation provision is to protect employees who wish to exercise their rights under the anti-discrimination provision. Because retaliation can take many forms, which are not necessarily workplace-related, the Court concluded that the latter provision was intended to be broader in its application.

The Court then dismissed Burlington Northern’s final argument that it “is ‘anomalous’ to read the statute to provide broader protection for victims of retaliation than for those whom Title VII primarily seeks to protect . . .”. In doing so, the Court compared Title VII to the National Labor Relations Act and found that jurisprudential interpretations surrounding the NLRA anti-retaliation provision provide broader protection than the underlying substantive provision.

While the Court’s interpretation of § 704(a) was entirely reasonable, an in pari materia reading would have provided the courts and employers with an objective standard. Further, such an interpretation would have provided employees sufficient protection from employer retaliation while effectively limiting the provision’s coverage to only those claims that are employment-related.

The majority argument, that Congress expresses its intentions by the words it includes or excludes, actually goes against the Court’s interpretation. If Congress wanted the anti-retaliation provision to be broader than the anti-discrimination provision, it could have drafted such a provision. For example, the Americans with Disabilities Act and the Family Medical Leave Act both include an extra provision that prohibits employers from attempting to “intimidate, coerce, threaten, or interfere with the exercise of rights.”

100. Id. The anti-retaliation provision’s primary purpose is to “[m]aintain . . . unfettered access to statutory remedial mechanisms.” Id. (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997)).
101. Id.
102. Id. at 2414.
103. Id.
104. Id. at 2419 (Alito, J., concurring). See also Von Gunten v. Maryland., 243 F.3d 858, 863 n.1 (4th Cir. 2001) (quoting Ross v. Commc’ns Satellite Corp., 759 F.2d 355, 366 (4th Cir. 1985)).
106. Id. at 31–32. However a valid counterargument is that any difference between the ADA/FLMA and Title VII was unintentional. If such were the case, this would mean that Congress intended to protect disabled individuals
Further, if Congress meant to include non-employment-related activity, it could have changed the language of the statute to reflect its intent. Instead, it declined to clarify the statutory language even though the term "adverse employment action" has been in use since 1977. Congress implicitly endorsed the interpretation adopted by lower courts that the adverse action must be "employment-related."

The Court’s determination that § 704(a)'s purpose demands a broader interpretation than that of the underlying anti-discrimination provision is hard to counter. Unfortunately, retaliation can take many forms—some of which may occur outside the workplace. However, as the Alito concurrence argued, retaliatory acts that are taken outside the employment setting and are severe enough to be actionable will be dealt with by other areas of law. Additionally, a broader interpretation of the anti-

more than victims of sexual or racial discrimination. Essary, supra note 71, at 152.


"[W]hile legislative inaction may not conclusively reflect legislative intent, one may reasonably infer that a Congress that enacted civil rights legislation affecting the very provision in question as recently as five years ago would have corrected such a widespread misapprehension . . . ." The Court has looked favorably on Congress’ implicit ratification of judicial interpretations in the past.

Id. (footnote omitted).

109. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2420 (2006) (Alito, J., concurring). For example, threatening to shoot an employee in the head would constitute assault. See, e.g., McDonnell v. Cisneros, 84 F.3d 256, 259 (7th Cir. 1996) ("Shooting a person for filing a complaint of discrimination would be an effective method of retaliation, though . . . the victim of the retaliation would have other, and more powerful, remedies than a suit under Title VII. This would be reason for confining the provision to retaliation that takes the form of an adverse job action.").

In fact, the majority cites only two cases in support of its contention that Title VII should protect non-workplace retaliation. First, the court discussed Rochon v. Gonzales, 438 F.3d 1211, 1213 (D.C. Cir. 2006), which involved the FBI's refusal to investigate death threats made on an employee that had complained. The Court failed to realize that this case could have been addressed under a standard limited to employment-related activity. Burlington, 126 S. Ct. at 2420 (Alito, J., concurring). Even when an agent is off duty, security provided by the FBI to its employees would “[qualify] as a term, condition, or privilege of
retaliation provision leads to the counterintuitive result set forth in the introductory hypothetical. An individual who is punched in the face for being a woman, as we saw in the principal hypothetical, cannot recover under § 703(a). However, an individual that protested discriminatory treatment of females and was punched in the face for his complaint can recover under § 704(a).

2. Adoption of the Supposed Middle Ground—The Reasonableness and Materially Adverse Requirements

After determining that the anti-retaliation provision is broader than the substantive discrimination provision, the Court decided what standard would be most appropriate for the "adverse employment action" prong of a retaliation claim. Instead of allowing recovery for all acts of retaliatory discrimination or adopting an *in pari materia* interpretation, the Court took the middle ground by inserting a reasonableness requirement.1 Thus, the only discrimination that is actionable is that which a reasonable employee would find adverse. Such an interpretation is not true to the language of Title VII. "[D]iscriminate against" in § 704(a) does not have any qualifying language.111

Thus, even though the court capitalized on the lack of qualifying language when determining that an "employment-related" adverse action was not required, it decided to overlook this when concluding that a reasonableness standard was appropriate. The Court most likely realized that if it interpreted the

employment." *Id.* Next, the Court wrongly portrayed *Berry v. Stevinson Chevrolet*, 74 F.3d 980 (10th Cir. 1996)—one of the cases cited to support its argument. The Court stated that the "employer filed false criminal charges against [a] former employee who complained about discrimination." *Burlington*, 126 S. Ct. at 2412 (referencing *Berry*, 74 F.3d at 984, 986). However in *Berry*, the employer did not file any charges against an employee. Instead, a fellow employee exercised his legal right to file charges against Berry. *Berry*, 74 F.3d at 980. The claim of the co-employee was at least reasonably legitimate, as Berry had asked the secretary to forge the co-employee's signature in order to negotiate the check. He then cashed the checks and kept the money. *Id.* at 983–84. That the employer may have influenced the employee's decision to file suit should be of no moment.


statute literally, any discriminatory treatment, no matter how miniscule, would be actionable. In order to avoid such an absurd result, it chose to look past the plain language. While the Court was wise in not allowing all discrimination to be actionable, an in pari materia interpretation would have been more consistent with the terms of the statute.

The Court went even further by requiring that the challenged action be "materially adverse." In other words, the employer action must be significant enough that "it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" While a materiality requirement will help to ensure that courts only compensate employer actions that are intentionally discriminatory, "[t]o import a standard of material adversity into retaliation claims is contrary to the ordinary meaning of the language" for the same reasons that the reasonableness requirement fails to comport with the statutory language.

3. Positive Aspects of the Broad Deterrence Approach

Even though the statutory language does not entirely support the Court's interpretation, there are persuasive arguments supporting the Court's decision. In light of the Supreme Court's decisions in Faragher v. Boca Raton and Burlington Industries Inc. v. Ellereth, a broad deterrence standard for retaliation cases is arguably necessary. Under Ellereth and Faragher, in order for employees to recover for workplace harassment by a supervisor that does not result in a tangible employment action, they must utilize internal grievance procedures. If they fail to do so, courts will deny recovery. However, if they utilize the internal grievance procedures, they open themselves up to various forms of

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112. "[A] strictly literal reading of 'discriminate against' is not a fair interpretation of Title VII since it is unlikely that Congress intended to authorize Title VII claims over trivial matters." Burlington, 364 F.3d at 799.
113. Burlington, 126 S. Ct. at 2415 (quoting Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).
114. Glover, supra note 24, at 590. See also Burlington, 126 S. Ct. 2405 (Alito, J., concurring).
117. Id. at 765. This is because the employer will have an affirmative defense to the employee's claim.
employer retaliation that might not meet the higher standards adopted by circuits in the past. Thus, in order to protect an employee's right to complain about harassment and the like, a broad deterrence standard is necessary.\textsuperscript{118} Another benefit of the broad case-by-case standard is that it will keep employers on their toes. Without a bright-line rule, employers are less likely to know what is legal for them to do in retaliation.\textsuperscript{119} In other words, "when you say that an act of retaliation is per se legal, it provides safe harbor for people to do things to individuals"; a case-by-case standard removes such a safe harbor.\textsuperscript{120}

A judge's job is to interpret the law and apply the facts to it. While the Court's interpretation of the anti-retaliation provision could have gone in a number of directions, the conclusions reached were reasonable in light of the ambiguous statutory language. What the Court failed to consider fully is the effect such a broad standard will have both in the legal realm and in the business world.

C. Ramifications of the Burlington Decision and the New Deterrence Standard

The following section discusses the consequences of the Court's decision on the business world and on present day litigation.

1. Burden on Employers

In Burlington, the Court faced competing Title VII goals. If employers have guidelines to follow, they would be able to retaliate legally in ways that fall outside of the guidelines. If employees know that their employers are aware of the guidelines,

\textsuperscript{118} Savage, \textit{supra} note 28, at 247.

\textsuperscript{119} See generally Matthew J. Wiles, \textit{Defining Adverse Employment Action in Title VII Claims for Employer Retaliation: Determining the Most Appropriate Standard}, 27 \textit{U. DAYTON L. REV.} 217, 236 (2001). "A real problem for employers, employees, and courts has been the absence of a uniform standard for evaluating what constitutes an adverse employment action for the purposes of establishing a prima facie case of retaliation within the burden-shifting framework used to evaluate these claims." \textit{Id.} at 243.

employees would be more deterred from accessing Title VII remedies. Such a result goes against Title VII’s purpose of “[m]aintaining unfettered access to statutory remedial mechanisms.” Employee deterrence in such cases presupposes that employees are aware of their employer’s familiarity with the law. This is, however, normally not the case. On the other hand, a standard that gives no guidance to employers also violates one of Title VII’s main purposes—“motivat[ing] employers to detect and deter Title VII violations.” Employers cannot be dissuaded from retaliating if they have no clear standard against which to measure their behavior.

In various cases over the years, the Supreme Court has reiterated that Title VII’s aim is “not to provide redress but to avoid harm.” However, the Burlington standard does not


The 1991 Civil Rights Act arguably changed the focus of Title VII from preventing employer retaliation to compensating employees that were deterred from exercising their rights. This argument is not persuasive. While the purpose of Title VII may have expanded in 1991, the original goal of prevention is still present. If compensation for deterring employees was meant to take the place of the original goal of deterring employers, there would be no compensatory and punitive damage cap.

123. A counterargument is that employers can be deterred by uncertainty. In other words, because an employer will not know the boundaries of retaliation, they will have an incentive to watch all of their behavior. This argument is unrealistic because it would require employers to (1) monitor everything that goes on in the workplace daily with a magnifying glass (thus drastically increasing costs) or (2) take no actions against any employee that has been involved in Title VII protected activity—no matter how legitimate the action is. Either way, an employer’s day-to-day operations would be crippled and bad employees will be insulated simply by participating in Title VII activity.

124. Kolstad, 527 U.S. 526, 545 (1999) (quoting Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998)). See also Currie, supra note 122, at 1338 (“The Supreme Court has stated that the general purpose of Title VII is a proactive, deterrent one aimed at preventing or at least resolving problems between employers and employees before they reach the point of litigation.”) (footnotes omitted).
support this purpose. The standard, which is inherently vague and subjective, does not assist an employer that seeks to "avoid harm." \[125\] In essence, the Burlington standard does nothing to clarify this area of the law. While the circuit split has been resolved, this standard is so fact-specific that it provides little assurance to the lawyers, judges, and employers who sought the Supreme Court's guidance. The standard forces employers who seek to eliminate retaliation in their workplace to guess "which areas of prevention demand their attention." \[126\] "[E]mployers will find it impossible to achieve the Congressional goal and purpose of Title VII: that is, to proactively eliminate discrimination from the American workplace." \[127\]

The subjective element of the reasonableness requirement makes the Burlington standard extremely unpredictable. Employers will have to decide with whom they are dealing before they can decide whether that individual may construe the employer's actions as retaliatory. Before the Court's dangerous crossover into the subjective arena, courts were generally unwilling to consider a plaintiff's subjective characteristics in determining whether an employer's action was an "adverse employment action." \[128\] How are the courts supposed to apply such a standard? How many individual characteristics should the

125. Currie, supra note 122, at 1339. The reasonableness requirement adopted in Burlington does little to assist the courts or employers in determining what is actionable retaliation. In determining what would be objectively reasonable, the Court in Burlington considered a "supervisor's refusal to invite an employee to lunch... trivial, a nonactionable petty slight." Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2415 (2006). The denial of a lunch invite by a supervisor may seem trivial to some; however, the effect on the career opportunities for those individuals that are not invited can be serious. Theresa M. Beiner, Do Reindeer Games Count as Terms, Conditions or Privileges of Employment Under Title VII?, 37 B.C. L. REV. 643, 645 (1996). In fact, a study of nine corporations by the United States Department of Labor revealed that casual interviews over lunches, dinners, and other social occasions made up part of their promotion practices. U.S. DEP'T OF LABOR, A REPORT ON THE GLASS CEILING INITIATIVE 6, 18-22 (1998). Thus, it is clear that those things that a judge or other outsider might consider trivial, may in fact be a strong deterrent to an objectively reasonable employee. White, supra note 27, at 1165.

126. Currie, supra note 122, at 1339.

127. Id. at 1340.

It will be very easy for the subjective element to consume the objective one. The question will no longer be whether a reasonable person would likely be deterred, but whether the employer action would deter an individual in this person's circumstances. The courts will then move on to consider such factors as how badly the person needed the job and whether the individual has family circumstances that make the employer action more significant than the action would have been otherwise.

The standard may further depend on whether a person is participating or opposing discrimination. If an individual has an economic interest in the case (they filed the claim and thus are "participating"), it will take more to deter that individual than it would if the individual has no economic interest in the outcome of the case (they simply picket in support of another's claim, and thus are "opposing").

The materiality requirement is also of little solace to employers. As one commentator pointed out, "[a]ny employer

130. The possibilities are endless: In Rochon v. Gonzales, 438 F.3d 1211 (D.C. Cir. 2006), the court indicated that a wrongly delivered letter by the Postal Service would be trivial and thus not actionable under § 704(a). However with a subjective element, will the employer and the court have to consider whether that person regularly receives items of great importance in the mail?
131. Transcript of Oral Argument at 38, Burlington, 126 S. Ct. 2405 (2006) (No. 05–259). See Washington v. Ill. Dep't of Revenue, 420 F.3d 658, 662 (7th Cir. 2005) ("[I]t takes less to deter an altruistic act than to deter a self-interested one . . . the sort of response deemed immaterial to self-interested charges could be material to others, and thus could be deemed discriminatory.").

This argument is very similar to that set forth by the Burlington concurrence. Justice Alito stated that in order for the jury to have any hope of determining what would deter a reasonable employee, they would need to look at the severity of the underlying discrimination or harassment. Burlington, 126 S. Ct. at 2420 (Alito, J., concurring). For example, if the person was not sexually harassed personally (but just did not like the treatment of her fellow employees) it would take much less to deter her than if she had personally been sexually harassed— in which case she would not want to put up with the harassment anymore. Alito recognized that such a result is topsy-turvy—it would give more protection to the individuals that had not personally suffered harassment or discrimination. Id. at 2421 (Alito J., concurring). However, he said that the other possibility— not considering the severity of the underlying discrimination—is just as ridiculous because it gives juries no guidance on how to apply the majority's standard. Id. at 2420–21. The majority in Burlington clarified that courts should not consider the severity of the underlying discrimination. Id. at 2416 (majority opinion). Therefore, whether the courts should consider a person's participation or opposition for purposes of Title VII is debatable.
action that prevents, is intended to prevent, or could potentially prevent an employee from participating in an EEOC investigation or complaint would be considered 'material' by any reasonable court that applies this standard." Regrettably, because of the standard's inherent subjectivity and vagueness, many actions that occur in the normal course of business could be considered retaliation.

A case-by-case adverse employment action standard will also significantly impinge on employers' ability to manage their businesses. While the legislative history surrounding § 704(a) is minimal, Congress clearly indicated that Title VII is meant to displace employers' prerogatives only to the extent necessary to accomplish the objectives of Title VII. Even though the Burlington standard would help ensure that employees are not deterred from exercising their rights under § 703(a), an interpretation limited to employment-related adverse actions would sufficiently protect employees, but would also strike a balance that would allow employers adequate control over their day-to-day business management.

A broad interpretation of the anti-retaliation provision interferes a great deal with employers' freedom to operate their businesses, as employees can use the retaliation provision to insulate themselves from adverse employment actions. It would be both difficult and inefficient for an employer to try to determine whether an employment decision, legitimate or otherwise, could potentially open them up to retaliation liability. As a result, employers feel pressured into retaining bad employees in order to avoid the hassles of retaliation law.

132. Rusie, supra note 12, at 405.
133. For example in large organizations, employers switch jobs around frequently to meet business demands. Also with the growth of technology, tightening of Internet access is prevalent. Under the new standard, either of these could be actionable retaliation.
2. Inconsistent Judgments, Increased Litigation, and the Elimination of Summary Judgment

Attorneys and judges nationwide anticipated the Supreme Court's decision in Burlington. Finally, the nation's highest Court would decide the appropriate "adverse employment action" standard, thereby reducing the number of inconsistent judgments. While the Court did choose a uniform standard for the federal circuits to apply, the potential for inconsistent judgments remains. The Court's case-by-case standard favors flexibility over uniformity. Inevitably, courts throughout the nation will continue to render inconsistent judgments.

The Court's decision will also increase the number of retaliation claims litigated. The number of frivolous claims will increase because "[i]f the liberal standard is used in every circuit, employees will be more likely to file a claim on the hope of getting a sympathetic judge or jury." Because the requirements for a plaintiff to establish a prima facie case are low, employers will be virtually unable to dispose of such claims on summary judgment. An employer will then have to choose between settling the claim or litigating in court. The effect will be especially significant in the Fifth and Eighth Circuits that formerly employed the "ultimate employment action" standard. In those circuits, summary judgment was common as the employer's action had to involve "hiring, granting leave, discharging, promoting, [or] compensating" in order to qualify as an adverse employment action. While many individuals would favor a system where employers have the uphill battle, most forget that those businesses simply pass their costs on to consumers. In the end, courts will

136. During the Burlington oral arguments, Justice Scalia recognized the implications of such a broad standard. He stated that if a black letter standard was not adopted in the retaliation context, there would be "no way . . . to get a case dismissed before it goes to a jury . . . every claim is going to be a jury trial." Transcript of Oral Argument at 54, Burlington, 126 S. Ct. 2405 (No. 05-259).
137. Rusie, supra note 12, at n.167.
139. Litigation is expensive, regardless of whether the plaintiff's claim is frivolous or has merit. In Franchetti v. Bloomberg, L.P., 411 F. Supp. 2d 466,
make an unnecessary number of decisions that should rightfully be made by employers, thereby stripping employers of the ability to run their businesses as they see fit.140

Federal courts are already swamped with employment discrimination cases.141 A case-by-case adverse employment action standard will result in an increased number of retaliation claims, thereby leading to the further bogging down of federal courts and the overshadowing of substantive discrimination claims.142 The reputation of employment discrimination law will also suffer. The public will question the utility of this area of law as a result of the anticipated media coverage that will focus on the ridiculous retaliation claims rendered under this standard.

The Sixth Circuit, in their opinion in the Burlington case, stated that "there are no indications that the broad rules still employed in the Ninth, Tenth, and Eleventh Circuits have opened unmanageable floodgates to aggrieved Title VII plaintiffs."143 However, those circuits employ a strictly objective standard. Distinguishing between frivolous claims and those that contain legitimate adverse actions will not be as cut and dry when the Supreme Court’s subjective element to the reasonableness test is taken into account.

467 (S.D.N.Y. 2006), an employer spent 1.3 million dollars defending a retaliation claim that the trial judge concluded was "utterly baseless and fraudulent."


142. As a final point, the courts should not have to be social referees. As the Court has previously stated, "Title VII does not become a 'general civility code.'" Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (citation omitted)). Application to non-workplace employer action threatens to make Title VII just that.

3. Incentive to Use Technology

The Burlington standard will open most employers up to increased liability.\textsuperscript{144} As a result, many employers will be motivated to replace human labor with technology. In fact, employers have recently begun replacing workers with technology in retail stores such as Wal-Mart and Albertsons Grocery Store. In any given Wal-Mart today, about one-fifth of the registers are self-checkout lanes where customers scan their own items and pay the machine directly using a credit card or cash. Whether employers have been motivated by the recent trend in employment law is uncertain, but it is this author’s opinion that after the Burlington decision, more stores are going to follow the lead of the Wal-Marts and Albertsons of the world. As one commentator pointed out, “[e]mployers who consistently have to pay to defend and settle these cases may find it more economical, or even necessary, to retain fewer employees or employ more technology to avoid having the human element in their workforce.”\textsuperscript{145}

As a result, the Burlington standard clearly cuts against federal policy. Each year the government struggles to keep the national unemployment rate down. Because the standard gives employers an incentive to utilize machinery over human labor, the unemployment rate will inevitably increase.

4. Incentive for Employee Action

A case-by-case standard is also an incentive for employees to complain. Under § 704(a) as it is presently construed, employees can insulate themselves by “participating” in a Title VII investigation or proceeding or by “opposing” illegal employment practices.\textsuperscript{146} While there is little room for employee manipulation in the opposition context,\textsuperscript{147} the jurisprudence surrounding the participation clause is much more lenient. An employee can file

\textsuperscript{144} Some circuits, such as the Seventh, Ninth, and D.C. Circuits, already employ a broad standard. Thus the Burlington decision will not increase liability for employers in those jurisdictions.

\textsuperscript{145} Wiles, supra note 119, at 238.

\textsuperscript{146} See supra Part IV.A.1.

\textsuperscript{147} This is because the employee has to reasonably believe the employer conduct violates Title VII in order to be protected under the opposition clause. Id.
fraudulent complaints under the participation clause and still be protected for purposes of Title VII.\textsuperscript{148} Thus, any time that an employee fears adverse action by an employer—legitimate or otherwise—she can make a fraudulent complaint and then "wield her protected status as a hammer against any and all adverse events that might affect her at the workplace."\textsuperscript{149}

The broad standard may also serve as an incentive to employees who seek preferential treatment. In other words, many employers will overcompensate in their treatment of employee-litigants. Instead of treating all employees the same, as was the intent of Congress, some employers will treat employee-litigants preferentially in order to ensure that the employee does not hit them with a retaliation claim in the future.\textsuperscript{150} Such a result clearly goes against the purpose of Title VII.

V. PREVENTING A TRAIN WRECK: JURISPRUDENTIAL RESPONSE

Employers will be on pins and needles if something is not done to temper the expansive interpretations surrounding the anti-retaliation provision. Retaliation law may be so unraveled that it would take a legislative amendment to address all of the concerns adequately; however, the following are a few ways the courts could analyze the remaining retaliation issues in an attempt to harness this area of law.

\begin{itemize}
  \item \textsuperscript{148} Id.
  \item \textsuperscript{149} Essary, \textit{supra} note 71, at 134. An employer may feel compelled to retain an "employee simply because she has complained about discrimination. Unfortunately, the retaliation section of Title VII may serve as a crutch for such poor workers because employers will hesitate to risk potential liability." David Anthony Rutter, \textit{Title VII Retaliation, A Unique Breed}, 36 J. MARSHALL L. REV. 925, 937 (2003).
  \item \textsuperscript{150} In other words, an employer may need to "take a legitimate, perhaps performance-based, employment action against an active employee who has just filed a discrimination claim against him: does he take action, or does he wait? In this situation, 'many employers feel compelled to actually accord their employee-litigants preferential treatment, a result which is clearly at odds with sound business management.'" Currie, \textit{supra} note 122, at 1344–45 (quoting Gary D. Friedman, \textit{The Excuse Factory: How Employment Law Is Paralyzing the American Workplace}, N.Y.L.J., Sept. 23, 1997 (book review), \textit{available at} http://www.manhattan-institute.org/html/_nylawjournal-the_excusefact.htm).
\end{itemize}
A. Protected Activity

The protected activity requirement should be narrowed in two respects: (1) the courts that have not already done so should require plaintiffs to have a reasonable, good faith belief under the participation clause, and (2) the courts should require voluntary participation in order for an individual to be protected under Title VII’s participation clause.  

It is unnecessary to have differing standards under the participation and opposition clauses of § 704(a). Allowing employees that “participate” for purposes of Title VII to bring fraudulent claims does little to further the purpose of Title VII. While giving even those employees who know they do not have a valid claim access to the courts definitely “[m]aintain[s] unfettered access to statutory remedial mechanisms,” those employees are not the individuals that Title VII should protect. Further, allowing protection for employees who file fraudulent claims leads to high litigation costs and a waste of judicial resources. Instead, only those with valid claims, or at least individuals who have a reasonable, good faith belief that they have a valid claim, should receive Title VII protection. As a result, courts should apply the same standard in both the “opposition” and “participation” contexts.

In addition, Title VII should only protect those individuals who voluntarily “participate.” In Merritt v. Dillard Paper Company, the court concluded that a co-employee who had given deposition testimony had “participated” for purposes of Title VII even though he was adverse to the plaintiff’s interests and his testimony was involuntary. Such a result is not what Congress had in mind. The language of § 704(a) indicates that the purpose of the anti-retaliation provision “is to protect the employee who utilizes the

151. While the opposition clause is viewed as being a lot broader and more dangerous than the participation clause, in that more conduct may be considered opposition, these suggestions would help ensure that the participation clause does not become as broad as the opposition clause. While the statutory language of § 704(a) indicates that Congress wanted the opposition clause to be construed broadly, the same conclusion does not follow from the language of the participation clause.
153. See supra note 139.
154. 120 F.3d 1181, 1182 (11th Cir. 1997).
tools provided by Congress to protect his rights." This purpose clearly implies that the employee's protected activity must be voluntary. Furthermore, Congress seeks to prevent employee deterrence. If the standard is what "might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination,'" voluntariness necessarily follows. An employee can hardly be deterred from something if he has no choice in the matter. Therefore, Title VII should only protect voluntary participation.

B. Prima Facie Causation

Because the Burlington standard is so expansive, courts should require more at the prima facie causation stage than mere temporal proximity. Strong proximity rules should give way to

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157. For example, [i]n Twisdale v. Snow, an employee participated in an internal discrimination investigation on the side of the employer, and sought protection under Title VII's anti-retaliation provisions. The section states that an employer shall not retaliate against an employee that "participated in any manner in the investigation." A literal meaning seems to suggest that the section protects an employee whose actions assist her employer. The Twisdale court rejected this interpretation, stating, "[p]erverse and absurd statutory interpretation are not to be adopted in the name of literalism." Consequently, the Court held that the employee was not protected under Title VII. The court noted that Title VII was created for the protection of those that are discriminated against and those that assist them, not employees who assist their employer in investigating a claim.

Rutter, supra note 149, at 934 (quoting 42 U.S.C.A. § 2000e-3(a) (2000); Twisdale v. Snow, 325 F.3d 950, 953 (7th Cir. 2003)).

Employees that have done nothing wrong or have not involved themselves in the case at all, but have been called to testify against their will, would likely be protected under the opposition clause. Limiting the participation clause is meant to prevent cases like Merritt, see supra Part IV.A.1, and Twisdale, where the individual testifying is a wrongdoer or is actively supporting the employer's case.

158. During Burlington oral arguments, Justice Scalia recognized that "[j]uries can have wonderful imaginations." He then went on to ask the attorney what safeguards there are to prevent every little thing from requiring a jury trial, and eventually being considered retaliatory. The attorney responded with causation. Without giving it much consideration, Scalia agreed. Transcript of Oral Argument at 41-42, Burlington, 126 S. Ct. 2405 (No. 05-259).
weaker proximity or case-by-case proximity rules. While the courts can still afford temporal proximity strong weight, they should look to the totality of the circumstances before determining whether there is adequate causation. Courts should consider other factors such as the "number and nature of protected activities and adverse actions . . . ."\footnote{159}

One way to increase the plaintiff's burden at the prima facie stage would be to require proof that the employer treated similarly situated employees differently. In other words, if the employer takes similar action against all employees or at least other employees who did not take part in Title VII protected activity, causation is not met without more.\footnote{160}

\textbf{C. Pretext}

Even if the prima facie elements to a retaliation claim remain extremely broad, the employer can still prevail as long as it can show that its actions were legitimate and the plaintiff fails to prove that the employer's reasons were mere pretext.\footnote{161} To ensure that employers retain some authority over employees, it is essential that

Commentators that support the deterrence standard also rely on the causation requirement to justify their broad approach. "Courts need not be overly concerned that a broad approach to adversity at the prima facie stage will inundate courts and unduly hamper employers in the management of their enterprises" because "retaliation plaintiffs must present evidence of a causal connection between the challenged employer action and the protected conduct."\footnote{159} White, \textit{supra} note 27, at 1190. Thus, it is clear that a more challenging causation requirement is a necessary safeguard.

While the Supreme Court in \textit{Clark County School District v. Breeden}, 532 U.S. 268 (2001) recognized that lower courts allow an inference based on temporal proximity, if the issue came directly before the court, Scalia and perhaps others may be unlikely to approve of such an inference. There needs to be some mechanism to restrict recovery; causation is one of the only avenues left. \textit{See also} Robinson v. City of Pittsburgh, 120 F.3d 1286, 1302 (3d Cir. 1997).

\footnote{159}{O'Brien, \textit{supra} note 16, at 753.}
\footnote{160}{See also Savage, \textit{supra} note 28, at 226. \textit{See e.g.,} McKenzie v. Ill. Dep't of Transp., 92 F.3d 473, 484 (7th Cir. 1996) (holding that an employer is not liable in retaliation where the adverse action was a generally applicable policy used against all employees).}
\footnote{161}{\textit{See supra} Part II.A.}
the plaintiff's burden at the pretext stage requires more than a showing of mere temporal proximity.\textsuperscript{162}

If the courts consider temporal proximity sufficient to establish both prima facie causation and pretext, plaintiffs would be able to proceed to trial with virtually no showing of causation. In each case, a plaintiff armed only with the timing between her protected activity and the employer's adverse action will defeat an employer's motion for summary judgment.\textsuperscript{163} To avoid such a result, courts should require plaintiffs to prove that "'but for' the protected activity, the . . . [adverse action] would not have occurred."\textsuperscript{164} Courts should look at how other similarly situated employees were dealt with, in addition to other factors relevant to a determination of "but for" causation or pretext.\textsuperscript{165}

D. Separate Knowledge Requirement at the Prima Facie Stage

In order to recover under Title VII, the plaintiff must prove that the employer was aware of the protected activity.\textsuperscript{166} However, some circuits allow temporal proximity to serve the dual purpose of providing an inference of causation and imputing "knowledge of protected activity to an employer."\textsuperscript{167} Imputing knowledge to the employer based on the timing of its activities alone is unreasonable. An employer that is unaware of an employee's protected activity should not be liable for damages simply because they happened to take an adverse employment action against an employee shortly after that individual filed a complaint.

162. This section proceeds on the assumption that most courts will continue allowing temporal proximity alone to establish prima facie causation.

163. O'Brien, supra note 16, at 761. For example, in Strother v. Southern California Permanente Medical Group, 79 F.3d 859 (9th Cir. 1996), the employer fired the employee one day after the employee had filed a claim of discrimination. The employer offered numerous non-retaliatory reasons for the adverse action; however, the court concluded that temporal proximity alone was sufficient to defeat the defendant's motion for summary judgment. \textit{Id.} at 870.


165. The factors utilized are similar to those used by courts that choose to heighten their requirements for prima facie causation. The only difference would be that in the pretext stage, the employer's legitimate reasons should be factored into the analysis. See Essary, supra note 71, at 149.


Employers that have no knowledge of an employee’s protected activity can hardly retaliate in response to that activity. Allowing plaintiffs to circumvent the knowledge requirement only increases the likelihood that frivolous claims will take it one more step toward a favorable judgment.

E. Damages

In most cases, a plaintiff who cannot establish an injury will not be able to recover. Otherwise, the plaintiff would receive a windfall. The same is true in the retaliation context. The Burlington Court reiterates this principle by stating that the “anti-retaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm.” Even though proof of injury is required in order to recover for retaliation, the court does not consider the issue of damages until after a trial on the merits. As a result, a plaintiff that has suffered no damage could avoid a motion for summary judgment and proceed to trial even though it is unquestionable that he should not recover.

Whether the employer is liable and whether the employee suffered any damage are separate inquiries. While these two considerations are distinct, there is no reason to reserve a determination of damages until the end of trial. For instance, tort law requires that a plaintiff prove damages in order to establish a prima facie case of negligence. Courts should follow the same approach in the retaliation context.

In order to establish a prima facie case in retaliation, the courts should require a showing of (1) protected activity, (2) adverse employment action, (3) employer knowledge, (4) causation, and (5) damages. After the plaintiff has provided sufficient evidence

169. For example, in Hashimoto v. Dalton, 118 F.3d 671 (9th Cir. 1997), the Ninth Circuit held that a negative job reference was an adverse employment action even though the prospective employer chose to hire the plaintiff anyway. See Ray v. Henderson, 217 F.3d 1234, 1241 (9th Cir. 2000) (referencing Hashimoto, 118 F.3d 671).
for all five elements, the burden would then shift to the defendant to provide a legitimate reason for its action. A prima facie damage requirement will allow courts to dismiss baseless claims early in the game.

What exactly is required to prove "damages" in a retaliation case? In *Meritor Savings Bank, FSB v. Vinson*, the Supreme Court concluded that the damage suffered by the plaintiff in a discrimination case need not be economic. The Court’s conclusion, however, provides little guidance in terms of damage thresholds for recovery.

In *Harris v. Forklift Systems, Inc.*, the Court decided the plaintiff's burden for recovery in a sexual harassment case. As in the retaliation context, quantifying damages in sexual harassment cases is extremely difficult. Despite the difficulty, the Court knew it needed to make a decision. It concluded that while psychological injury is not required, something more than mere offensive conduct is required in order to recover for a harassment claim. The plaintiff must prove that she found the activity hostile or abusive and that a reasonable person would find the activity hostile or abusive. The standard contains both a subjective and objective element, as in the retaliation context. The Court adopted a set of factors to assist in applying the *Harris* standard including: the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance."

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172. *Id.* at 64. While *Meritor* was a sex discrimination case, courts would probably reach a similar conclusion in the retaliation context.
173. In other words, the decision is unhelpful in determining how much damage should be required in order to prevail in a retaliation claim.
175. The implicit nature of the injury in retaliation cases makes the damages question much more uncertain than in other areas of law. For example, in most personal injury cases it is fairly easy to establish whether an injury has occurred. However, in retaliation cases, being "deterred" from exercising rights is the injury. Such an inquiry is inherently relative.
177. *Id.* at 22. "So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive..." *Id.*
In order to consistently apply the standard the Court adopted in *Burlington*, courts should use factors similar to those employed in *Harris*.

While the factors would not be as necessary in cases where the action altered the terms and conditions of employment or was an ultimate employment action, the factors would be of great help in cases where the alleged retaliatory action is more subtle. The factors will ensure that behavior is severe enough to warrant compensation. Even though the *Harris* standard was initially created to deal with alterations to "conditions" of employment, the reasoning is still applicable in the retaliation context. The Court in *Harris* struggled to find a reasonable line between "making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury." The same issues are appearing now in the retaliation context.

Further, some circuits that have wrestled with a hybrid of the two areas—retaliatory harassment—have already drawn analogies to the *Harris* case. In *Ray*, the Ninth Circuit concluded that retaliatory harassment "is actionable only if it is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" While the *Harris* test may not be perfect for retaliation situations, there may not be a test that can perfectly capture the goals of the anti-retaliation provision. Justice Scalia had a similar concern in *Harris*. He knew that the standard left juries with little assistance and unfettered discretion in deciding what constitutes sexual harassment by employers. However, Scalia also

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*Harris*, 510 U.S. at 23). The employee's psychological well-being is also a factor to consider. *Harris*, 510 U.S. at 23.

179. The final factor would not be applicable in all cases, as the Court has clarified that the adverse action does not need to be employment-related in order to be actionable.

180. In these two areas, it is much easier to show damage.


182. Ray v. Henderson, 217 F.3d 1234, 1245 (9th Cir. 2000) (quoting *Harris*, 510 U.S. at 21). The Ninth Circuit went on to clarify that the conduct must be both subjectively and objectively offensive. *Id.* at 1245. The Ninth Circuit in *Ray* also adopted the broad EEOC deterrence approach for adverse employment actions, which is similar to the approach adopted by the *Burlington* Court.

understood that there was no other alternative.\textsuperscript{184} He realized that people need targets in order to shape behavior, and while the standard given in this case was not perfect, it was better than no standard at all.\textsuperscript{185} The same is true in the retaliation context. Juries should not be left with unfettered discretion to decide what “deters” a reasonable employee. Courts in retaliation cases should utilize factors similar to those adopted in \textit{Harris}.

\textbf{VI. PREVENTING A TRAIN WRECK: LEGISLATIVE INVOLVEMENT}

\textit{Burlington} was a bad policy decision. The Supreme Court's discussion of the proper statutory interpretation of the anti-retaliation provision was very thorough; however, the Court did not give proper consideration to the practical consequences that would follow.\textsuperscript{186} Employee protection is important, but the broad deterrence standard goes too far.\textsuperscript{187} The standard provides little if any guidance to employers who wish to avoid becoming liable for retaliation. In addition, the standard gives employers an incentive to use technology instead of employees. Finally, the standard will lead to increased litigation, inconsistent judgments, and the elimination of summary judgment in the retaliation area.\textsuperscript{188} The

\textsuperscript{184}. \textit{Id.}
\textsuperscript{185}. “There are times when even a bad rule is better than no rule at all.” Antonin Scalia, \textit{The Rule of Law as a Law of Rules}, 56 U. CHI. L. REV. 1175, 1179 (1989) (referencing KARL N. LLEWELLYN, \textit{THE COMMON LAW TRADITION} 17 (1960)).
\textsuperscript{186}. Normally it is the job of the legislature to make policy decisions; however, when the statutory language is ambiguous, and a court has the ability to go one way or the other, it becomes the courts’ job to determine what the legislature would have desired as a matter of policy.
\textsuperscript{187}. Because numerous other statutes look to Title VII interpretations for guidance, the broad interpretation adopted by the \textit{Burlington} Court is especially dangerous. \textit{See} Rusie, \textit{supra} note 12, at 383–84 (“Since enactment of Title VII, Congress inserted parallel provisions into the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Equal Pay Act of the Fair Labor Standards Act, and the Family Medical Leave Act.”)

Any negative consequence of the \textit{Burlington} decision in the Title VII context will carry over into other areas. For example, if there is a flood of litigation in the Title VII retaliation context because of the Court’s decision, there is a high likelihood that the same result will follow in the ADA, ADEA, FLSA, and ERISA contexts as well—as each of these statutes also has an anti-retaliation provision.

\textsuperscript{188}. Even though an employer’s chance of succeeding at the summary judgment phase is greatly decreased, there is still hope. In \textit{Reis v. Universal City Development Partners, LTD.}, 442 F. Supp. 2d 1238, 1252–53 (M.D. Fla.
effects will be most noticeable in the courts that previously utilized the “ultimate employment action” standard such as the Fifth Circuit and states like Louisiana that follow that court’s jurisprudence.

As Federal District Judge Stanley Sporkin poignantly stated:

The evidence needed to make a prima facie case is much too low. It seems that almost anyone not selected for a job can maintain a court action. It is for this reason that the federal courts are flooded with employment cases. We are becoming personal czars of virtually every one of this nation’s public and private institutions. The drafters of the original legislation could never have intended the resulting consequences from what they deemed to be necessary, progressive legislation. It is obvious that amendatory legislation is required. What is needed is a better screening mechanism as a pre-requisite for gaining access to this nation’s federal court system. If an appropriate screening mechanism cannot be devised, then at a minimum a new Article I court should be created to hear this flood of cases. The point is some change is urgently needed.

Judge Sporkin is absolutely correct. Something needs to be done. If courts are unwilling to narrowly interpret the other retaliation elements, the Supreme Court either needs to back away from the standard or Congress needs to amend § 704(a).

2006), the Middle District of Florida applied the Burlington standard and decided that the denial of a transfer request was not something that would deter a reasonable employee. The court stated that unlike in Burlington, the two job positions in this case were almost identical. Id. at 1253. This case may also be different because the employer merely denied an employee’s request for better conditions after protected activity rather than taking affirmative negative action to “retaliate” for the protected activity.

189. Tschappat v. Reich, 957 F. Supp. 297, 299 (D.D.C. 1997). While this case was in the context of an age and gender discrimination claim, the same reasoning applies in the retaliation context.

190. It is arguable that the Court could later characterize its decision that the “adverse employment action” standard is not limited to employment-related activity as dicta. The action that Burlington took against Ms. White was clearly employment-related, thus the Court was not required to decide that issue in order to decide Ms. White’s case.
standard any time soon (if ever); thus, Congress needs to amend the statute to clarify what "discriminate" means. The amended statute should clearly indicate that non-employment-related activity is not within the scope of the anti-retaliation provision and provide a specific standard to assist courts and employers in deciding whether something constitutes an "adverse employment action."\(^{191}\)

*Yvette K. Schultz*

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191. "Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes." Scalia, *supra* note 185, at 1179.

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