ADDING SUBJECTIVE FUEL TO THE VAGUE-STANDARD FIRE: A PROPOSAL FOR CONGRESSIONAL INTERVENTION AFTER *BURLINGTON NORTHERN & SANTA FE RAILWAY CO. V. WHITE*

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I. INTRODUCTION

When the United States Supreme Court decided *Burlington Northern & Santa Fe Railway Co. v. White*[1] on June 22, 2006, it created an uber-protected class of those workers who have complained of discrimination or participated in some way in the resolution or investigation process of their own or someone else's charge of discrimination. The Court's eagerly anticipated[2] decision in *White* ties the hands of employers without sufficient need and, more importantly, without sufficient basis in the relevant statute[3] or its underlying policy goals. While protection for whistleblowers is of utmost importance in today's workplace,[4] the Court

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

2. *See, e.g.*, "Adverse Employment Action" Argument in Supreme Court, http://www.lawmemo.com/blog/2006/04/adverse_employm_1.html (Apr. 11, 2006) (referring to *White* case as "the most important employment law case of the year"); Robert Whitman & Renee Phillips, *Supreme Court Clarifies Standards for Title VII Claims*, MONDAQ BUS. BRIEFING (Jun. 27, 2006) (referring to Supreme Court's decision in *White* as "eagerly anticipated").

3. Civil Rights Act of 1964, 42 U.S.C. § 2000e (2000).

4. *See generally* Richard Lacayo & Amanda Ripley, *Persons of the Year: The Whistleblowers*, TIME, Dec. 30, 2002, at 30 (naming as persons of the year corporate whistleblowers Sherron Watkins of Enron, Coleen Rowley of the FBI and Cynthia Cooper of Worldcom).

went too far in *White*, implementing a vague and highly subjective standard that affords employees who complain of discrimination, whether founded or not, what in practicality amounts to near immunity from even the slightest changes in working conditions. Indeed, after the Court's decision in *White*, an employer must treat an employee who has engaged in any activity protected by Title VII with kid gloves and must be far more careful about its interaction with any such employee than it must be as to those workers in the minority groups Title VII was originally enacted to protect.

This Article will explain how the Court's decision in *White* goes too far in protecting employees who complain of discrimination under Title VII, both as a matter of statutory interpretation and as a matter of policy. In Part II, I will frame the issue by comparing and contrasting the two most relevant statutory provisions and highlighting the decisions of the United States Supreme Court that bear on their interpretation. In Part III, I will expose the issue as it arose in a split among the federal circuit courts of appeals and as it came to the Supreme Court in *White*, and in Part IV I will discuss the Supreme Court's decision in the *White* case itself. In Part V, I will explain the practical and legal ramifications of the *White* decision, and, finally, I propose in Part VI that Congress intervenes to fix the problems the decision creates.

II. THE SOURCE OF THE CONFLICT: TWO SIMILAR BUT DISTINCT STATUTORY PROVISIONS, AND THE SUPREME COURT'S LIMITED INTERPRETIVE INPUT.

A. An Exercise in Comparison and Contrast: The Relevant Statutory Provisions

When Congress enacted Title VII of the Civil Rights Act of 1964 forty-three years ago, it sought to combat one of the biggest social problems of that era—rampant discrimination against minorities in the workplace.[5] In order to effectuate this purpose, Congress made it:

5. *See generally* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) ("The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens."); Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971) ("The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."); H.R. REP. NO. 88-914 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 2391, 2391 ("The bill, as amended, is designed primarily to protect and provide more effective means to enforce the civil rights of persons within the jurisdiction of the United States.").

> an unlawful employment practice for an employer . . . 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 . . . .[6]

This core substantive statutory provision was intended to prohibit employers from treating employees differently from one another because of such employees' protected trait or traits.[7] Title VII does not, however, tout as its primary goal redress of the harms that might be brought about by these banned discriminatory acts.[8] Instead, the statute is intended to be preventive in nature, and encourages employer forethought, employee involvement in deterrence and enforcement, and conciliation before litigation.[9] To that end, the statute not only makes it unlawful to treat employees differently because of their race, sex, religion, and national origin, but also prohibits "discriminat[ion] against" any employee who has "opposed" any employment practice made unlawful by Title VII or has "made a charge, testified, or participated in any manner in an investigation, proceeding, or hearing" under Title VII.[10] This section of the statute, often referred to as the "anti-retaliation provision," thus creates an additional protected class—i..e., an employee is protected by Title VII not only on the basis of her "race, color, religion, sex, or national origin," but also on the basis of her status as an employee who either has complained of the sort of discrimination prohibited by the statute or has participated in the investigation or trial of such a claim.[11]

Congress enacted the anti-retaliation provision of Title VII at the same time it enacted the core substantive provision of the statute,[12] and used

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6. 42 U.S.C. § 2000e-2(a).

7. *Id.*; *see also McDonnell Douglas*, 411 U.S. at 792 (explaining the purpose and implications of 42 U.S.C. § 2000e); *Griggs*, 401 U.S. at 429-30 (stating the purpose of Title VII: "It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.").

8. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 805-06 (1998) ("Although Title VII seeks 'to make persons whole for injuries suffered on account of unlawful employment discrimination,' . . . its 'primary objective,' like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm." (citations omitted)).

9. *Id.*; *see also* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998) (referencing "Congress' intention to promote conciliation rather than litigation in the Title VII context . . . ." (citing E.E.O.C. v. Shell Oil Co., 466 U.S. 54, 77 (1984))).

10. 42 U.S.C. § 2000e-3(a).

11. *Id.* §§ 2000e-2(a), 2000e-3(a); *see also* Sanders v. N.Y. City Hum. Res. Admin., 361 F.3d 749, 755 (2d Cir. 2004) ("Title VII makes an employer liable for discriminating against its employees based on race or gender, or for retaliating against an employee for having challenged such discrimination.").

12. 42 U.S.C. § 2000e-3(a).

similar language in both provisions. Specifically, both Section 703 of Title VII of the Civil Rights Act of 1964 (what I refer to as the "core substantive provision" of the statute, which is codified at 42 U.S.C. § 2000e-2) and Section 704 (the anti-retaliation provision, codified at 42 U.S.C. § 2000e-3) use the terms "discriminate against" to describe the sort of action made unlawful thereby. The term "discriminate against," however, though employed repeatedly, is never expressly defined in the statute. Moreover, although the Supreme Court has on several occasions spoken to the scope and meaning of the core substantive provision more generally,[13] it has not (at least until this last term[14]) addressed specifically the scope and meaning of the terms "discriminate against" as they appear anywhere in the statute.[15]

Even absent a statutory definition or explicit Supreme Court-endorsed interpretation, the lower courts and commentators agreed almost unanimously that both the core substantive provision and its anti-retaliation counterpart require plaintiff to prove some adverse action to make out a prima facie case. That is, the circuit courts have generally agreed that the term "discriminate against" as used in both provisions requires a plaintiff to prove some adverse employment action by the employer.[16] This substantial

13. *See infra* Part II.B. (discussing Supreme Court cases interpreting Title VII's core substantive provision).

14. Burlington Northern & Santa Fe Railway Co. v. White, 126 S. Ct. 2405, 2414-16 (2006).

15. Nor does the legislative history offer clear answers. The Congressional Record includes only a basic definition of the term "discriminate," contained in an interpretive memorandum read into the record during a Title VII debate: "To discriminate is to make a distinction, to make a difference in treatment or favor . . . ." 110 CONG. REC. 7213 (1964).

16. *See, e.g.*, Holcomb v. Powell, 433 F.3d 889, 902 (D.C. Cir. 2006) (requiring "'materially adverse consequences affecting the terms, conditions, or privileges of employment. . . .' " to support retaliation claim and quoting standard from case pertaining to claim under anti-discrimination provision); *Sanders*, 361 F.3d at 755 (stating that aggrieved employee must show "adverse employment action" to support claim under either core substantive anti-discrimination provision or anti-retaliation provision of Title VII); James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 376 n.2 (4th Cir. 2004) (noting that court's own prior interpretation of Title VII's anti-retaliation provision, requiring "some adverse employment action" to state cognizable claim, applied with equal force in case where plaintiff claims discrimination under statute's core substantive provision); White v. Burlington N. & Santa Fe Ry. Co., 364 F.3d 789, 799-800 (6th Cir. 2004) (en banc), *reh'g en banc denied*, Apr. 26, 2005, *aff'd sub. nom*, 126 S. Ct. 2405 (2006) (holding that term "discriminate against" in anti-retaliation provision of Title VII should be interpreted to require same materially adverse employment action required to support claim under core substantive anti-discrimination provision of not only Title VII but also other federal employment discrimination statutes like Americans With Disabilities Act); Griffin v. Potter, 356 F.3d 824, 829-30 (7th Cir. 2004) (applying same "materially adverse" employment action standard to both Title VII retaliation claim and discrimination claim under Age Discrimination in Employment Act); Hernandez v. Crawford Bldg. Material Co., 321 F.3d 528, 531-32 (5th Cir. 2003) (discussing Fifth Circuit precedent for proposition that anti-discrimination provision and anti-retaliation provision of Title VII both require showing of adverse employment action, albeit of different degrees); Heno v. Sprint/U. Mgm't Co., 208

unanimity did not, however, translate into universal agreement. Thus, while the courts agreed that an employee must show some adverse action by the employer to state a prima facie case of retaliation, a heated debate arose as to what actions by employers should suffice to satisfy the adverse-action element. The disagreement focused on the statutory language, with primary emphasis on the similarities and differences between the core substantive provision of Title VII and its anti-retaliation counterpart. Specifically, the language of the anti-retaliation provision simply declares it "an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment" because any such employee has engaged in protected activity.[17] Similarly, the core substantive provision also labels the prohibited conduct "an unlawful employment practice" and uses the term "discriminate against" to describe the acts made unlawful thereby, but then goes on to include more detail—that is, Section 703 makes it "an unlawful employment practice for an employer . . . 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 [protected trait.]"[18] As such, the core substantive provision describes in more detail the kind of discrimination it prohibits, including not only refusal to hire and discharge but also other forms of discrimination that affect the employee's "compensation, terms, conditions, or privileges of employment."[19] By contrast, the anti-retaliation provision includes no reference to forms of "discriminat[ion]" and instead only makes it "an unlawful employment practice . . . to discriminate." [20] Courts disagreed about how to interpret these two related but distinct statutory provisions, and the legislative history offered no guidance.[21] Should courts

F.3d 847, 857 (10th Cir. 2000) (stating that alleged adverse action is sufficient to support retaliation claim under Title VII only if materially affects "compensation, terms, conditions, or privileges of employment . . . ." as under core substantive provision of Title VII); Mondzelewski v. Pathmark Stores, Inc., 162 F.3d 778, 787 (3d Cir. 1998) (stating that "our Court and others have interpreted 'discriminat[ion]' to mean conduct that falls within the basic prohibition against employment discrimination found in 42 U.S.C. § 2000e-2(a)(1) . . . ." and that courts thus require plaintiff to "show that he or she suffered a 'materially adverse employment action.' " to support claim under either core substantive provision or anti-retaliation provision); Ledergerber v. Stangler, 122 F.3d 1142, 1144 (8th Cir. 1997) ("In order to overcome her initial burden of establishing a prima facie case of discrimination *or* retaliation, appellant was required to show, among other things, that she suffered an adverse employment action that affected the terms or conditions of her employment." (emphasis added)).

17. 42 U.S.C. § 2000e-3(a).

18. *Id.* § 2000e-2(a)(1) (emphasis added).

19. *Id.*

20. *Id.* § 2000e-3(a).

21. The legislative history of Title VII contains almost no reference to the anti-retaliation provision. What reference it does contain amounts to nothing more than a

treat the anti-retaliation provision's unadorned prohibition of "discriminat[ion] against" protected individuals as shorthand for the more detailed acts prohibited in the statute's core substantive provision? Or does Congress's omission of the "compensation, terms, conditions, or privileges of employment" language from the anti-retaliation provision signal a difference, intentional or not, in the scope of the prohibited conduct? If so, does that difference make the anti-retaliation provision broader, such that it encompasses more employer acts as prohibited discrimination than its sister provision, or does the difference make the anti-retaliation provision narrower, encompassing only the most severe employment decisions?

B. Helpful Instruction or Added Confusion?: The Supreme Court Precedents Pertinent to the Debate

The Supreme Court has decided numerous cases under Title VII since its enactment over 40 years ago, but has offered very little express instruction as to the meaning of the term "discriminate against" as used therein. Indeed, it was not until late last term that the Supreme Court addressed the meaning of the adverse-action element in the retaliation context at all.[22] Prior to that time, the Court had, however, spoken at least indirectly to the adverse requirement in the discrimination context.

Most of the Supreme Court's precedents instructive on the adversity requirement involve claims of sexual harassment. Perhaps the clearest such instruction came in the Court's 1986 decision in *Meritor Savings Bank v.*

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committee report's reiteration of part of the anti-retaliation provision without any explanation of its meaning. H.R. Rep No. 88-914 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2403; Edward C. Walterscheid, *A Question of Retaliation: Opposition Conduct as Protected Expression Under Title VII of the Civil Rights Act of 1964*, 29 B.C. L. REV. 391, 393 (1988). Courts have therefore been left to interpret the anti-retaliation provision without the aid of any legislative history. Hochstadt v. Worcester Found. for Experimental Biology, 545 F.2d 222, 230 (1st Cir. 1976). The court in *Hochstadt* described the predicament well:

> Neither in its wording nor legislative history does section 704(a) make plain how far Congress meant to immunize hostile and disruptive employee activity when it declared it unlawful for an employer to discriminate against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter . . . ." 42 U.S.C. § 2000e-3(a). The statute says no more, and the committee reports on the Civil Rights Act of 1964 and the Equal Employment Opportunity Act of 1963, which later became Title VII of the Civil Rights Act, repeat the language of 704(a) without any explanation. *See* H.Rep.No.914, 88th Cong., 2d Sess., U.S. Code Cong. & Admin.News, p. 2401 (1964); H.Rep.No.570, 88th Cong., 1st Sess. 5 (1963). The proceedings and floor debates over Title VII are similarly unrevealing. Courts are thus left to develop their own interpretation of protected opposition.

Id.

22. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2414-16 (2006).

Vinson.[23] The plaintiff in that case, Mechelle Vinson, claimed sexual harassment by her supervisor, who managed the branch of defendant Meritor Savings Bank where she worked.[24] The Bank claimed that Vinson could not prevail under Title VII because the hostile-environment harassment she alleged resulted in no tangible or economic loss.[25] The Court rejected the Bank's argument, holding that "the language of Title VII is not limited to 'economic' or 'tangible' discrimination."[26] Notably, though, the Court did not base its decision on the term "discriminate against" but instead focused on the phrase "terms, conditions, or privileges of employment," finding that it "evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment" and, therefore, is not limited solely to "economic" or "tangible" harm.[27] Thus, the Court held that a plaintiff could prevail on a claim of sexual harassment under Title VII even without proof of any resultant tangible or economic injury: "For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[28]

The Court's reliance on the phrase "terms, conditions, or privileges of employment" rather than the phrase "discriminate against" in *Meritor Savings Bank* is not necessarily intuitive. Indeed, before the Court decided that case, one might have readily argued that the term "discriminate against," used to describe the conduct made unlawful under Title VII, indicates the type and severity of harm required to support a claim, while the phrase "terms, conditions, and privileges of employment" simply signals that the alleged "discrimination" must somehow affect the employment relationship.[29] Under this view, a decision that the core substantive provision prohibits not just economic or tangible harm but also non-economic, intangible forms of discrimination so long as they are severe or pervasive, might have made the most sense as an interpretation of

23. 477 U.S. 57 (1986).
24. *Id.* at 59-60.
25. *Id.* at 64.
26. *Id.*
27. *Id.*
28. *Id.* at 67.
29. *See* Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L.J. 1121, 1151-53 (1998) (proposing that the phrase:

> 'compensation, terms, conditions, or privileges of employment' emphasizes the employment-related nature of the prohibited discrimination . . . .[and] is better read as making clear that an employer who discriminates against an employee in a non-job-related context would not run afoul of Title VII, rather than as sheltering employment discrimination that does not significantly disadvantage an employee.)

the term "discriminate against." However, the Court did not take this position. Instead, the Court relied upon Congress's use of the phrase "terms, conditions, or privileges of employment" to support its conclusion that Title VII encompasses such intangible harms. Thus, the Court's decision in *Meritor Savings Bank* at least supports, if it does not stand for, the proposition that the phrase "terms, conditions, or privileges of employment" as used in Title VII limits the scope of the statute to those discriminatory actions which have either a direct (i.e., tangible or economic) effect on the plaintiff's employment or an indirect (i.e., intangible or non-economic) effect but are nevertheless severe and pervasive.

The Supreme Court has espoused this view on several occasions since deciding *Meritor Savings Bank.*[30] *Harris v. Forklift Systems, Inc.*[31] is illustrative. Teresa Harris, like Mechelle Vinson, claimed sexual harassment by her supervisor—in this case the company's president.[32] The district court held that while some of the acts of harassment alleged by Harris "'offended [Harris] and would offend the reasonable woman,' . . . they were not 'so severe as to be expected to seriously affect [Harris'] psychological well-being'" and accordingly were not actionable.[33] The court of appeals affirmed, but the Supreme Court reversed, holding that a plaintiff alleging hostile-environment harassment need not demonstrate that the alleged conduct "seriously affect[ed] plaintiff's psychological well-being."[34] Instead, she need only show that her work environment would reasonably be perceived, and was subjectively perceived by her, as hostile or abusive, in order to support her claim.[35] In so holding, the Court expressly reaffirmed its decision in *Meritor Savings Bank*, defining a "hostile" or "abusive" work environment as one that "is permeated with 'discriminatory intimidation, ridicule, and insult' . . . that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and

30. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 786 (1998)

> (We have repeatedly made clear that although the statute mentions specific employment decisions with immediate consequences, the scope of the prohibition 'is not limited to economic or tangible discrimination' . . . and that it covers more than 'terms and conditions' in the narrow contractual sense. . . . Thus, in *Meritor* we held that sexual harassment so 'severe or pervasive' as to 'alter the conditions of [the victim's] employment and create an abusive working environment' violates Title VII.);

Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 78 (1998) (reiterating *Meritor Savings Bank* holding).

31. 510 U.S. 17 (1993).

32. *Id.* at 19.

33. *Id.* at 20.

34. *Id.* at 22.

35. *Id.*

create an abusive working environment.'"[36] Thus, the Court's decisions in *Meritor Savings Bank* and *Harris*, read together, demonstrate that the Court interprets Title VII's core substantive provision to provide relief not only when an employer inflicts direct economic or tangible harm to the employee's compensation, terms, conditions, or privileges of employment, but also when the employer's conduct brings about only intangible, non-economic harm that otherwise constitutes sufficiently severe or pervasive discrimination as to alter the terms and conditions of the employee's work environment, making it hostile or abusive.

The Court's 1998 decision in *Ellerth*[37] focused on agency law as a determinant of an employer's vicarious liability for sexual harassment, but also addressed at least indirectly the severity of harm required under the statute, leaving courts and commentators wondering about its import in other contexts. Kimberly Ellerth claimed that her supervisor, a midlevel manager at defendant-employer Burlington Industries, had subjected her to constant sexual harassment.[38] While much of the alleged harassment consisted of threats to affect adversely the terms of Ellerth's employment, none of these threats were ever carried out.[39] Thus, the issue before the Court in that case was "whether, under Title VII . . . , an employee who refuses the unwelcome and threatening sexual advances of a supervisor, yet suffers no adverse, tangible job consequences, can recover against the employer without showing the employer is negligent or otherwise at fault for the supervisor's action."[40] In analyzing this question, the Court first reaffirmed the holding in *Meritor Savings Bank* as it is described above, instructing "that Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment and . . . the latter must be severe or pervasive."[41] Turning then to the agency aspects of the question presented, the Court held that an employer is strictly liable for supervisory harassment that constitutes a "tangible employment action" but may only be held responsible for supervisor misconduct short of that standard if the employer was negligent.[42] Most significant here is the Court's "import[ation]" of the "tangible employment action" concept from circuit court cases defining the adverse action element of a Title VII discrimination claim to mark the dividing line between conduct for which employers are strictly liable and conduct for which an affirmative defense

36. *Id.* at 21.

37. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).

38. *Id.* at 747-48.

39. *Id.* at 751.

40. *Id.* at 746 -47.

41. *Id.* at 752; *see also id.* at 754 (stating that a claim of hostile-work-environment harassment, i.e. one involving only unfulfilled threats as opposed to threats carried out, "requires a showing of severe or pervasive conduct").

42. *Id.* at 765.

may be available. The Court stated: "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[43] Thus, under *Ellerth*, an employer whose supervisory employee engages in harassment that falls short of a tangible employment action may avoid liability upon showing that it had in place adequate anti-harassment policies and complaint procedures that the employee unreasonably failed to invoke. Meanwhile, the employer whose supervisor's harassment culminates in a tangible employment action is liable for that misconduct without regard to any care it may have taken to avoid such harms.[44] Notably, though, while the Court expressly relied upon the circuit courts' definition of adverse action for claims under the core substantive provision, it did not adopt or even endorse that definition for the purpose it served in those cases.[45] As such, the significance of the Court's "import[ation]" of that definition was left open for debate among the lower courts and commentators.[46] It was not until its decision in *White* that the Court offered its own view of that matter.[47]

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43. *Id.* at 761.

44. *Id.* at 765.

45. *Id.* at 761.

46. Courts and commentators alike eagerly engaged in this debate. *See, e.g.*, Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999) (citing *Ellerth* as controlling standard of liability for retaliation claims); Rosalie Berger Levinson, *Parsing the Meaning of "Adverse Employment Action" in Title VII Disparate Treatment, Sexual Harassment, and Retaliation Claims: What Should be Actionable Wrongdoing?*, 56 OKLA. L. REV. 623, 624 (2003) (criticizing lower courts for "indiscriminately borrow[ing] from" *Ellerth* to define adverse employment action); Scott Rosenberg & Jeffrey Lipman, *Developing a Consistent Standard for Evaluating a Retaliation Case Under Federal and State Civil Rights Statutes and State Common Law Claims: An Iowa Model for the Nation*, 53 DRAKE L. REV. 359, 414-16 (2005) (suggesting that courts nationwide adopt adverse action standard modeled after Supreme Court's definition of "tangible employment action" in *Ellerth*); Joan M. Savage, Note, *Adopting the EEOC Deterrence Approach to the Adverse Employment Action Prong in a Prima Facie Case for Title VII Retaliation*, 46 B.C. L. REV. 215, 246-47 (2004) (proposing that EEOC's deterrence-based adverse action standard is "most logical" in light of the Supreme Court's decision in *Ellerth*); White, *supra* note 29, at 1157 ("Read in full, the distinction drawn in [*Ellerth*] is not between adverse action by a supervisor that is sufficiently material and that which is not, but between employment decisions that can be made only by supervisors and workplace harassment that can be engaged in by supervisors and co-workers alike.").

47. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2413 (2006) (limiting *Ellerth*'s discussion of "tangible employment actions" to providing a dividing line between hostile-environment harassment cases in which employer is liable for supervisor acts with and without affirmative defense and stating unequivocally that "*Ellerth* did not discuss the scope of the general anti-discrimination provision . . . [a]nd . . . did not mention Title VII's anti-retaliation provision at all"); *see infra* notes 185-187 and accompanying text (discussing Court's dismissal of *Ellerth* as authoritative precedent in deciding *White*).

The Court's decision during that same term in *Oncale v. Sundowner Offshore Services, Inc.*[48] was among the few cases to address more directly the meaning of the term "discriminate" under Title VII. The male plaintiff in *Oncale* alleged sexual harassment by his male supervisors and co-workers.[49] The district and circuit courts agreed that Title VII did not support a cause of action for same-sex sexual harassment, but the Supreme Court reversed.[50] As in *Ellerth*, the Court here likewise turned first to *Meritor Savings Bank* and *Harris* as precedents defining the contours of actionable misconduct under Title VII.[51] The focus there, as before, was on Congress's use of the words "terms, conditions, and privileges of employment" in the statute's core substantive provision, and the Court recognized again that those words do not limit the scope of the statute to those employer acts that affect "'terms' and 'conditions' in the narrow contractual sense, but [that they instead] 'evince[] a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment.'"[52] The Court did not, however, limit its focus to that particular statutory language when it went about justifying its holding that Title VII reaches claims of same-sex harassment. This time, the Court also relied on Congress's use of the term "discriminate" to define the prohibited conduct: "Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at '*discriminat[ion]* . . . because of . . . sex . . . .' The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[53] Plaintiff "must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted '*discriminat[ion]* . . . because of . . . sex.'"[54] These assertions do not answer all the questions, but they offer at least two hints as to what the Court thinks Congress meant by the term "discriminate" in Title VII: (1) such "discriminat[ion]" may occur when an employer subjects certain protected-class individuals to terms and conditions of employment that are "disadvantageous" compared to treatment afforded to others; and (2) employer conduct that is "merely tinged with offensive . . . connotations" related to the employee's protected trait does not constitute actionable "discriminat[ion]."

48. 523 U.S. 75 (1998).
49. *Id.* at 77.
50. *Id.* at 77, 82.
51. *Id.* at 78.
52. *Id.*
53. *Id.* at 80 (emphasis and alteration in original).
54. *Id.* at 81 (emphasis and alteration in original).

The Court had also referenced briefly the meaning of the term "discriminate" under Title VII nearly ten years earlier in *Price Waterhouse v. Hopkins*, though without substantial clarification.[55] There, the court quoted an interpretive memorandum entered into the Congressional Record at the time of Title VII's enactment.[56] The memorandum defined the term "discriminate" generally: "To discriminate is to make a distinction, to make a difference in treatment or favor."[57]

Until it decided *White*, the Court never came any closer to defining the term "discriminate against" as used in Title VII other than these less-than-lucid assertions in *Price Waterhouse* and *Oncale*. Moreover, the instruction the Court did provide pertained specifically to the core substantive provision, not the anti-retaliation provision, further fostering uncertainty as to the latter provision's meaning and scope. Thus, the lower courts were left to interpret on their own what Congress intended. Their tools were limited to the statutory language itself, the sparse Supreme Court authorities on point, and their assessments of legislative policy based on these sources.

III. THE CONFLICT DEVELOPS: A THREE-WAY (OR MORE) CIRCUIT SPLIT

Questions about the scope of the anti-retaliation provision, in the absence of any instruction from the Supreme Court, led the lower courts into great dissension and the federal circuit courts of appeals into a three-way split. At one end of the spectrum, the Fifth and Eighth Circuits interpreted the anti-retaliation provision as narrower than the statute's core substantive provision, and required plaintiffs to show an "ultimate employment action," such as "'hiring, granting leave, discharging, promoting, and compensating.'"[58] At the other end of the spectrum, the Ninth Circuit read the difference in language to make the anti-retaliation provision broader, and therefore the court required only that the plaintiff show an action "reasonably likely to deter" protected activity.[59] Finally,

55. 490 U.S. 228 (1989).

56. *Id.* at 243-44.

57. *Id.* at 244 (quoting 110 Cong. Rec. 7213 (1964)).

58. Banks v. East Baton Rouge Parish Sch. Bd., 320 F.3d 570, 575 (5th Cir. 2003); *see also*, Okruhlik v. University of Arkansas, 395 F.3d 872 (8th Cir. 2005) (affirming judgment as matter of law for employer on grounds no adverse employment action shown because denial of tenure was not final decision and so not an "ultimate act" of employer); Hernandez v. Crawford Building Material Co., 321 F.3d 528, 531 (5th Cir. 2003) ("'Our court has analyzed the 'adverse employment action' element in a stricter sense than some other circuits.' . . . In the Fifth Circuit, only an 'ultimate employment decision' by an employer can form the basis for liability for retaliation under Title VII." (citing Mattern v. Eastman Kodak Co., 104 F.3d 702, 705 (5th Cir. 1997))).

59. *See, e.g.* Ray v. Henderson, 217 F.3d 1234, 1237 (9th Cir. 2000) ("[A]n adverse employment action is adverse treatment that is reasonably likely to deter employees from

the First, Second, Third, Fourth, Sixth, Seventh, Eleventh, and D.C. Circuits, reading the provisions together, adopted variants on a middle-ground "materially adverse action" standard.[60] The split engendered significant debate; indeed, it received substantial attention from commentators.[61]

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engaging in protected activity.")

60. *See, e.g.*, Noviello v. City of Boston, 398 F.3d 76, 92-93 (1st Cir. 2005) (indicating that the term "discriminate" should carry the same meaning in anti-retaliation provision as in the anti-discrimination provision of Title VII and requiring some evidence of severe or pervasive harassment to support adverse-action element of retaliation claim); Fairbrother v. Morrison, 412 F.3d 39, 56 (2d Cir. 2005) ("An adverse employment action is a 'materially adverse change' in the terms and conditions of employment."); Moser v. Indiana Dep't of Corrections, 406 F.3d 89 (5th Cir. 2005) (indicating that only those employer actions meeting a threshold level of materiality may support retaliation claim); Medina v. Income Support Div., 431 F.3d 1131, 1136 (10th Cir. 2005) ("[T]o constitute an adverse action, the employer's conduct must be 'materially adverse' to the employee's job status."); Griffin v. Potter, 356 F.3d 824, 829 (7th Cir. 2004) ("An adverse employment action must be materially adverse, not merely an inconvenience or a change in job responsibilities . . . . An adverse employment action is one that significantly alters the terms and conditions of the employee's job"); Stavropoulos v. Firestone, 361 F.3d 610, 617 (11th Cir. 2004) (stating that non-ultimate employment decisions are actionable only if "meet some threshold level of substantiality," defined as " 'objectively serious and tangible enough' to alter [the employee's] 'compensation, terms, conditions, or privileges of employment'"); Marrero v. Goya of Puerto Rico, Inc., 304 F.3d 7, 23 (1st Cir. 2002) (setting threshold as "materially adverse employment action"); Ford v. General Motors Corp., 305 F.3d 545, 553 (6th Cir. 2002) ("With respect to the third element of the prima facie case, the adverse employment action must be 'materially adverse' for the plaintiff to succeed on a Title VII claim."); Von Gunten v. Maryland, 243 F.3d 858, 865 (4th Cir. 2001) ("What is necessary in all § 2000e-3 retaliation cases is evidence that the challenged discriminatory acts or harassment adversely effected 'the terms, conditions, or benefits' of the plaintiff's employment."); Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997) (stating that employee cannot establish retaliation claim without evidence that employer's actions altered employee's terms, conditions, or privileges of employment).

61. *See, e.g.*, Linda M. Glover, *Title VII Section 704(a) Retaliation Claims: Turning a Blind Eye Toward Justice*, 38 HOUS. L. REV. 577, 579 (2001) (arguing that the "disarray in precedent stems from inconsistent statutory interpretation and inappropriate application of the prima facie elements" of a retaliation claim); Levinson, *supra* note 46 (noting that the circuits are divided as to the amount of harm that plaintiffs must show in order to state a claim of disparate treatment and retaliation); Brian A. Riddell & Richard A. Bales, *Adverse Employment Action in Retaliation Cases*, 34 U. BALT. L. REV. 313 (2005) (arguing that the circuit courts of appeals should adopt an expansive approach in determining what constitutes adverse employment action); Rosenberg & Lipman, *supra* note 46 (describing that what constitutes actionable retaliation in an employment case varies from circuit to circuit); Savage, *supra* note 46 (pointing out that the circuits are divided on the issue of the types of acts give rise to a prima facie case of retaliation).

A. The "Ultimate Employment Decision" Standard: The Fifth and Eighth Circuits

The approach taken by the Fifth and Eighth Circuit Courts of Appeals was perhaps most extreme. In these circuits, an employee could establish a prima facie case of retaliation under Title VII only by showing that the employer made an "ultimate employment decision" with respect to the employee's job.[62] To be sure, this standard set the bar quite high:

> An employment action that 'does not affect job duties, compensation, or benefits' is not an adverse employment action under Title VII. . . . Only 'ultimate employment decisions such as hiring, granting leave, discharging, promoting, and compensating' satisfy the adverse employment action element. . . . [A] decision made by an employer that only limits an employee's opportunities for promotion or lateral transfer does not qualify as an adverse employment action under Title VII.[63]

This exacting standard precluded employee-plaintiffs from recovering in many cases alleging a wide range of employer decisions as adverse, including hostile treatment by supervisors and/or co-workers;[64] job transfers or duty changes described as "purely lateral," even though these changes might involve work in a dirtier or otherwise less desirable position or location;[65] implementation of new job requirements that prevented

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62. Hockman v. Westward Comms., LLC, 122 Fed. Appx. 734 (5th Cir. 2004); *Hernandez*, 321 F.3d at 531.

63. Banks v. East Baton Rouge Parish Sch. Bd., 320 F.3d 570, 575 (5th Cir. 2003).

64. *Hockman*, 122 Fed. Appx. at 748; Henthorn v. Capitol Comms., Inc., 359 F.3d 1021, 1028-29 (8th Cir. 2004).

65. *Henthorn*, 359 F.3d at 1028-29.; *see also* Ledergerber v. Stangler, 122 F.3d 1142, 1144 (8th Cir. 1997) (affirming summary judgment in favor of defendant-employer on grounds that plaintiff failed to show adverse employment action based on claim regarding the replacement of employees whom she supervised with different employees in the equivalent job classification, because such an employment change involved "only minor changes in working conditions and no reduction in pay or benefits"). Notably, the Eighth Circuit was not entirely uniform in its approach; indeed, this circuit issued several decisions that appeared to weaken the ultimate-employment-decision standard announced in *Ledergerber*. *See, e.g.*, *Henthorn*, 359 F.3d at 1028 (omitting any reference to "ultimate" employment actions and instead purporting to require only a "material change in employment" with a direct effect on the employee's " 'salary, benefits, or responsibilities'"); Baker v. John Morrell & Co., 382 F.3d 816, 829-30 (8th Cir. 2004) (upholding claim even though alleged adverse acts had no direct impact on plaintiff's compensation, benefits or employment status); Spears v. Miss. Dep't of Corr. & Human Res., 210 F.3d 850 (8th Cir. 2000) (finding, without reference to "ultimate" employment action, that allegations of transfer from one facility to another with no other change in pay or benefits and of downward alteration of performance evaluation failed to support actionable retaliation claim because the employment change involved only minor changes in working conditions and no reduction in pay or benefits and the job evaluation was not used to her detriment); Cossette v. Minn. Power & Light, 188 F.3d 964, 972 (8th Cir. 1999)

plaintiffs from receiving pay increases or promotions;[66] and denial of professorial tenure when avenues of appeal remained available.[67] In short, these circuits required a final, decisive act directly affecting the employee's compensation, terms, conditions, or privileges of employment in order to support a retaliation claim; "mediate" or "interlocutory" decisions[68] with only indirect adverse effects would not suffice.

B. The "Reasonably-Likely-to-Deter" Standard: The Ninth Circuit and the EEOC

At the opposing end of the spectrum from the Fifth and Eighth Circuits was the United States Court of Appeals for the Ninth Circuit. That court held in *Ray v. Henderson* that "an action is cognizable as an adverse employment action if it is reasonably likely to deter employees from engaging in protected activity."[69] In *Ray*, the plaintiff-employee claimed retaliation based on employer decisions that affected the terms and

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(affirming summary judgment in favor of employer on employee's retaliation claim based on negative performance evaluation because "[a]t most, the evaluation resulted in a loss of status or prestige without any material change in [plaintiff's] salary, position, or duties"). The court did not, however, explicitly overrule its ultimate-employment decision precedent, and in 2005, the court again appeared to demand the higher level of adversity sanctioned under the ultimate-employment-decision standard. Okruhlik v. Univ. of Ark., 395 F.3d 872, 879-881 (8th Cir. 2005) (finding insufficient to support retaliation claim tenure-track professor's allegations that she was denied tenure because avenues of appeal were still available to her and "each decision along the way is not actionable. Only the final decision is the ultimate act"). Moreover, most courts and commentators agree that the Eighth Circuit applied the same "ultimate-employment-decision" standard that the Fifth Circuit implemented, even though the court was not always so explicit in applying it. *See, e.g.* White v. Burlington N. & Santa Fe Ry. Co., 364 F.3d 789, 799-800 (6th Cir. 2004) (en banc), *reh'g en banc denied* Apr. 26, 2005, *aff'd sub. nom*, 126 S. Ct. 2405 (2006) (stating that Fifth and Eighth Circuits applied "ultimate employment decision" standard); Ray v. Henderson, 217 F.3d 1234, 1240-41 (9th Cir. 2000) (stating that "[t]he most restrictive view of adverse employment actions is held by the Fifth and Eighth Circuits."); Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1456 (11th Cir. 1998) (noting that "the Eighth Circuit has sided with the Fifth Circuit" in requiring "ultimate employment decision" to support retaliation claim); Riddell & Bales, *supra* note 61, at 316-17 (asserting that "[t]he Fifth and Eighth Circuits take the restrictive approach, holding that only ultimate employment decisions . . . constitute actionable adverse employment actions."); Savage, *supra* note 46, at 216 (noting that Fifth and Eighth Circuits both follow ultimate-employment-decision standard). *But see White*, 364 F.3d at 801 (stating that "while the Eighth Circuit has ostensibly adopted the 'ultimate employment decision' standard, it has consistently applied a broader standard."); Von Gunten v. Maryland, 243 F.3d 858, 864 (4th Cir. 2001) (arguing the same); Rosenberg & Lipman, *supra* note 46, at 381-84 (2005) (describing the Eighth Circuit's test as requiring only material adversity, not ultimate employment action).

66. Banks v. E. Baton Rouge Parish Sch. Bd., 320 F.3d 570, 576-77 (5th Cir. 2003).

67. Okruhlik v. Univ. of Ark., 395 F.3d 872 (8th Cir. 2005).

68. *Banks*, 320 F.3d at 578; *Okruhlik*, 395 F.3d at 879.

69. 217 F.3d 1234, 1243 (9th Cir. 2000).

conditions of his employment both indirectly and directly to varying degrees.[70] The court concluded that all of the employer actions alleged by plaintiff qualified as sufficiently adverse to support a claim of retaliation: "[t]he actions decreased [plaintiff's] pay, decreased the amount of time that he had to complete the same amount of work, and decreased his ability to influence workplace policy, and thus were reasonably likely to deter [plaintiff] or other employees from complaining about discrimination in the workplace."[71] While an employer action that decreases the employee's compensation would often also qualify under the stricter "ultimate employment decision" standard, most of the other actions alleged by the plaintiff in *Ray* would likely have been dismissed by a court in the Fifth or Eighth Circuits as insufficient to support a retaliation claim. In this respect, then, the Ninth Circuit's "reasonably likely to deter" standard was substantially broader than that followed in its sister circuits, circuits which required an "ultimate" act to support a claim.

The EEOC also endorsed the "reasonably-likely-to-deter" standard as it was adopted by the Ninth Circuit. The most recent version of the EEOC Compliance Manual addressed to retaliation, published in 1998, states that "[t]he statutory retaliation clauses prohibit 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."[72] In support of its position, the EEOC cites to both the "statutory language" and "policy considerations."[73] With respect to the former, the EEOC states that the language of the anti-retaliation provision is broader than the core substantive provision of the statute; this is because it does not purport to limit its coverage to those employer acts that affect the "terms, conditions, or privileges of employment."[74] As to the latter—the policy considerations—the EEOC contends that its interpretation "accords with the primary purpose of the anti-retaliation provision, which is to '[m]aintain[] unfettered access to [the] statutory remedial mechanisms,' "[75] by providing broad protection for employees who would or do in fact

70. *Id.* at 1237-39.

71. *Id.* at 1244.

72. 2 OFFICE OF PROGRAM OPERATIONS, U.S. E.E.O.C., E.E.O.C. COMPLIANCE MANUAL ¶ 8005, at 6512 (May 20, 1998) (hereinafter E.E.O.C. COMPLIANCE MANUAL).

73. *Id.*

74. *Id.*; *compare* 42 U.S.C. § 2000e-2(a) (2006) (making it unlawful 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") *with* 42 U.S.C. § 2000e-3(a) (prohibiting any employer from "discriminat[ing] against" any employee who has engaged in protected activity); *see also supra* Part II.A. (comparing and contrasting core substantive provision of Title VII with anti-retaliation provision).

75. *Id.* (alteration in original) (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997)).

complain about discrimination so that the public interest in enforcing the statute is promoted.[76]

The EEOC has not always endorsed this broad approach, though. Indeed, it was not until 1998, when the EEOC introduced its latest interpretation of the anti-retaliation provision of Title VII, that it advocated this "reasonably-likely-to-deter" standard. Prior to that time, the EEOC took the position that proof of a claim under the anti-retaliation provision should be made the same way a claim under the core substantive provision of the statute is established—that is, by showing that "the [employer] took some sort of adverse employment-related action against him."[77] Thus, the EEOC endorsed a narrower interpretation of the anti-retaliation provision of the statute, in line with its interpretation of the core substantive provision. This interpretation remained intact for the first 34 years of the statute's existence; its broader interpretation has only been in effect for the last eight years.

C. *The "Material-Adverse-Action" Standard: The Middle Ground Majority Approach*

Occupying much of the expanse between the opposite positions taken by the Fifth and Eighth Circuits, on one hand, and the Ninth Circuit and EEOC, on the other, were the remaining nine circuit courts of appeals. In those circuits, some threshold level of materiality was required before an employer action could support a retaliation claim under Title VII. But while these circuits agreed that the employer's action against the employee must meet a threshold level of materiality, the application of this standard varied some from circuit to circuit and case to case; indeed, the application of this standard even engendered conflict as to how exactly to define the circuit split itself.[78] Most notably, the variations arose as to two distinct issues: (1) what degree of "materiality" was required; and (2) whether the

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76. *Id.*

77. 2 OFFICE OF PROGRAM OPERATIONS, U.S. E.E.O.C., E.E.O.C. COMPLIANCE MANUAL § 614.1(d) (Jan. 1998); 2 E.E.O.C. COMPLIANCE MANUAL § 614.3(a) (Mar. 1988).

78. *Compare* Ray v. Henderson, 217 F.3d 1234, 1240 (9th Cir. 2000) (stating that the First, Seventh, Tenth, Eleventh and D.C. Circuits "define adverse employment action broadly" while the Second and Third Circuits hold "an intermediate position" and placing itself within the "majority" in adopting ultimate-employment-decision standard), *with* White v. Burlington N. & Santa Fe Ry. Co., 364 F.3d 789, 799-800 (6th Cir. 2004) (en banc), *reh'g en banc denied* Apr. 26, 2005, *aff'd sub. nom*, 126 S. Ct. 2405 (2006) (characterizing Seventh Circuit's position as most closely aligned with that of Ninth Circuit and EEOC); *see generally* Petition for a Writ of Certiorari, White v. Burlington N. & Santa Fe Ry. Co., 2005 WL 2055901, at *10 ("The chaos [surrounding the circuit split] is such that courts and commentators even disagree about how to characterize the various courts of appeals' positions within the circuit split."); 2 LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 34.04 [1]-[4] (MB 2d ed. 2006).

action must have had some adverse impact on a "term, condition, or privilege" of employment, as required under the core substantive provision of Title VII.

1. The Degree of Materiality Required

The nine courts of appeals falling in this middle ground all stated the relevant adverse-action standard with substantial similarity. That is, the First, Second, Third, Fourth, Sixth, Seventh, Tenth, Eleventh and District of Columbia Circuits all required some "materially adverse" effect on the employee or her employment in order to state a claim for retaliation.[79] In the majority of cases decided under this standard—cases which arose in varying factual and legal contexts—the court affirmed judgment as a matter of law in favor of the defendant employer on plaintiff's retaliation claim, either at the summary judgment stage or at trial. For example, courts in the First, Fourth, Seventh, Tenth, and D.C. Circuits have all upheld judgments for the defendant on plaintiff's claims of varying forms of retaliatory harassment.[80] Likewise, the First, Second, Fourth, Tenth, and D.C. Circuits

79. *See, e.g.*, Holcomb v. Powell, 433 F.3d 889, 902 (D.C. Cir. 2006); Fairbrother v. Morrison, 412 F.3d 39, 56 (2d Cir. 2005) (stating that "[a]n adverse employment action is a 'materially adverse change' in the terms and conditions of employment."(quoting Blackie v. Maine, 75 F.3d 716, 725 (1st Cir.1996))); Medina v. Income Support Division, 413 F.3d 1131, 1135 (10th Cir. 2005) (stating that actionable adverse action "must be 'materially adverse' to the employee's job status," and that such a claim is to be determined on a "case-to-case basis" and "does not include 'a mere inconvenience or an alteration of job responsibilities'."); Griffin v. Potter, 356 F.3d 824, 829 (7th Cir. 2004) ("An adverse employment action must be materially adverse, not merely an inconvenience or a change in job responsibilities."); Marrero v. Goya of Puerto Rico, Inc., 304 F.3d 7, 23 (1st Cir. 2002) ("Work places are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action."); Ford v. General Motors Corp., 305 F.3d 545, 553 (6th Cir. 2002) ("With respect to the third element of the *prima facie* case, the adverse employment action must be 'materially adverse' for the plaintiff to succeed on a Title VII claim."); Shannon v. Bellsouth Telecomms., Inc., 292 F.3d 712, 716 (11th Cir. 2002) (applying adverse-action standard from Title VII discrimination case, whereby employee must show "serious and material change in the terms, conditions, or privileges of employment" to establish an actionable claim); Von Gunten v. Maryland, 243 F.3d 858, 866 (4th Cir. 2001) (stating that alleged adverse employment action must have "significant" effect on " 'terms, conditions, or benefits' of the plaintiff's employment" to support claim); Mondzelewski v. Pathmark Stores, Inc., 162 F.3d 778 (3d Cir. 1998) (drawing upon Title VII cases and requiring "materially adverse employment action" to support retaliation claim).

80. Jones v. D.C. Dep't of Corr., 429 F.3d 276, 280 (D.C. Cir. 2005); *Medina*, 413 F.3d at 1135; *Griffin*, 356 F.3d at 829; *Marrero*, 304 F.3d at 23; Parkins v. Civil Constructors of Ill., Inc., 359 F.3d 1021, 1029 (7th Cir. 1998); Gunnell v. Utah Valley State Coll., 152 F.3d 1253, 1265 (10th Cir. 1998); *Von Gunten*, 243 F.3d at 867; Munday v. Waste Mgmt. of N. Am., Inc., 126 F.3d 239, 243 (4th Cir. 1997).

have all affirmed defense judgments against claims by plaintiffs arising out of job reassignments or transfers.[81]

On the other hand, many of these courts have also found that certain actions, similar in many respects to those deemed insufficiently material in some cases, were sufficient to allow the retaliation claim to reach the jury in others. For example, while the plaintiff's inter-department transfer and her employer's tolerance of co-worker harassment were held by the First Circuit to be insufficient to support plaintiff's retaliation claim in *Marrero v. Goya of Puerto Rico, Inc.*,[82] that court found the co-worker harassment experienced by the plaintiff in *Noviello v. City of Boston*[83] sufficient to allow her claim to go to a jury. Similarly, while the plaintiff's transfer to a "floater" position and poor performance review were found insufficiently material by the Second Circuit in *Fairbrother v. Morrison*, the plaintiff's reassignment involving different responsibilities and greater contact with the prisoner population, coupled with harassment by her co-workers and supervisors, was upheld by that court as sufficient to allow plaintiff's retaliation claim to reach a jury in *Richardson v. NY State Department of Correctional Services*.[84] The D.C. Circuit held that plaintiff's allegations of verbal harassment, a change in her work shift, and her transfer to a different jobsite with less desirable conditions were not actionable in *Jones v. D.C. Department of Corrections*,[85] but the same court reversed the employer's summary judgment on plaintiff's claim of reduced responsibilities over a period of years in *Holcomb v. Powell*.[86] Thus, while each of these courts applied the same general standard—requiring some material adverse change in the plaintiff's employment to support an actionable retaliation claim—the application of this standard led to varying results. Of course, these varying results can in many cases be attributed to distinct differences in the factual contexts in which they arose. Indeed, such variations are at least to be expected and are perhaps even inevitable. Thus, even in those courts that applied a mostly uniform standard, the results often could not be predicted with any substantial degree of accuracy. Significantly, though, the material adversity standard offers at least the opportunity for an objective approach that allows employers and courts alike to administer the law with some predictability while simultaneously still permitting the inevitably varying contexts to receive the attention they deserve.

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81. *Jones*, 429 F.3d at 280; *Fairbrother*, 412 F.3d at 56; Tran v. Trs. of the State Colls. in Colo., 355 F.3d 1263, 1267 (10th Cir. 2004); *Marrero*, 304 F.3d at 23; *Von Gunten*, 243 F.3d at 868; Boone v. Goldin, 178 F.3d 253, 255-56 (4th Cir. 1999).

82. 304 F.3d at 26-27.

83. 398 F.3d 76, 96-97 (1st Cir. 2005).

84. 180 F.3d 426, 444-46 (2d Cir. 1999).

85. 429 F.3d at 280.

86. 433 F.3d at 902.

2. The Extent to Which the Action Must Be Employment-Related

A related sub-issue also cropped up in some retaliation cases heard in these "middle-ground" circuits. That is, while most claims of retaliation were based upon alleged adverse actions related directly to the plaintiff's employment, some plaintiffs claimed forms of retaliation occurring outside the workplace. For example, in *Berry v. Stevinson Chevrolet*, the plaintiff, a former employee of Chevrolet, claimed that after he mentioned he might file an EEOC charge, a manager at defendant Stevinson Chevrolet initiated a criminal complaint with the sheriff's office, alleging that the plaintiff had committed forgery.[87] The trial court awarded plaintiff $265,000 on his retaliation claim, as compensation for the "'extreme emotional distress, suffering, embarrassment, humiliation, loss of reputation, standing in the community . . . he experienced as a proximate result of [his employer's] retaliation,' as well as for the legal fees he incurred in defending himself against the theft and forgery charges."[88] On appeal, the defendant/employer argued that Title VII does not reach the reporting of a suspected crime because such activity, having little or nothing to do with the plaintiff's employment, cannot constitute an "unlawful employment practice" as a matter of law.[89] The Tenth Circuit rejected defendant's argument, holding that "malicious prosecution can constitute adverse employment action," and reasoning that because Title VII is remedial in nature, it should be "liberally construed" to include not only former employees[90] (as held in other Tenth Circuit precedent at the time, and confirmed shortly thereafter by the United States Supreme Court in *Robinson v. Shell Oil Co.*[91]), but also extra-employment acts.[92] Further, the Tenth Circuit also reasoned that retaliatory prosecution bears a connection to present or future employment, in that a criminal trial "is necessarily public and therefore carries a significant risk of humiliation, damage to reputation, and a concomitant harm to future employment prospects."[93] Thus, while the Tenth Circuit has consistently required a retaliation plaintiff to allege an action "'materially adverse' to the employee's job status . . . such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits,"[94] the court, in what appears to still be good law,[95] also

87. 74 F.3d 980, 984 (10th Cir. 1996).
88. *Id.*
89. *Id.* at 986.
90. *Id.*
91. 519 U.S. 337, 346 (1997).
92. *Berry*, 74 F.3d at 986.
93. *Id.*
94. Medina v. Income Support Div., N.M., 413 F.3d 1131, 1136 (10th Cir. 2005).
95. *But cf.* Dick v. Phone Directories Co., 397 F.3d 1256, 1269 (10th Cir. 2005)

did not hesitate to extend the reach of the anti-retaliation provision to action only indirectly related to the plaintiff's job.

The District of Columbia Circuit has similarly concluded that the adverse action alleged in support of a retaliation claim under Title VII need not bear a direct relationship to the plaintiff's employment status. In *Rochon v. Gonzales*, the plaintiff claimed that his employer, the Federal Bureau of Investigations ("FBI"), retaliated against him for filing a Title VII lawsuit by refusing to investigate a death threat made by a federal prisoner.[96] The court held that an employer action that would be "material to a reasonable employee" such that it "well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination'" is sufficient to support a retaliation claim, without regard to "whether the alleged retaliatory act is related to the plaintiff's employment."[97] Thus, plaintiff's claim that the FBI failed or refused to investigate a death threat against him, albeit only peripherally related to his employment, was sufficient to state an actionable retaliation claim.[98]

What is perhaps most striking about these decisions is their implication for the statutory construction question raised by the circuit split. That is, if the anti-retaliation provision of Title VII was intended to be interpreted in the same manner as the statute's core substantive provision, then those courts extending the reach of the former to acts outside the employment relationship have misapplied the statute. As discussed in more detail in Part II.A. of this Article, the core substantive provision of Title VII expressly limits its applicability to those employer actions that discriminate against the employee "with respect to his compensation, terms, conditions, or privileges of employment."[99] The anti-retaliation provision includes no such express limitation.[100] Thus, whether Congress intended the anti-retaliation provision of the statute to incorporate those same limitations or not should determine whether it extends to actions that affect the employee only outside the workplace. The Supreme Court answered this question in *White*, but, as discussed in Part VI below, its decision likely warrants some congressional intervention.[101]

(distinguishing *Berry* on the grounds that charges against plaintiff had not led to trial and thus she did not suffer same public humiliation and "concomitant harm to future employment prospects" as the plaintiff in *Berry*).

96. 438 F.3d 1211, 1213-14 (D.C. Cir. 2006).

97. *Id.* at 1219.

98. *Id.* at 1219-20.

99. 42 U.S.C. § 2000e-2(a)(1) (2006).

100. *Id.* § 2000e-3(a).

101. *See infra* Section VI (discussing need for Congress to amend Title VII in light of Supreme Court's decision in White).

D. The Middle-Ground Majority Approach in Action: The Decisions of the Lower Courts in White

The decisions of the district and circuit courts in the *White* case exemplify the varying results that can flow from application of the middle-ground standard and demonstrate the need for clearer instruction as to how the law should apply.

1. The Events Leading to White's Lawsuit and Disposition at the Trial Court

The Burlington Northern & Santa Fe Railway Co. ("Burlington"), a railroad operator in Tennessee, hired Sheila White in June 1997 to work in the Maintenance of Way Department as a "track laborer."[102] This position involved a myriad of duties including moving track components and material, clearing brush, and removing litter and spilled cargo from the right-of-way.[103] The Burlington supervisor who interviewed White expressed interest in her previous experience operating forklifts, and when the department's forklift operator took a different position shortly after White came to work there, Burlington assigned White to operate the forklift as her primary duty.[104] White continued to operate the forklift, in addition to performing some of the other track laborer tasks, for approximately three months.[105] In September 1997, White complained to Burlington management that her immediate supervisor had made inappropriate remarks to her in front of her all-male colleagues, including a suggestion that women should not work in the Maintenance of Way Department.[106] After conducting an internal investigation, Burlington suspended White's supervisor for ten days and required him to attend a sexual-harassment training session.[107] At approximately the same time, Burlington reassigned White to perform only "standard track laborer tasks."[108] Burlington explained to her that co-workers had complained that White, the only female and a relatively new employee, was receiving preferential treatment because of her sex in that she was assigned the "'less arduous and cleaner job' of forklift operator."[109]

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102. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2409 (2006).
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id*; *see also* White v. Burlington N. & Santa Fe Ry. Co., 310 F.3d 443, 447 (6th Cir. 2002), *rev'd en banc* 364 F.3d 789 (6th Cir. 2004), *aff'd sub. nom* 126 S.Ct. 2405 (2006) ("*White I*") (discussing co-worker complaints).

White filed a charge of discrimination with the EEOC on October 10, 1997, claiming that her reassignment to standard track laborer duties constituted unlawful sex discrimination and retaliation for her complaint about her supervisor's harassment.[110] She filed a second EEOC charge in December, claiming that Burlington's managers had placed her under surveillance and were scrutinizing her daily activities.[111] Shortly after Burlington received the second charge, White and her immediate supervisor had a disagreement, which led her supervisor to report White to management as insubordinate and place her on immediate suspension without pay.[112] Pursuant to the internal grievance procedures provided in the company's collective bargaining agreement, Burlington conducted an internal investigation. The company concluded, after 37 days, that the suspension was unwarranted because White had not in fact been insubordinate.[113] Thus, Burlington reinstated White with back pay for the 37 days of her suspension.[114] She then filed an additional EEOC charge alleging retaliation based on the suspension.[115]

White subsequently filed a lawsuit in the Western District of Tennessee based on these events, claiming that Burlington discriminated against her on the basis of her sex and retaliated against her for complaining about alleged sex discrimination. Specifically, she alleged that Burlington unlawfully reassigned her from forklift operator duties to standard track laborer tasks and suspended her without pay for 37 days.[116] The case was tried in front of a jury from August 29, 2000 until September 5, 2000. At the conclusion of trial, the jury returned a verdict in Burlington's favor on White's sex discrimination claim but in White's favor on her retaliation claim, awarding $43,500 in compensatory damages, including $3,250 in medical expenses incurred to treat alleged emotional distress during her suspension.[117] Burlington then filed a renewed motion for judgment as a matter of law on White's retaliation claim, which the court denied, and Burlington sought timely appeal.[118]

2. Reversal by a Three-Judge Panel of the Sixth Circuit

In *White I*, a three-judge panel of the United States Court of Appeals for the Sixth Circuit reversed the trial court's denial of Burlington's motion

110. *White I*, 310 F.3d. at 448.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*

for judgment as a matter of law on November 13, 2002.[119] Explaining the applicable standard, the court stated:

> [A] plaintiff must identify a materially adverse change in the terms and conditions of his employment to state a claim for retaliation under Title VII. . . . A material adverse change includes a termination in employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation. . . . Importantly, a change in employment conditions 'must be more disruptive than a mere inconvenience or an alteration of job responsibilities.'[120]

The court then proceeded to address the two actions alleged by White as adverse, concluding in turn that each failed to satisfy the requisite standard.[121] First, as to White's reassignment from forklift duties to standard track-laborer tasks, the court found that she suffered no reduction in pay or benefits and was given neither significantly diminished material responsibilities nor a less prestigious job title.[122] As such, her reassignment constituted a non-actionable "lateral transfer," at most.[123] Moreover, the court rejected White's contention that her reassignment could support a retaliation claim because the standard track laborer tasks were more "physically demanding" than operating a forklift:

> The fact that forklift duty is less physically demanding than track maintenance work does not make White's reassignment a cognizable adverse employment action. The railroad hired White as a track maintenance worker. One of her explicit job responsibilities was to maintain the railroad tracks. We fail to see how White suffered an adverse employment action by being directed to do a job duty for which Burlington Northern hired her.[124]

The court likewise concluded that White's temporary suspension followed by a reinstatement with back pay failed to rise to the level of a cognizable material adverse employment action. Here, the court relied heavily on its conclusion that the suspension was not the employer's final act but rather was only an intermediate step in its decision-making process.[125] The court cited its own precedent, in which a university

119. *Id.* at 443.
120. *Id.* at 450 (citations omitted).
121. *Id.* at 450-51.
122. *Id.* at 451.
123. *Id.*
124. *Id.*
125. *Id.*

professor's retaliation claim was rejected where the initial denial of her application for tenure was subsequently reversed through an internal grievance process and she was awarded tenure with full back pay and benefits to the date tenure was initially denied. The court concluded that White likewise suffered no "final or lasting adverse employment action" sufficient to support her claim.[126] Notably, the court here departed from its own precedent and applied the more exacting "ultimate employment decision" standard in this part of the opinion.[127] Indeed, rather than citing any of its own precedents in support of its conclusions, the court instead cited to *Mattern v. Eastman Kodak Co.*,[128] the seminal Fifth Circuit case adopting the ultimate-employment-decision standard.[129] Prior to its decision in *White I*, however, the court had repeatedly required only that plaintiff show a materially adverse employment action to support a retaliation claim.[130] It had only applied the higher threshold of an ultimate employment decision in a few cases, most of which did not include claims under the anti-retaliation provision but instead asserted claims of discrimination.[131]

3. The Sixth Circuit's En Banc Decision Affirming the Trial Court.

Perhaps because of this departure from Sixth Circuit precedent, perhaps because of the circuit split, or perhaps for some other reason, the Sixth Circuit granted plaintiff rehearing en banc, vacating the panel's decision in *White I*.[132] Contrary to the result reached by the panel in *White I*, on April 14, 2004, the en banc court affirmed the trial court's denial of

126. *Id.* (discussing Dobbs-Weinstein v. Vanderbilt Univ., 185 F.3d 542, 545-46 (6th Cir. 1999)).

127. *Id.*

128. 104 F.3d 702 (5th Cir. 1997).

129. *White I*, 310 F.3d at 451.

130. *See, e.g.*, Ford v. General Motors Corp., 305 F.3d 545, 552 (6th Cir. 2002) ("With respect to the third element of the *prima facie case*, the adverse employment action must be "materially adverse" for the plaintiff to succeed on a Title VII claim."); Hollins v. Atlantic Co., 188 F.3d 652, 662 (6th Cir. 1999) ("[A] plaintiff must identify a materially adverse change in the terms and conditions of his employment to state a claim for retaliation under Title VII . . . .").

131. *See, e.g.*, Dobbs-Weinstein v. Vanderbilt Univ., 185 F.3d 542, 545-46 (6th Cir. 1999) (holding, in Title VII sex- and national-origin-discrimination case, that plaintiff failed to show an actionable "ultimate employment decision").

132. White v. Burlington N. & Santa Fe Ry. Co., 321 F.3d 1203, 1204 (6th Cir. 2003); *see generally* Brief of Pl./Appellee/Cross-Appellant at 4 & Petition for Rehearing En Banc, White v. Burlington N. & Santa Fe Ry. Co., 321 F.3d 1203 (2003) (Nos. 00-6780 & 01-5024), 2002 WL 32750745 (arguing, in addition to discussing the circuit split, in support of petition for an en banc rehearing, stating that the panel decision was inconsistent with Sixth Circuit precedent).

Burlington's motion for judgment as a matter of law.[133] After stating the facts of the case, the court began its discussion by assessing the evolution of the relevant Sixth Circuit precedent. Indeed, the court identified *Kocsis v. Multi-Care Management, Inc.*, as "the seminal case for defining adverse employment action." [134] *Kocsis* was a disability discrimination case brought under the Americans With Disabilities Act. In that case, the court required the plaintiff to show that she had suffered "'a materially adverse change in the terms of her employment'" to support her discrimination claim.[135] The court extended the *Kocsis* standard to the Title VII retaliation context in *Hollins v. Atlantic Co.*[136] In that case, the court held that the plaintiff's lower performance evaluation ratings failed to rise to the level of a materially adverse employment action.[137] Adhering to these precedents, the en banc court in *White II* rejected White's suggestion that it adopt the EEOC's broad definition of adverse employment action as "'any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter a charging party or others from engaging in protected activity;'" instead, the court reaffirmed the material-adverse-employment-action standard.[138] The court reasoned that "[s]ince the adverse-employment action element developed by this Circuit is an exception to a broad, strictly literal reading of Title VII's anti-discrimination provisions, we will continue to define the exception narrowly so as not to frustrate the purpose of Title VII while deterring lawsuits over trivial matters."[139] Moreover, the court went on to disapprove of its own reference to the "ultimate-employment-decision" standard that was articulated in *Dobbs-Weinstein*,[140] questioning that panel's reliance on outdated Fourth Circuit case law and ultimately joining "the majority of other circuits in rejecting the 'ultimate employment decision' standard."[141]

Applying the material-adverse-action standard to the facts, the court first concluded that White's suspension without pay was sufficiently adverse to support her claim of retaliation.[142] In the court's view, the fact that White challenged the suspension decision and that Burlington later "corrected" its action by reinstating White with full back pay and benefits

133. White v. Burlington N. & Santa Fe Ry. Co., 364 F.3d 789, 791 (6th Cir. 2004) ("*White II*").

134. *See id.* at 795-800 (citing Kocsis v. Multi-Care Mgmt., Inc., 97 F.3d 876, 885-87 (6th Cir. 1996)).

135. *Id.* at 797 (quoting Kocsis v. Multi-Care Mgmt., 97 F.3d 876 (6th Cir. 1993)).

136. *Id.* (quoting Hollins v. Atlantic Co., 188 F.3d 652, 662 (6th Cir. 1999).

137. *Id.* at 798 n.3 (discussing Hollins, 188 F.3d at 662).

138. *Id.* at 799-800.

139. *Id.* at 800.

140. *See* Dobbs-Weinstein v. Vanderbilt Univ., 185 F.3d 542, 545-46 (6th Cir. 1999).

141. *White II*, 364 F.3d at 801.

142. *Id.* at 802-03.

was not sufficient to deprive White of her right to recover for unlawful retaliation under Title VII.[143] "The alleged discriminatory decision . . . was the suspension without pay."[144] According to the court, this decision was sufficiently adverse to support White's retaliation claim.[145]

The court similarly concluded that White's reassignment from forklift operator duties to standard track laborer tasks constituted an actionable adverse employment action.[146] Reasoning that her new position "was by all accounts more arduous and 'dirtier,'" and that "the forklift operator position was objectively considered a better job," the court held that White's job transfer was sufficient to support her claim.[147]

The position taken by the majority of the en banc court in *White II* met little disagreement, drawing only one additional opinion on the issue relevant here, and that opinion concurred in the result. Judge Clay agreed with the majority that White's reassignment and her temporary suspension without pay rose to the level of actionable adverse employment actions, and supported the majority's rejection of the "ultimate employment decision" standard that was applied in *Dobbs-Weinstein*.[148] Judge Clay wrote separately, however, because he disagreed with the material-adverse-employment-action standard that the majority adopted.[149] Instead, he supported the standard adopted by the Ninth Circuit and the EEOC, whereby a plaintiff could establish the adverse-action element of a prima facie case of retaliation by showing that the employer's decision "would be 'reasonably likely to deter [employees] from engaging in protected activity.'"[150] Thus, he disagreed with the majority's interpretation that the language of and policy behind the statute suggest application of the same "materially adverse" standard under the anti-retaliation provision as is articulated under the anti-discrimination provision. Instead, Judge Clay believed that the anti-retaliation provision's standard should be broader, promoting greater access to the statute's remedial scheme and, concomitantly, requiring that employers treat employees who have engaged in protected activity more carefully than those in other classes of employees protected by Title VII.

Dissatisfied with the new result, Burlington first sought rehearing from the en banc appellate court. When the court denied its request on April 26, 2005, Burlington saw review by the United States Supreme Court as its best and only option. Thus, on August 24, 2005, Burlington filed a

143. *Id.* at 803.
144. *Id.*
145. *Id.*
146. *Id.* at 803.
147. *Id.*
148. *Id.* at 808-09 (Clay, J., concurring).
149. *Id.*
150. *Id.* at 809.

Petition for a Writ of Certiorari, requesting the Court grant review.

> Whether an employer may be held liable for retaliatory discrimination under Title VII for any "*materially adverse change* in the terms of employment" (including temporary suspension rescinded by the employer with full back pay or an inconvenient reassignment, as the court below held); for any adverse treatment that was "reasonably likely to deter" the plaintiff from engaging in protected activity (as the Ninth Circuit holds); or only for an "ultimate employment decision" (as two other courts of appeals hold).[151]

In support of its Petition, Burlington placed primary emphasis on the confusion flowing from the circuit split with respect to the adverse-action standard in a Title VII retaliation case.[152] In addition, Burlington urged the Court to grant review because "the issue arises with great frequency," both in the Title VII context and under other federal employment statutes, as well; and because "the ruling below will jeopardize legitimate employer practices by the imposition of unwarranted and unpredictable litigation risk."[153]

4. The Supreme Court's Grant of Certiorari and the Parties' Briefs to the Court

The Supreme Court granted review on December 5, 2005.[154] In its Brief to the Court, Burlington argued that the same adverse-action standard, defined by the Supreme Court in *Burlington Industries, Inc. v. Ellerth*[155] as a "tangible employment action," applies under both the anti-retaliation provision and the core substantive provision of Tile VII, and that White could not satisfy that standard.[156] Burlington pointed to both the language of the statute as well as its legislative purposes in support of its position that the two parts of Title VII have the same meaning, and that the Court's precedent in *Ellerth* should control.[157]

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151. Petition for a Writ of Certiorari at i, Burlington N. & Santa Fe Ry Co. v. White, 126 S. Ct. 797 (U.S. 2005) (No. 05-259), 2005 WL 2055901. Burlington also sought the court's review with respect to the applicable burden of proof on a re-trial that was limited to a claim for punitive damages. *See id.* The Court denied review on this second issue. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. 797, 797-98 (U.S. 2005).

152. Petition for Writ of Certiorari at 9-17, *White*, 126 S. Ct. 797 (No. 05-259), 2005 WL 2055901.

153. *Id.* at 18-21.

154. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 797, 797 (2005).

155. 524 U.S. 742 (1998).

156. Brief of Petitioner at 11-42, Burlington N. & Santa Fe Ry Co. v. White, 126 S. Ct. 2405 (No. 05-259), 2006 WL 704480.

157. *Id.* at 11-24.

Burlington then turned to the facts of White's case and argued that her reassignment from forklift duties to standard track laborer tasks, in addition to her temporary suspension followed by reinstatement with full back pay, failed to meet this "tangible employment action" standard. As to the former, Burlington emphasized that White was in fact hired not as a forklift operator per se, but as a track laborer more generally, with forklift operation being one of the many duties that she might be assigned as a track laborer.[158] She therefore could not prove any adverse change in her compensation or in the terms, conditions, or privileges of her job, because she remained at all times in the job for which she was hired.[159] Burlington additionally argued that White's temporary suspension did not suffice because, being only "temporary and tentative," it was "not the official act of the enterprise," and therefore could not support employer liability.[160] Further, such an act should not be actionable as a matter of policy, stipulated Burlington, because employers need the discretion to act promptly upon alleged workplace rule violations, which further promotes Title VII's preference for "conciliation" and "voluntary compliance" over litigation.[161]

White's opposition brief answered Burlington's arguments in turn by focusing similarly on the language of the statute and its underlying policies.[162] White urged that the anti-retaliation provision should be interpreted on its face, and that the provision does not include any materiality requirement.[163] Rather, White asserted, the statute requires only that the alleged "discriminat[ion]" be "against" the employee.[164] Although White never clearly articulated the standard that she proposed, she contended that Burlington's proposed interpretation found no support in the language of the statute, its underlying policies, or in Supreme Court precedents. White then focused the remainder of her brief on proving that her temporary suspension was amply sufficient to support her retaliation claim and the jury verdict in her favor.[165] Specifically, White contended that an employer cannot cure an unlawful suspension simply by later reinstating the employee with back pay; instead, the employer should remain liable for its wrongful acts regardless of its subsequent conduct.[166]

158. *Id.* at 25.

159. *Id.* at 27.

160. *Id.* at 34 (quoting *Ellerth*, 524 U.S. at 762).

161. *Id.* at 38-40 (quoting *Ellerth*, 524 U.S. at 764).

162. Brief of Respondent at 8-19, 22-27, 37-38, Burlington N. & Santa Fe Ry Co. v. White, 126 S. Ct. 2405 (U.S. 2006) (No. 05-259), 2006 WL 622126.

163. *Id.* at 8-13.

164. *Id.* at 9-10.

165. *Id.* at 38-50. Notably, at no point did White ever address the change in her job duties in any detail.

166. *Id.* at 40-44.

As White argued, Burlington should not be relieved of liability for its wrongful act just because Burlington later rescinded the initial decision of its supervisory employee to suspend her.[167]

White also filed a "Supplemental Brief" in response to the brief filed by the United States as amicus curiae.[168] Notably, the amicus brief filed by the government *supported* the judgment in White's favor.[169] White filed a critical response, however, expressing disapproval of the material-adverse-action standard the government supported, on grounds that it was unworkable as a matter of statutory interpretation and of policy.[170]

The briefing closed with a reply filed by Burlington.[171] The Supreme Court heard oral argument on April 17, 2006. The case was then submitted to the Court for decision.

IV. THE SUPREME COURT STEPS INTO THE FRAY: WHITE PREVAILS UNDER A NEW FORMULATION OF THE "MATERIAL ADVERSITY" STANDARD

The United States Supreme Court issued its decision two months later on June 22, 2006.[172] The Court's nine justices unanimously agreed that the actions taken against White—a reassignment of job duties and a temporary suspension followed by reinstatement with back pay—were sufficient to support the jury's verdict in her favor.[173] Only eight of the nine justices, however, joined the majority opinion authored by Justice Breyer.[174] Justice Alito wrote separately to express his disagreement with the majority's interpretation of the anti-retaliation provision, though he reached the same conclusion via an alternative analysis.[175]

A. The Majority Opinion: A New Standard, No Clarity

The Court's analysis began with the language of the statute.[176] The Court identified the anti-retaliation provision's use of the term

167. *Id.*

168. Supplemental Brief for Respondent, *White*, 126 S. Ct. 2405 (No. 05-259), 2006 WL 690256.

169. Brief for the United States as Amicus Curiae Supporting Respondent, *White*, 126 S. Ct. 2405 (No. 05-259), 2006 WL 622123.

170. Supplemental Brief for Respondent, *White*, 126 S. Ct. 2405 (No. 05-259), 2006 WL 690256.

171. Reply Brief of Petitioner, *White*, 126 S. Ct. 2405 (No. 05-259), 2006 WL 937535.

172. *White*, 126 S. Ct. 2405.

173. *Id.* at 2416, 2421.

174. *Id.* at 2408.

175. *Id.* at 2418 (Alito, J., concurring).

176. *Id.* at 2410.

"discriminate against" as the focal point of the case, and stated that while "[n]o one doubts that the term 'discriminate against' refers to distinctions or differences in treatment that injure protected individuals," the Circuit Courts of Appeals nevertheless disagree on the answers to two related questions concerning this terminology: (1) whether the phrase encompasses harms that occur outside the workplace or are not job-related; and (2) what is the requisite level of harmfulness to which the retaliatory discrimination must rise.[177] According to the Court, then, resolving this disagreement required it to answer both of those questions in this case.[178] The Court addressed each in turn, and then discussed how the conclusions it reached applied to the present facts. Thus, one can state the majority's holding in three parts: (1) that the anti-retaliation provision of Title VII is broader than the statute's core substantive provision insofar as it encompasses employer actions and harms that either occur outside the workplace or are otherwise non-work-related; (2) that a plaintiff claiming violation of the anti-retaliation provision of Title VII must show that the alleged employer action would have been materially adverse to a reasonable employee in the plaintiff's position, meaning that it "might well have dissuaded a reasonable worker from making or supporting a charge of discrimination;" and (3) that White's reassignment and suspension satisfy that standard.[179]

1. The Court Extends the Anti-Retaliation Provision's Reach to Non-Workplace Harms

The Court's discussion of the first question—whether the anti-retaliation provision reaches non-workplace harms—focused primarily on a comparison of the anti-retaliation provision to the statute's core substantive provision.[180] Specifically, the Court placed great weight on Congress's omission from the anti-retaliation section of language defining the types of harms covered by the statute's core substantive provision as those actions that affect the employee's "compensation, terms, conditions, or privileges of employment."[181] The anti-retaliation provision, by contrast, refers only to "discriminat[ion]," and contains no further description or limitation as to

177. *Id.* at 2410-11; *see also supra* notes 131-132 and accompanying text (discussing circuit split).

178. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2411 (2006).; *see also infra* notes 188 and 247 and accompanying text (suggesting that the Court was wrong to decide whether anti-retaliation provision encompasses non-work-related harms).

179. *White*, 126 S. Ct. at 2409, 2414–16.

180. *Id.* at 2411-12; *see also supra* Part II.A. (comparing and contrasting statutory provisions).

181. *Id.* at 2411.

the sort of harmful acts it prohibits.[182] These "linguistic differences" led the Court to presume that Congress intended the provisions to cover different acts, a presumption for which the Court found ample support in the purposes of the provisions.[183] According to the Court, "the anti-discrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status."[184] On the other hand, the anti-retaliation provision "seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees."[185] As such, the Court held that the substantive provision seeks to accomplish its goals by simply prohibiting employment-related discrimination: "The substantive provision's basic objective of 'equality of employment opportunities' and the elimination of practices that tend to bring about 'stratified job environments,' . . . would be achieved were all employment-related discrimination miraculously eliminated."[186] While the Court could not say the same about the anti-retaliation provision, the court found that "[a]n employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace."[187] As such, the Court concluded that the "purpose reinforces what the language already indicates, namely, that the anti-retaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment."[188]

As a means of reinforcing its conclusion, the Court also discussed the failure of either its own precedents or EEOC authorities to support Burlington's proposed interpretation. First, the Court rejected Burlington's suggestion that the Court's decision in *Burlington Industries, Inc. v. Ellerth*

182. *Id.* at 2411-12.
183. *Id.* at 2412.
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.* (emphasis in original) (citing Rochon v. Gonzales, 438 F.3d 1211, 1217-18 (D.C. Cir. (2006)).
188. *White*, 126 S. Ct. at 2412-13. Notably, this entire section, except to the extent that it supports the Court's formulation of the material adversity standard and its specific holdings about the sufficiency under that standard of White's alleged adverse acts, is dicta. Both of the alleged retaliatory acts—White's reassignment from forklift to track-laborer duties and her temporary unpaid suspension—clearly related directly to White's employment. Thus, contrary to the Court's assertion, it did not need to decide whether the anti-retaliation provision encompasses non-workplace harms in order to decide this case. *See id.* at 2411 (discussing whether anti-retaliation provision encompasses non-workplace harm). Nevertheless, the Court devoted substantial attention to this issue, and purported to reach a holding directed to it. *Id.* at 2412-13. The impact of this pernicious dicta is discussed in more detail *infra*, at Part V.A.

supplies the appropriate standard under the anti-retaliation provision.[189] To the contrary, the Court stated that "*Ellerth* did not mention Title VII's anti-retaliation provision at all" and therefore has no bearing on this case.[190] Instead, the Court limited *Ellerth*'s holding to defining the term "tangible employment action" only for the purpose of "'identify[ing] a class of [hostile work environment] cases' in which an employer should be held vicariously liable (without an affirmative defense) for the acts of supervisors."[191] *Ellerth* did not, therefore, as Burlington suggested and as many Circuit Courts had found, define the scope of actionable adverse employment decisions under Title VII generally. Its holding, said the Court, was far more limited.

The Court likewise found no support from the EEOC for Burlington's position. The Court conceded that earlier versions of the EEOC's Compliance Manuals limited the scope of the anti-retaliation provision to "adverse *employment-related* action."[192] However, the EEOC promoted a broader interpretation not only elsewhere in those same manuals but also in other Commission publications during that same time.[193] Moreover, and more importantly, said the Court, the EEOC's latest version of the Compliance Manual addressing the anti-retaliation provision is the *only* direct statement on the scope of that provision and interprets it far more broadly than Burlington proposed.[194]

Finally, the Court rejected Burlington's suggestion that it would be illogical to interpret the anti-retaliation provision as providing greater protection to victims of retaliation than victims of discrimination.[195] Such an interpretation best serves the differing purposes of the two provisions by assuring that employers provide the "cooperation upon which accomplishment of the Act's primary objective depends."[196] Moreover, the Court noted that Congress has similarly afforded broader protection to victims of retaliation in other contexts, citing to the National Labor Relations Act (NLRA). That is, the NLRA's substantive provision prohibits "discrimination in regard to . . . any term or condition of employment," while its anti-retaliation provision prohibits not only "discharge" but also other forms of "discriminat[ion]."[197] Thus, the Court concluded, Title VII's anti-retaliation provision is broader than its core

189. *Id.* at 2413.
190. *Id.*
191. *Id.*
192. *Id.* (emphasis added).
193. *Id.*
194. *Id.* at 2413-14.
195. *Id.* at 2414.
196. *Id.*
197. *Id.* (citing 29 U.S.C. § 158(a)(3), § 158(a)(4)).

substantive provision, at least insofar as it "extends beyond workplace-related or employment-related retaliatory acts and harm."[198]

2. The Court Adopts a Material Adversity Standard With Alternative Objective and Subjective Components

Next, the Court turned to the second question raised by the circuit split: the scope of retaliatory acts that the statute prohibits. Here, the Court struck a middle ground between the standards proposed by the parties and held that "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'"[199] Explaining its conclusion, the Court reasoned that "*material* adversity" is required in order "to separate significant from trivial harms" because Title VII "does not set forth 'a general civility code for the American workplace.'"[200] Employer acts that amount to nothing more than "petty slights" or "minor annoyances" fall outside the scope of actionable material conduct, said the Court, because such acts would not deter protected conduct—the problem against which the anti-retaliation provision is intended to protect.[201] Thus, the Court concluded that the materiality standard strikes the appropriate balance because it "will screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination."[202]

The Court also instructed that while courts should apply its standard objectively, "context matters."[203] Thus, the Court purported to ensure that its standard was "judicially administrable" by focusing attention on the "reactions of a *reasonable* employee".[204] Nevertheless, the Court indicated that the specific circumstances surrounding each employee's situation must be taken into account.[205] The Court provided two examples:

> 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. . . . A supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an

198. *Id.*
199. *Id.* at 2415.
200. *Id.* (emphasis in original) (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998)).
201. *Id.*
202. *Id.* at 2416.
203. *Id.* at 2415.
204. *Id.*
205. *Id.* at 2415-16.

> employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination. Hence, a legal standard that speaks in general terms rather than specific prohibited acts is preferable, for an "act that would be immaterial in some situations is material in others."[206]

Thus, the Court's standard requires that a plaintiff's alleged adverse action be one that would deter a reasonable, objectively-viewed employee, but one in the plaintiff's specific position, from complaining about discrimination. These examples therefore inject substantial subjectivity into the Court's nominally objective standard. The biggest problems with *White's* holding originate here, as will be discussed in more detail below.[207]

3. The Court Upholds White's Retaliation Claims Based on the Reassignment of Her Job Duties and Her Temporary Unpaid Suspension

The Court then applied its standard to the facts of White's case. Turning first to White's reassignment from forklift duties to standard track-laborer tasks, the Court recognized that changing an employee's job duties, even within the employee's existing job description, might well amount to retaliation, as by requiring an employee to perform "more arduous" tasks rather than "those that are easier or more agreeable."[208] Such an action could deter a reasonable employee from complaining about discrimination or participating in the discrimination-investigation process.[209] The Court's analysis went further, however, to take account of "the circumstances of [White's] particular case."[210] Here, the Court noted that

> the jury had before it considerable evidence that the track laborer tasks were 'by all accounts more arduous and dirtier'; that the 'forklift operator position required more qualifications, which is an indication of prestige'; and that 'the forklift operator position was objectively considered a better job and the male employees resented White for occupying it.'[211]

As such, the Court determined that the evidence supported the jury's verdict in White's favor, as "the reassignment of responsibilities would

206. *Id.*
207. *See infra* Part V.
208. *Id.* at 2416.
209. *Id.*
210. *Id.* at 2417.
211. *Id.*

have been materially adverse to a reasonable employee."[212]

The Court reached a similar conclusion with respect to White's thirty-seven day unpaid suspension. Here, the Court again engaged a two-part analysis, concluding first that "[m]any reasonable employees would find a month without a paycheck to be a serious hardship" and, second, that White in particular found the suspension difficult, in that she had no income at Christmas, became very depressed, and ultimately obtained medical treatment for her emotional distress.[213] Thus, the Court concluded that a thirty-seven day suspension "could well act as a deterrent" to engaging in protected activity and therefore was sufficiently adverse to support White's claim.[214] Moreover, the fact that Burlington later rescinded its suspension decision and reinstated White with full back pay was of no consequence.[215] The Court rejected Burlington's contention that because Title VII, throughout much of its history, provided only for equitable relief, it should not be interpreted to encompass this case simply because Title VII was amended in 1991 to permit recovery of compensatory and punitive damages.[216] Indeed, such an amendment, said the Court, provides further support for the conclusion that Congress intended to afford a right of recovery to plaintiffs in White's position, as Congress's expressed intention in affording such remedies was to "help make victims whole."[217] Thus, the Court concluded that both of the retaliatory acts alleged by White could support her claim, as both would deter not only a reasonable person in general, but also one in plaintiff's specific position, from engaging in the enforcement activities the anti-retaliation provision encourages.

4. Without Complete Unanimity: Justice Alito's Concurring Opinion

While he agreed with the Court's ultimate conclusion that the employer decisions alleged by White were sufficient to support her retaliation claim, Justice Alito wrote separately to express his disagreement with the adverse-action standard announced by the Court. According to Alito, the anti-retaliation provision suggests only two possible interpretations.[218] The first—the one "staunchly defend[ed]" by White—"makes [section] 703 narrower in scope than [section] 704 and thus implies

212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.* (citing West v. Gibson, 527 U.S. 212, 219 (1999) (quoting H.R. Rep. No. 102-40, pt. 1 at 64-65 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 602-03)).
218. *Id.* at 2418-19 (Alito, J., concurring).

that the persons whom Title VII is principally designed to protect—victims of discrimination based on race, color, sex, national origin, or religion—receive less protection than victims of retaliation."[219] It also "'makes a federal case' out of any small difference in the way an employee who has engaged in protected conduct is treated."[220] Alito expressed "doubt that Congress meant to burden the federal courts with claims involving [such] relatively trivial differences in treatment," and therefore found the second possible interpretation—that adopted by the majority of the Circuit Courts of Appeals—more plausible.[221] Under this interpretation, the anti-retaliation provision reaches the same discriminatory acts as the statute's core substantive provision—i.e., only those that are "materially adverse" to a reasonable person. Alito praised this standard both for its objectivity and for its ability to "weed[] out" insignificant claims on summary judgment motions, "while providing ample protection for employees who are subject to real retaliation."[222] Moreover, contrary to the majority, Alito found support for this interpretation in the Court's decision in *Burlington Industries, Inc. v. Ellerth*, as the Court there "'import[ed]' this test for use in a different context—to define the term 'tangible employment action,' a concept we used to limit an employer's liability for harassment carried out by its supervisors."[223]

Alito then proceeded to criticize the interpretation adopted by the majority for lacking support in the language of the statute. First, Alito denounced the Court's reliance on its view that the Act's "only purpose" is prevention of employer decisions that might deter protected activity, explaining that such a narrow view is inaccurate.[224] This view is too narrow, according to Alito, because it fails to account for other purposes plausibly served by the Act, including the prevention of harm to individuals, a purpose expressly recognized elsewhere in the majority opinion.[225]

Second, Alito predicted that the majority's test "well might dissuade a reasonable worker from making or supporting a charge of discrimination" and would "lead to perverse results."[226] Specifically, it would require a court to take account of the nature and severity of the discrimination claimed by the employee and would force them to engage in a cost-benefit analysis of suffering alleged discrimination quietly versus risking retaliation for complaining. Alito pointed out that the threat of retaliation is

219. *Id.*
220. *Id. at 2419.*
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.* at 2420.
225. *Id.*
226. *Id.* at 2421.

much less likely to deter the victim of the severest forms of discrimination than the victim of less significant acts of discrimination. As such, the majority's deterrence standard would function illogically to afford relief from retaliation to fewer victims of severe discrimination, and more victims of de minimis discrimination, who are more likely to be dissuaded from engaging in protected activity.[227] Further, Alito attacked the majority's standard as unclear, insofar as it purports to be objective but still requires a court to take account of some unidentified set of individual characteristics such as whether the employee has young children at home, and what the employee's family financial situation might be.[228]

Finally, but without much explanation, Alito condemned the majority's test as supplying a "loose and unfamiliar causation standard"—one that he found unwelcome "in an area of the law in which standards of causation are already complex."[229] Alito therefore disagreed with the majority's formulation of the relevant adverse-action standard and proposed instead that the anti-retaliation provision should reach the same discriminatory acts covered by the statute's core substantive provision.[230] While concededly not the most loyal to the plain language of the statute, such an interpretation would, according to Alito, afford sufficient protection to victims of "real" retaliation while providing an objective standard that the judiciary could administer with substantial clarity.[231]

Alito concluded by applying his material-adversity standard to the facts of White's case, and reached the same conclusion as the majority. That is, Burlington's decision to assign White to new duties that were admittedly "more arduous" and "dirtier," as well as less prestigious, served as almost a *de facto* demotion and was therefore amply sufficient to support her claim.[232] Alito likewise determined, though without explanation, that White's 37-day unpaid suspension also satisfied his formulation of the relevant standard. Thus, although their paths differed, Alito and the majority eventually reached the same destination.

V. THE WAYWARD WAYS OF THE COURT: AN UNWORKABLY VAGUE AND IMPRACTICAL STANDARD THAT FAILS TO MEET STATED OR NECESSARY GOALS

The analytical approach taken in the majority and the concurring opinion in *White* properly focuses on the language of the statute but does so

227. *Id.* at 2420-21.
228. *Id.* at 2421.
229. *Id.*
230. *Id.*
231. *Id.*
232. *Id.* at 2421-22.

from such a narrow vantage that the Court fails to take sufficient account of other important statutory-interpretation criteria. The careful consideration of these criteria ought to lead to a somewhat different result. As the Court has repeatedly stated, the first step in the statutory-interpretation process is to determine whether the language of the statute at issue is plain and unambiguous.[233] Where the language is plain and unambiguous, no interpretation is necessary and the court must enforce the statute as written.[234] Ambiguity exists only when the statutory language, on its face as well as in context, "is capable of being understood by reasonably well-informed persons in two or more different senses."[235] Thus, if the court finds that the language of the statute is ambiguous, then the court endeavors to discern its meaning by reference to what its drafters intended.[236] This process should involve inquiry into three matters: (1) the language of the statute in both the narrow context in which it appears and the broader context of the statute as a whole; (2) the policy goals or purposes that the statute serves, as reflected in its legislative history and/or elsewhere; and (3) the reasonableness of the proposed interpretation in light of practical considerations.[237]

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233. Desert Palace, Inc. v. Costa, 539 U.S. 90, 98 (2003); Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997); *see also* 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 45:02 at 6-11(West 6th ed. 2000) (collecting cases to support proposition that "'[w]here the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion.'").

234. *Costa*, 539 U.S. at 98; *Robinson*, 519 U.S. at 340; SINGER, *supra* note 233, § 45:02, at 6-11.

235. SINGER, *supra* note 233, § 45:02, at 11-12. As renowned statutory-interpretation scholar Professor Norman J. Singer points out, though, it can rarely be said that statutory language is truly and wholly unambiguous on its face, as words only occasionally have intrinsic meanings. *Id.* at 12-13. By way of example, Professor Singer posits that while the term "automobile" "has fairly determinate content and is not likely to cause great difficulty in interpretation, . . . the word 'bill' may refer to an evidence of indebtedness, to currency, to a petition, to a person's name, to the anatomy of a bird, a portion of a cap and a host of other objects, and may need 'interpretation' and 'construction.'" *Id.* at 13. Thus, "[i]t is only through custom, usage, and convention that language acquires established meanings," so a court's conclusion that statutory language is unambiguous often means simply that the court has already construed the language of the statute and will apply the meaning assigned in that process, or perhaps that the court is unwilling to consider the impact of extrinsic evidence on the meaning of particular statutory language and so opts to declare its meaning unequivocally instead. *Id.* at 13-14.

236. SINGER, *supra* note 233, § 45:05, at 25.

237. *See* Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 600 (2004) (referencing "text, structure, purpose and history of the ADEA" as interpretive resources supporting conclusion that ADEA not intended to prohibit employer from favoring older workers over younger ones); *Robinson*, 519 U.S. at 345 (turning to "broader context provided by other sections of the statute" and statute's purposes in resolving ambiguity as to meaning of term "employees" in anti-retaliation provision of Title VII); SINGER, *supra* note 233, § 45:13, at 107-08 (identifying as resources of interpretation statutory language and context, legislative

While the Court in *White* gave some consideration to the language of the anti-retaliation provision and its context, as well as at least one of its purposes, the Court did not go far enough in its inquiries. As a result, the Court's interpretation of the anti-retaliation provision is inconsistent with the language of Title VII in its broader context, fails to fulfill the policy goals of the statute as a whole, and implements an unworkably vague standard that is wholly impractical in the real world.

In the remaining Parts V and VI of this Article, I will discuss each of these problems with the *White* decision, and in turn offer a proposal to remedy the situation. Thus, in subpart V.A. below, I will show how the Court's narrow view of the anti-retaliation provision alone without sufficient reference to the context in which it appears leads the Court to interpret the statute more broadly than the statutory language and structure warrant. In subpart V.B., I will turn to the Court's singular focus on unfettered access to statutory remedial mechanisms as the primary or only goal of the anti-retaliation provision and demonstrate that it disregards and even contravenes other equally important statutory purposes. In subpart V.C., I will explain how the interpretation adopted by the Court unjustifiably ties the hands of employers and implements a standard that will lead to continued lack of clarity in the lower courts. Finally, in Part VI, I will offer a solution to the problems that the Court's decision in *White* creates and propose a revision to the statute's anti-retaliation provision that will change the relevant standard to better fit the context of the statute as a whole and better fulfill its broader policy goals. Because the effect of stare decisis in a case like this is so strong, these problems cannot easily be remedied by further Court action.[238] Instead, Congress should intervene to overrule legislatively the Court's decision in *White* and impose a clearer anti-retaliation standard that is more loyal to the statute's language and underlying purposes.

A. The Court Makes a Rocky Start: Neither the Statutory Language nor Its Context Compels the Majority's Interpretation

The first problem with the Court's analysis is its narrow view of the statutory language that fails to take sufficient account of the broader context in which the anti-retaliation provision appears. This problem is not apparent at first blush. Indeed, the Court began its analysis much as one might expect, focusing on the statutory language and honing in on the term

history and underlying policy, and "concepts of reasonableness").

238. *See* Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 362-63 (2000) ("The policy of stare decisis is at its most powerful in statutory interpretation, which Congress is always free to supersede with new legislation.").

"discriminate against" as critical.[239] Breezing past any inquiry into whether the statute contains an ambiguity needing interpretation, the Court summarily concluded that "[n]o one doubts that the term 'discriminate against' refers to distinctions or differences in treatment that injure protected individuals."[240] The Court proceeded to recognize that, notwithstanding this declaredly universal truth, courts have disagreed as to "whether the challenged action has to be employment or workplace related and . . . how harmful that action must be to constitute retaliation."[241] After highlighting the circuit split on this issue, the Court acknowledged that some courts read the language of these two similar, but not identical, provisions *in pari materia*—the position advocated to the Court by Burlington.[242] Most such courts conclude, as urged by Burlington, that the term "discriminate against" should be read to mean the same thing in both provisions, so that both occurrences of the term encompass the same scope of employer actions, not only as to employment-relatedness (i.e., workplace harms only), but also as to severity.[243]

The Court rejected this position, though, and instead found that "[t]he language of the substantive provision differs from that of the anti-retaliation provision in important ways."[244] Specifically, the Court accorded great weight to the substantive provision's use of the terms "hire," "discharge," and "compensation, terms, conditions, or privileges of employment," which terms are conspicuously absent from the anti-retaliation provision.[245] The Court therefore "presume[d]" that "Congress intended its different words to make a legal difference," and proceeded to justify its conclusion in light of statutory purposes.[246]

While the Court's analysis took into account both the language of the anti-retaliation provision and the statute's core substantive provision, the range of analysis used still stopped short of what it should have been. The Court's focus was too narrow, leaving its result flawed. A broader scope of inquiry in at least two respects at this statutory-language-focused interpretive phase would likely have left open the possibility of contrary results, instead of leading the Court so quickly to "presume" that any difference in language reflects intentionally different meaning.

First, and pertinent specifically to the Court's first holding that the anti-retaliation provision encompasses non-workplace harms,[247] the Court

239. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2410 (2006).
240. *Id.*
241. *Id.*
242. *Id.* at 2410-11.
243. *Id.*
244. *Id.* at 2411.
245. *Id.* at 2411-12.
246. *Id.* at 2412.
247. This aspect of the Court's decision is dictum. *See supra* note 188. Nevertheless,

never discussed the fact that both sections 703(a) and 704(a) define "an unlawful *employment* practice."[248] That terminology appears prominently at the beginning of not only the first subpart of the core substantive provision, but also in nearly every other subpart thereafter, each of which makes it "an unlawful employment practice" for the type of entity covered by that subpart (e.g., an employment agency,[249] a labor organization,[250] or a joint labor-management committee controlling apprenticeship[251]) to "discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin."[252] The anti-retaliation provision is identical insofar as Congress therein made it "an unlawful employment practice . . . to discriminate against" those individuals who engage in protected activity.[253]

Congress's repeated reference to "an unlawful employment practice," as opposed to, for example, "an unlawful practice" more generally, surely is not unintentional. Such specific, prominent, and repeated reference to *employment* practices warrants at least mention, if not more detailed attention, in an analysis of whether the statute encompasses wrongs outside of or that do not depend on an employment relationship. Indeed, to disregard (or at least exclude discussion of) this statutory language, as the Court did, is disloyal to the cardinal rule of statutory interpretation, that "effect [should be] given . . . to *every* word, clause, and sentence of a statute."[254] The Court's singular focus on Congress's omission from the anti-retaliation provision of certain words describing the kind of discrimination made actionable under the statute's core substantive provision results in an overly narrow analysis that misses a key point. While such distinctions should not be disregarded entirely, Congress's use of the term "employment practice" in labeling the activities made unlawful by the statute is more instructive on the question of whether the statute encompasses non-workplace harms than is its extrapolation, or lack thereof, on the basic term "discriminate against" in describing the prohibited acts themselves. The statute prohibits "discriminat[ion]," but only activities that constitute "employment practices" need to be considered in the first place.

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because the Court represents its determination of this issue as a "holding," this dictum is likely to have substantial influence, if not be determinative, in subsequent lower court decisions.

248. 42 U.S.C. §§ 2000e-2(a)(1), 2000e-3(a) (2006) (emphasis added).

249. *Id.* § 2000e-2(b).

250. *Id.* § 2000e-2(c).

251. *Id.* § 2000e-2(d).

252. *Id.* § 2000e-2(a)(1).

253. *Id.* § 2000e-3(a).

254. SINGER, *supra* note 233, § 46:06, at 181 (emphasis added); *see also* United States v. Menasche, 348 U.S. 528, 538-39 (1955).

Congress's use of the term "employment practices" is not alone sufficient to justify a conclusion that the Act *does not* include non-workplace harms. However, the Court's narrow focus on the term "discriminate against" and its modifiers inappropriately disregards other key language in the operative provisions of the statute. The result is that the Court too quickly concludes (or "presume[s]," as the case may be) that the core substantive provision and the anti-retaliation provision have different meanings, while a closer look at the statutory language in context would reveal striking and important similarities. Thus, consideration of Congress's repeated reference to "employment practices" in defining the conduct made unlawful by the statute does not necessarily compel a different result than that reached by the Court on the facts of *White*, but it at least leaves open the possibility that the anti-retaliation provision does not encompass non-workplace harms.

This same error plagues the Court's second holding, in which the Court states that the anti-retaliation provision prohibits any employer conduct that is "materially adverse, which in this context means it well might have dissuaded a reasonable worker [in the plaintiff's position] from making or supporting a charge of discrimination."[255] Indeed, here, the Court did not engage in a separate analysis of the statutory language or context.[256] Instead, the Court relied on its earlier conclusion that the two provisions of the statute are different, and proceeded to justify its proposed standard in light of statutory policy and its own precedents.[257] Had the Court expanded the breadth of its inquiry into the statutory language and context, its conclusion would not be justifiable because the statutory language does not support the Court's test. As Justice Alito points out in his concurring opinion, the anti-retaliation provision on its face simply prohibits "discriminat[ion] against" employees who engage in protected activity.[258] The plainest meaning of this term would encompass any difference in treatment that negatively impacts protected individuals. Indeed, the majority's own definition of "discriminate against," which it accepts without question, supports this interpretation.[259] The Court did not, however, adopt this "plain meaning" interpretation. Instead, the Court implicitly, and I believe correctly, recognized that such a broad

255. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2415 (2006) (internal quotation marks omitted) (quoting Rochon v. Gonzales, 483 F.3d 1211, 1219 (D.C. Cir. 2006)).

256. *Id.*

257. *Id.* at 2415-16

258. *Id.* at 2418.

259. *Id.* at 2410 ("No one doubts that the term 'discriminate against' refers to distinctions or differences in treatment that injure protected individuals."); *see also* 110 CONG. REC. 7213 (1964) ("To discriminate is to make a distinction, to make a difference in treatment or favor . . . .").

interpretation is inconsistent with the statute's underlying purposes.[260] As such, the task before the Court turned to determining just what the scope of that provision should be within the broad range of standards one might propose. However, the Court did not turn to the language or context of the statute for guidance, as the rules of statutory construction would first advise.[261] Rather, the Court looked straight to its narrow perceptions of the statute's purposes and concluded, without any further reference to the language or context of the statute, that it prohibits "materially adverse" employer actions that "well might have dissuaded" a reasonable worker in the plaintiff's position from engaging in protected activity.[262]

Setting aside, for now, whether Title VII's purposes justify the majority's position,[263] neither the statutory language nor its context supports the Court's standard.[264] Nothing about the statutory language or its context suggests that Congress intended to prohibit employer actions that might dissuade a reasonable worker in the plaintiff's position from engaging in protected activity. Indeed, no part of the statute states, either expressly or implicitly, that deterrence is a critical factor in the actionability of a claim, or that it is even involved. Rather, the more logical intrinsic interpretive aid in these circumstances is the very provision that the Court casts aside—the other part of the statute that likewise makes certain "employment practices" "unlawful," i.e., the core substantive provision.

Justice Alito would have taken this approach. He agreed with the majority (and with me) that the plainest interpretation, which is also the broadest interpretation in this case, is not satisfactory.[265] He suggested that the only "other plausible interpretation . . . reads [sections] 703(a) and 704(a) together [so that] 'discriminat[ion]' under [section] 704(a) means the discriminatory acts reached by 703(a)—chiefly, discrimination 'with respect to . . . compensation, terms, conditions, or privileges of

260. *See White*, 126 S. Ct. at 2414 (beginning a discussion of a relevant adverse-action standard with the premise that "[t]he anti-retaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm"); *see also infra* Part V.B. (discussing the statute's purposes and their roles in statutory interpretation).

261. *See* SINGER, *supra* note 233, § 47:01 at 208 ("The starting point in statutory construction is to read and examine the text of the act and draw inferences concerning the meaning from its composition and structure." (footnote omitted)).

262. *White*, 126 S. Ct. at 2414-16 (internal quotation marks omitted) (quoting Rochon v. Gonzales, 483 F.3d 1211, 1219 (D.C. Cir. 2006)).

263. *See infra* Part V.B (criticizing the Court's discussion of the statute's purposes as too narrowly focused).

264. *See White* 126 S. Ct. at 2418 (Alito, J., concurring) ("The majority's interpretation has no basis in the statutory language and will, I fear, lead to practical problems.").

265. *See supra* notes 244-54 and accompanying text (discussing the inadequacies of the plainest interpretation of the anti-retaliation provision).

employment.'"[266] Alito then offered two sources of authority to support his position: (1) lower court decisions applying a "materially adverse employment action" standard under both provisions on this basis, and (2) the Supreme Court's "import[ation]" of that same materially adverse employment action standard to define "tangible employment action" in the context of employer vicarious liability.[267]

Justice Alito's reasoning is not entirely clear and perhaps does not even justify the result he reaches. First, the fact that numerous circuit courts applied the same "materially adverse employment action" standard under both the anti-retaliation provision and the core substantive provision should not compel the Supreme Court to reach the same conclusion. Second, as discussed above, the Supreme Court's "import[ation]" of the materially adverse employment action standard to define "tangible employment action" in *Ellerth* does not necessarily mean, or even suggest, that the same standard applies here.[268] The *Ellerth* holding pertained specifically to principles of agency law, and the Court drew upon the lower courts' adverse-action standard to mark the dividing line between those supervisory acts for which the employer will be strictly liable and those for which the employer may be liable only if negligent.[269] Although *Ellerth* certainly does not close the door to the application of that same materially adverse employment action standard under the anti-retaliation provision, it does not demand that result. At a minimum, some rationale to justify applying *Ellerth* in this context is needed.

Notwithstanding the shortcomings of Justice Alito's reasoning, though, the premise from which he starts is sound. Where the language of the statutory provision in question is ambiguous (here, the anti-retaliation provision does not announce any particular adverse-action standard), the first interpretive aid should be the language of other, closely-related statutory provisions, so that the pertinent provision can be read in context. In this case, the best and most obvious source in that regard is the core substantive provision of Title VII, which, although not identical to the anti-retaliation provision, bears a striking resemblance to it.[270] Both provisions

266. *White*, 126 S. Ct. at 2419 (Alito, J., concurring).

267. *Id.* (internal quotation marks omitted) (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998)).

268. *See supra* notes 37-47 and accompanying text (discussing the Court's reliance upon circuit court decisions to define "tangible employment action" in *Ellerth* and suggesting that its significance for other contexts remained unknown thereafter).

269. *White*, 126 S. Ct. at 2419 (Alito, J., concurring); *see also* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998) (setting the standard for an employer's vicarious liability as partially determined by whether a supervisor's harassment culminated in a tangible employment action or not).

270. *See supra* Part II.A. (discussing the differences and similarities between the anti-retaliation provision and the core substantive provision).

make it an "unlawful employment practice" for an employer to "discriminate against" certain individuals.[271] The main difference between the two provisions is that the core substantive provision protects individuals based on personal characteristics, while the anti-retaliation part protects individuals based on their conduct.[272] Aside from this obvious distinction, the two provisions operate almost identically, except that the core substantive provision offers more description as to the types of acts it considers discriminatory.[273] This distinction was critical to the Court, and led it to conclude that the scopes of the provisions are vastly different.[274] However, this conclusion is not compelled by the language of the statute, read in context. Instead, it is equally plausible that Congress's omission from the anti-retaliation provision of the additional descriptors it included in its core substantive counterpart, while perhaps intentional, is not reflective of such vast differences in intended *meaning*. Maybe Congress used the terms "unlawful employment practice" and "discriminate against" in both provisions to connote that the scope should indeed be the same, and simply intended the abbreviated language in the anti-retaliation provision to serve as shorthand for its earlier, more descriptive language.[275] Although such an interpretation is likewise not compelled by either the language of the statute or its context alone, it is nevertheless plausible, and one that should not be discarded without considering which interpretation best comports with other intrinsic and extrinsic aids to interpretation, including the statute's legislative history, policy, and purpose, as well as the reasonableness of the proposed standard considering its practical application. I therefore turn to those alternate sources now.

B. The Policy Arguments: The Court's Narrow View of the Statute's Purposes Leads It Astray

The Court's limited construction of the statutory language and context caused it to reach abrupt conclusions about the appropriate scope and standard under the anti-retaliation provision, but it was the Court's constrained view of the statute's purposes that ultimately led it astray. After "presum[ing]" that Congress's use of additional modifiers with the

271. 42 U.S.C. §§ 2000e-2(a)(1), 2000e-3(a) (2006).

272. *Id.*; *see also White*, 126 S. Ct. at 2412 ("The substantive provision seeks to prevent injury to individuals based on who they are, i.e., their status. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, i.e., their conduct.").

273. 42 U.S.C. § 2000e-2(a).

274. *White*, 126 S. Ct. at 2414-16.

275. *See* Dep't of Revenue of Or. v. ACF Indus., Inc., 510 U.S. 332, 342 (1994) ("[I]dentical words used in different parts of the same act are intended to have the same meaning." (citations omitted) (internal quotation marks omitted) (quoting Sorenson v. Sec'y of Treasury, 475 U.S. 851, 860 (1986))).

term "discriminate against" in the core substantive provision signals an intentional and stark difference in meaning between that provision and its anti-retaliation counterpart, and in the absence of any legislative history directly on point,[276] the Court turned immediately to discussion of the statute's purposes in an effort to justify its conclusions.[277] Here, the Court juxtaposed the purposes of the two provisions against one another, recognizing the anti-discrimination provision's aim to prevent discrimination against individuals in the workplace based on their race, color, national origin, religion, or gender, and the anti-retaliation provision's goal of "preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees."[278] The Court then concluded that, to secure the substantive provision's goals, Congress only needed to prohibit employment-related discrimination.[279] However, securing the anti-retaliation provision's goals, the Court continued, would require that additional forms of discrimination be prohibited.[280] The Court determined that because "[a]n employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace[, a] provision limited to employment-related actions would not deter the many forms that effective retaliation can take."[281]

The Court was not wrong to identify, and even emphasize, the maintenance of "unfettered access to statutory remedial mechanisms" as an important purpose served by the anti-retaliation provision. Indeed, that is surely one of the most important goals of that part of Title VII. It is undeniable that society cannot eradicate discrimination in the workplace—and therefore meet the central goal of the statute as a whole—without sufficient protection for employees who believe prohibited discrimination is occurring.

The Court erred, however, in focusing so narrowly on what it perceived as the *only* purpose of the anti-retaliation provision sufficiently significant to warrant discussion. While no doubt important, such "unfettered access to statutory remedial mechanisms" is surely not the only purpose of that provision. Attention to the Court's source of authority for that proposition verifies as much. In support of its assertion that unfettered

276. *See* Hochstadt v. Worcester Found. for Experimental Biology, 545 F.2d 222, 230 (1st Cir. 1976) (noting that legislative history is silent as to the intended scope and meaning of the anti-retaliation provision); Walterscheid, *supra* note 21, at 393 (noting the absence of any legislative history directed to the meaning of Title VII's anti-retaliation provision).

277. *White*, 126 S. Ct. at 2412.

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

access is the statute's primary purpose, the Court cited the only other Supreme Court decision to identify specifically the policy behind Title VII's anti-retaliation provision. In *Robinson v. Shell Oil Co.*, the Court likewise relied exclusively on that same statutory purpose.[282] There, the Court held that the term "employees" in Title VII's anti-retaliation provision includes not only current but also former employees.[283] After finding that term ambiguous on its face, the Court justified its conclusion based on "[t]he broader context provided by other sections of the statute," wherein former employees may also make use of the statute's remedial mechanisms, as well as what it perceived as "a primary purpose" served by the statute: "Maintaining unfettered access to statutory remedial mechanisms."[284] Notably, however, the *Robinson* Court did not employ restrictive language in its formulation of the statute's purpose. Instead, the Court simply indicated that unfettered access to remedial mechanisms is "a primary purpose of anti[-]retaliation provisions" generally, and cited to cases decided under the National Labor Relations and Fair Labor Standards Acts to support that position.[285]

Perhaps the Court's singular focus on maintenance of unfettered access to the statute's remedies is justified in light of the dearth of pertinent legislative history.[286] Indeed, the legislative history offers very little in the way of other potential purposes served by the anti-retaliation provision, and the Supreme Court has never shed any further light on the subject. Even if not explicitly stated in the legislative history or expressly adopted by the Supreme Court, though, other plausible purposes likely exist. For instance, one commentator has suggested that maintenance of the employer's prerogative to manage the workplace as he or she sees fit, not maintenance of access to the statute's remedies, is the only statutory purpose supported by the anti-retaliation provision's history.[287] Based on this view, the employee protection afforded by the anti-retaliation provision must yield to, or at least take into account, the employer's right to control his or her

282. 519 U.S. 337, 346 (relying upon "[m]aintaining unfettered access to statutory remedial mechanisms" as "a primary purpose" underlying the anti-retaliation provision in support of holding that term "employees" in that provision includes former employees).

283. *Id.*, at 345-46.

284. *Id.*

285. *Id.*, at 346 (emphasis added) (citing NLRB v. Scrivener, 405 U.S. 117, 121-22 (1972) and Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292-293 (1960)).

286. *See* Walterscheid, *supra* note 21, at 393 (stating that legislative history of Title VII's anti-retaliation provision is limited to committee reports that "simply repeat certain language of Section 704(a) without any explanation of its meaning").

287. *Id.*

business and its human resources.[288] If the Court had considered this policy rationale, its ultimate outcome would likely have been different.

Another plausible purpose served by the anti-retaliation provision is its protection of the informal conciliation process. Title VII confers upon the EEOC the power to investigate any charge of discrimination made against an employer or other covered entity.[289] If, upon conducting such an investigation, the EEOC determines "that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."[290] This informal conciliation process must take place *before* any formal litigation is filed.[291] In order to fulfill this duty, the EEOC must have access to all pertinent information, including that obtainable from both the charging party and from other employees. As such, another purpose underlying the anti-retaliation provision might well be promoting the statute's conciliatory goals. This process is heavily dependent upon the input of employees who in turn may need the protection that this provision affords. Again, consideration of such possible alternative statutory purposes might have at least influenced, if not directly impacted, the Court's analysis.

The dearth of legislative history and of other worthy authorities offering insight into the statute's purpose should not, however, narrow the focus when interpreting the relevant provision, as it did in *White*. Instead, the absence of clear indicators pertinent specifically to that provision should cause the Court to cast its net more widely, with attention to the purposes underlying the entire statute. Indeed, had the Court taken account of other well-established goals served by Title VII, more generally—i.e., had the Court engaged a broader-scale inquiry of the statute's purposes—it likely would have reached somewhat different conclusions.

At least three other policy goals that are served by Title VII deserved attention here. First and foremost, Congress enacted Title VII to ensure equality of employment opportunities among all individuals and to eliminate those discriminatory practices that have disadvantaged people with certain personal characteristics in the workplace.[292] Although the Court recognized this goal in its discussion of the core substantive provision, it failed to give it sufficient attention. The Court discussed this central goal of Title VII only insofar as to juxtapose it against the narrower

288. *See infra* notes 306-14 and accompanying text (discussing management prerogative as statutory purpose relevant to interpretation of anti-retaliation provision).

289. 42 U.S.C. § 2000e-5(b) (2006).

290. *Id.*

291. *Id.*; E.E.O.C. v. Keco Indus., Inc., 748 F.2d 1097, 1101 (6th Cir. 1984).

292. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973).

purposes served specifically by the anti-retaliation provision.[293] These differences in statutory purpose, said the Court, prove that the provisions likewise differ in meaning—Congress intended one provision to eradicate trait-based discrimination, while the other serves the wholly different goal of "assur[ing] the cooperation upon which accomplishment of the Act's primary objective depends."[294] To treat these purposes as wholly separate, however, is not consistent with construction of the statute as a whole.[295] Rather, the two provisions of the statute must be read together to promote not just the purposes served by each individual provision but also by the entire statute.[296] The Court concluded that since the two provisions serve different purposes, they must have different meanings as well. This position fails to take sufficient account of the primary goal of the statute as a whole. Congress aimed, first and foremost, to eradicate discrimination on the basis of race, ethnicity, religion, and gender when it enacted Title VII.[297] The anti-retaliation provision, while also serving its own function, should primarily promote this central goal.[298] The Court's holding in *White*, however, accords broader scope and meaning to the anti-retaliation provision than to the statute's core provision.[299] This, in turn, results in a broader standard under the anti-retaliation provision that elevates the status of individuals covered by it above those the statute aims first and foremost to protect.

A simple hypothetical with two variations illustrates this principle. Suppose an industrial company that assigns one employee to operate a

293. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2412-14 (2006).

294. *Id.*, at 2414.

295. *See* Gustafson v. Alloyd Co., Inc., 513 U.S. 561, 570 (1995) (noting that statutes "should not be read as a series of unrelated and isolated provisions"); Smith v. United States, 508 U.S. 223, 233 (1993) ("Just as a single word cannot be read in isolation, nor can a single provision of a statute.").

296. *See* Shapiro v. United States, 335 U.S. 1, 31 (1948) ("[W]e must heed the equally well-settled doctrine of this Court to read a statute, assuming that it is susceptible of either of two opposed interpretations, in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen."); SINGER, *supra* note 233, § 46:05, at 174-75 (referencing "cardinal rule that the general purpose, intent or purport of the whole act shall control, and that all the parts be interpreted as subsidiary and harmonious to its manifest object, and if the language is susceptible of two constructions, one which will carry out and the other defeat such manifest object, it should receive the former construction").

297. *See Green*, 411 U.S. at 800 ("The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.").

298. *See id.* at 799-800 (stating that anti-retaliation provision "relates solely to discrimination against an applicant or employee on account of his participation in legitimate civil rights activities or protests," while core substantive provision "deals with the broader and centrally important question under the Act of whether for any reason, a racially discriminatory employment decision has been made").

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

piece of heavy machinery (e.g., a bulldozer) as his or her primary duty. Operating this bulldozer requires that he or she possess special skills. Suppose further that, in response to complaints from other employees with greater seniority who likewise possess the special skills required to operate the bulldozer, the employer decides to re-assign the bulldozer operator to perform other tasks so that the bulldozer-operation duties can be distributed more broadly. The new duties assigned to the former bulldozer operator fall within the broad parameters of the employee's basic job description. Nevertheless, the employee is understandably disgruntled—he/she much prefers the cleaner, and at least perceptibly more prestigious, bulldozer operation duties. Now suppose further that in one scenario, this disgruntled employee is an African-American female. In a variant on the same hypothetical, the disgruntled employee is a white male who complained to management just a few weeks earlier that female employees were harassing him based on his sex. Under these circumstances, the African-American female may be unable to make out a prima facie case of race or sex discrimination because, perhaps among other things, the employer's act of changing her duties within her pre-existing job description would likely not be considered sufficiently adverse.[300] Such a change in duties within the parameters of the employee's pre-existing job description simply does not effect an "extreme . . . change in the terms and conditions of [her] employment" as the Court requires.[301] Thus, any claim she might bring is subject to dismissal at summary judgment, if not before. By contrast, however, the white male who recently complained of harassment is now far more likely to survive past the summary judgment stage, and reach a jury on his retaliation claim. The Court's holding in *White* provides direct support for his claim.[302] He is therefore much more likely to receive a favorable settlement from the employer, even without having to expend the time, energy and money required to pursue litigation. This hypothetical may over-simplify the matter, but it nevertheless illustrates that the Court's imposition of a broader adverse-action standard under the anti-retaliation

300. *See, e.g.*, James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 376 (4th Cir. 2004) ("[A]bsent any decrease in compensation, job title, level of responsibility, or opportunity for promotion, reassignment to a new position commensurate with one's salary level does not constitute an adverse employment action even if the new job causes some modest stress not present in the old position."); Brown v. Brody, 199 F.3d 446, 456 (D.C. Cir. 1999) (affirming summary judgment for the employer because the employee failed to show sufficient adverse employment action to support a race discrimination claim based on job transfer absent circumstances showing demotion or other "clear showing of adversity").

301. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) ("We have made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment . . . .").

302. *See White*, 126 S. Ct. at 2417 (holding that reassignment to dirtier and more arduous job duties from position of some prestige supports actionable retaliation).

clause than under the core substantive provision elevates the status of those who engage in protected activity above those the statute was originally designed to protect.

Indeed, this hypothetical demonstrates that the Court's standard might even lead to perverse results by creating an incentive for employees to bring meritless claims in order to obtain protection from routine job actions. For example, in a further variant on the hypothetical, if two employees both apply for the open bulldozer-operator job, but one has recently filed a complaint and therefore becomes protected under the anti-retaliation provision, he is more likely to get that job, regardless of merit, seniority, or any other more relevant factors. As such, the Court's standard not only elevates the status of whistleblowers above the minorities whom the statute was intended to protect, but it also creates classes among employees, divided along lines of those who have engaged in protected activity and those who have not, to the direct detriment of workplace equity.

The Court addressed this concern only briefly, in response to similar arguments offered by both Burlington and the United States government as amicus curiae in their briefs to the Court.[303] The Court's response, however, is limited to the assertion that Congress likewise provided protection from retaliation in other contexts "without any judicial suggestion that those provisions are limited to the conduct prohibited by the primary substantive provisions" of the respective statutes.[304] The Court cited to the National Labor Relations Act ("NLRA"), and cases decided thereunder, as support, but its citations do not reflect any affirmative determination that the NLRA's anti-retaliation provision is indeed broader in scope than its substantive counterpart, or that such a conclusion is required in any other context, under Title VII or otherwise. The Court's citations indicate at most that the NLRA's anti-retaliation provision *might* be broader in scope, not that in fact it is.[305] The Court therefore offered essentially no substantive response to the well-founded argument that applying a broader standard under the anti-retaliation provision needlessly elevates the status of whistleblowers above historically mistreated and down-trodden groups. As a result, the Court's analysis failed to take sufficient account of the primary purpose underlying Title VII as a whole—the eradication of workplace discrimination against minority individuals.

303. *Id.* at 2414.

304. *Id.*

305. *See* Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 740 (1983) (discussing breadth of anti-retaliation provisions of the NLRA but without reference or comparison to Act's substantive provision); and NLRB v. Scrivener, 405 U.S. 117, 121-22 (1972) (discussing purpose of the NLRA's anti-retaliation provision).

The Court's standard also contravenes Title VII policy by discouraging forethought by employers and interfering unnecessarily with management prerogatives.[306] The Court has repeatedly touted the importance of the latter of these policies, emphasizing that Title VII does not require an employer to give preferential treatment to any of the individuals it protects or to "restructure its employment practices to maximize the number of [protected-class individuals] hired."[307] The former of these policies is also important, and is most evident in cases like *Ellerth*, where the Court held that an employer sued for sexual harassment by a supervisor may mount an affirmative defense comprised of two parts: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[308] This decision provided a strong incentive for employers to ensure that they had in place thorough and well-publicized policies prohibiting any form of harassment in the workplace, to provide open lines of communication between employees and management about alleged harassment, to implement training programs at all employment levels, to raise awareness of what constitutes harassment, and to impose stiff penalties as evidence of the employer's unwillingness to tolerate it.

The Court's decision in *White*, however, does not promote any such positive response because the standard it imposes is unworkably vague. The Court describes its standard as an objective one. Indeed, the Court devotes an entire paragraph to explaining the need for objectivity under these circumstances:

> We refer to reactions of a *reasonable* employee because we believe that the provision's standard for judging harm must be objective. An objective standard is judicially administrable. It avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings. We have emphasized the need for objective standards

306. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998) (referencing encouragement of employer forethought as one of Title VII's "basic policies").

307. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 259 (1981). *See also* Price Waterhouse v. Hopkins, 490 U.S. 228, 242 (1989) ("The other important aspect of the statute is its preservation of an employer's remaining freedom of choice . . . . The statute's maintenance of employer prerogatives is evident from the statute itself and from its history, both in Congress and in this Court."); United Steelworkers of Am. v. Weber, 443 U.S. 193, 206 (1979) (gleaning from legislative history of Title VII that Congress did not intend to diminish traditional "management prerogatives").

308. 524 U.S. at 765.

> in other Title VII contexts, and those same concerns animate our decision here.[309]

The very next paragraph, however, changes the landscape drastically, injecting substantial subjectivity into the inquiry that the Court works so hard to tout as wholly objective.[310] Specifically, the Court qualifies the "objective" adverse-action standard by requiring that courts take account of the plaintiff's unique circumstances. The Court explained:

> We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters. 'The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.[311]

The first of the two examples the Court then offers makes abundantly clear the subjective nature of its test: "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."[312] Thus, a schedule change that might not "dissuade a reasonable worker from making or supporting a charge of discrimination" and therefore is not "materially adverse" under the objective side of the Court's standard, still might nevertheless be actionable if the affected employee happens to have young children at home.[313] But how is an employer contemplating such a schedule change to know whether the affected employee has young children at home needing attention at night?

The subjective side of the Court's standard therefore leaves an employer considering any change that might affect an employee who has recently engaged in protected activity with two choices: it can interview the employee extensively in an attempt to ascertain whether the contemplated change might somehow affect her more substantially than an otherwise "reasonable worker" (the riskier approach), or it can refrain from taking any action affecting her at all, regardless of its needs (the safer but otherwise less desirable approach). The first option may encourage forethought by employers—indeed, it does so to an extreme—but only to the detriment of traditional management prerogatives, as employers will be

309. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2415 (2006) (emphasis in original) (citing Pa. State Police v. Suders, 542 U.S. 129, 141 (2004) (constructive discharge doctrine)); *see also*, Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (defining the hostile work environment doctrine)).

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

forced to treat employees protected under the anti-retaliation provision with kid gloves and thereby lose the ability to make and implement decisions affecting such employees without exposure to substantial Title VII liability. The second option, however, is in many respects worse, as it deprives the employer entirely of the ability to manage its human resources in the way it deems most effective. Moreover, the subjectivity of the standard casts such ambiguity on whether a given employer action will support a retaliation claim that an employer has almost no incentive to devote substantial forethought to its course of action because it is almost impossible to predict accurately how an employee's unique circumstances will bear upon any change he might face. The educated employer will know that the best way to avoid risk is to do nothing at all, rather than to undertake a more extensive and thoughtful review of the situation.

Consider, for example, a relatively typical scenario in which this concern might arise. Suppose that Employee A, a female, has complained of sexual harassment by Employee B, her male supervisor. Cognizant of its duties under *Ellerth*, the employer responded quickly to Employee A's complaints and conducted a thorough investigation of her allegations, which led the employer to conclude that some unlawful harassment had indeed taken place. Thus, the employer determined that not only should Employee B suffer an unpaid suspension, but also Employee A should no longer have to report to or work with Employee B after he returns (presuming the offense was not so grave as to warrant immediate discharge). The organizational structure of the company, however, is such that it could easily transfer Employee A to a different, comparable position with the same pay and benefits, but would encounter substantial organizational difficulty (and thus expense) not only finding an alternative position for Employee B but also replacing him as a supervisor in Employee A's department. After *White*, an employer is well advised to transfer Employee B notwithstanding the extraordinary difficulties it may then encounter, rather than Employee A, because it will incur a substantial risk of Title VII liability by taking any action affecting Employee A, especially without detailed knowledge of any unique circumstances that might make her more susceptible to negative impact. While it is true that Employee A should not be made to suffer any negative consequences from these circumstances, of which she was victim and not perpetrator, Title VII was not intended to require employers to treat the individuals protected by it more favorably than others.[314] But the risk-averse employer faced with this conundrum will likely do just that, and will accord special treatment to

314. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800-01 (1973) (noting that purpose of Title VII is "to assure equality of employment opportunities and to eliminate . . . discriminatory practices" and not "to guarantee a job to every person regardless of qualifications" or to afford preferential treatment to members of protected classes).

Employee A in order to reduce the prospect of costly and time-consuming litigation. Indeed, the risk-averse employer will likely not only do what it takes to remove Employee B from Employee A's work environment, rather than the converse, but will likely choose not to take any action that might affect Employee A in any respect for at least several months and maybe more, until the time period of presumptive causation has passed.

The approach adopted by the Court in *White* takes adequate account of *one* of the central purposes of Title VII's anti-retaliation provision but fails to accord sufficient consideration to other, equally important policies underlying the statute as a whole. While prohibiting employer conduct aimed at stifling employee participation in the enforcement process is critical, it is improper to do so to such an extent that hampers other statutory goals. Title VII aims chiefly to eradicate discrimination in the workplace, and any interpretation of it should bear that goal in mind first and foremost. The standard adopted by the Court in *White* not only detracts from this worthy goal by elevating the status of whistleblowers above those the statute was originally enacted to protect, but also interferes substantially and unnecessarily with management prerogatives and even discourages the employer forethought that the statute seeks to promote. For these reasons and in light of other practical considerations discussed below, the Court's interpretation simply does not work.

C. *An Unworkable Standard in the Real World: The Impracticalities of the Court's Approach.*

Not only does the Court's decision in *White* fail to take adequate account of relevant policy considerations, but it also implements a standard that is unworkably vague in at least three respects. The first is readily apparent on review of the Court's own illustration of its standard. As discussed above,[315] the Court's standard, although initially touted as objective, includes highly subjective components.[316] The Court explained that "any given act of retaliation will often depend upon the particular circumstances," and offered as an example the single mother with young children who suffers a far greater burden by a schedule change to the night shift than many other workers without childcare needs would experience.[317] No doubt this is true. But by offering this example, the Court suggests that an employer must ascertain substantial personal information about an employee who has engaged in protected activity before making any

315. *See supra* notes 309-13 and accompanying text (discussing subjective side of Court's standard).

316. *See White*, 126 S. Ct. at 2415-16 (qualifying objective standard on grounds that "[c]ontext matters").

317. *Id.*

changes that affect her job, as the alternative is having to defend any subsequent lawsuit solely on the grounds that the decision was made for a legitimate, non-discriminatory reason, and severely limiting its opportunities to defend successfully a non-retaliatory decision at or prior to the summary judgment stage. As such, the Court opens wide a large can of worms. How extensively must the employer search to determine how a proposed decision might affect a protected worker? What characteristics should count? The standard is nominally objective—whether a reasonable employee in the plaintiff's position would find the employer's action materially adverse—but apparently requires an employer to engage in a fact-finding mission of some unspecified scope. Moreover, because the inquiry advised by the Court is so fact-specific, an employer striving to "do the right thing" may be thwarted from doing so simply for lack of guidance as to what questions it should ask, and which of the employee's myriad unique circumstances it should take into account. The Court's subjective standard also implicates concerns about employee privacy. If an employer is required to dig deeply into an employee's personal life in order to ascertain how a proposed employment action might affect him, his personal life becomes the employer's business, and he might resist the process. In any event, he must choose between disclosing the requested information or possibly suffering what he perceives to be an adverse job action. Most employers attempting to avoid liability will surely find this process extremely unwieldy, if not impossible. As such, the subjectivity of the Court's standard makes its implementation almost wholly unworkable in the real world.

The Court's standard also suffers from ambiguity in the form of what Justice Alito refers to as "a loose and unfamiliar causation standard."[318] This ambiguity arises from the Court's explanation of the "material adversity" standard it imposes: "[A] plaintiff must show that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have "dissuaded a reasonable worker from making or supporting a charge of discrimination."'"[319] As with the Court's working-mother example, discussed above, this assertion raises a multitude of questions. How does one (i.e., an employer attempting compliance or a court adjudicating a claim) assess whether an action "*well might* have dissuaded" protected activity? Is this somehow different from an action that, for example, "*would* have dissuaded" that same reasonable worker from lodging a complaint? What purpose does the modifier term "*well*" serve? In other words, does the standard "*well might*

318. *Id.* at 2421.

319. *Id.* at 2415 (emphasis removed) (citing Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006) (quoting Washington v. Ill. Dep't of Revenue, 420 F.3d 658, 662 (7th Cir. 2005)).

have dissuaded" protected activity differ from a standard that only encompasses actions that simply "*might* have dissuaded" protected activity? If so, how? The Court does not answer any of these questions, nor does the Court provide any indication as to how an employer attempting compliance, an aggrieved employee contemplating legal action, or a court adjudicating a claim should answer them. Instead, the Court leaves these questions open, to be decided by the lower courts, beginning the process once again of defining the adverse-action standard under the anti-retaliation provision.

Third, the deterrence-based aspects of the standard make it both unworkably vague and detrimentally subjective in that it may require courts and/or juries to assess the alleged adverse act relative to the severity of the discrimination alleged in each case. Justice Alito raised this point in his concurring opinion:

> [T]he majority's interpretation logically implies that the degree of protection afforded to a victim of retaliation is inversely proportional to the severity of the original act of discrimination that prompted the retaliation. A reasonable employee who is subjected to the most severe discrimination will not easily be dissuaded from filing a charge by the threat of retaliation; the costs of filing the charge, including possible retaliation, will have to be great to outweigh the benefits, such as preventing the continuation of the discrimination in the future and obtaining damages and other relief for past discrimination. Because the possibility of relatively severe retaliation will not easily dissuade this employee, the employer will be able to engage in relatively severe retaliation without incurring liability under § 704(a). On the other hand, an employee who is subjected to a much milder form of discrimination will be much more easily dissuaded. For this employee, the costs of complaining, including possible retaliation, will not have to be great to outweigh the lesser benefits that might be obtained by filing a charge.[320]

The majority responded directly to this criticism, stating simply that "contrary to the claim of the concurrence, this standard does *not* require a reviewing court or jury to consider 'the nature of the discrimination that led to the filing of the charge.' . . . Rather, the standard is tied to the challenged retaliatory act, not the underlying conduct that forms the basis of the Title VII complaint."[321] However, the majority's response does not answer the problem. A hypothetical may aid illustration. Suppose that Employee A, an African-American female, suffers a series of adverse employment acts, including a 50% pay decrease along with a demotion from a high-level

320. *Id.* at 2420-21 (Alito, J., concurring).

321. *Id.* at 2416 (citation omitted).

management position to a non-supervisory laborer position. Employee B, a Muslim, is denied the reasonable accommodation of an hour off work at noontime on two or three separate Fridays so that he may attend religious ceremonies.[322] Suppose further that if either employee complains about the discrimination suffered, the employer will deprive him or her of two days of paid vacation time to which he or she is otherwise entitled. A reasonable employee in B's position might be dissuaded from complaining about the alleged discrimination for fear of losing two full days' worth of paid vacation, thus making the employer's deprivation of a paid-vacation benefit "material" under the majority's standard *in that case.* A reasonable employee in A's position, however, would *not* be deterred from complaining about the severe discrimination she has suffered, even if she might also lose two days of paid vacation. This cost is not so high as to deter her from complaining about the substantial losses she has already sustained and from seeking relief. As such, the employer's act of denying paid vacation might well be unlawful, actionable retaliation in B's case, but at the same time fail to support a retaliation claim at all in A's. The Court's reliance upon deterrence in defining what actions are sufficiently "material" to support a retaliation claim therefore requires the court and/or the jury in some, if not all cases, to assess the underlying discriminatory act relative to the alleged retaliation, thereby injecting substantial vagaries and greater unpredictability into the inquiry.

These considerations of reasonableness and practicality should probably take a back seat to the other statutory interpretation tools discussed above—the language of the statute itself,[323] and the policies and purposes behind it.[324] Nevertheless, "[i]t is a 'well established principle of statutory interpretation that the law favors rational and sensible construction.'"[325] The interpretation offered by the Court, while not entirely irrational on its face, leads to impractical and irrational results. It ties the hands of employers unnecessarily tight, and imposes a vague and subjective standard that will leave employers, employees, and courts alike guessing as to which employer actions are sufficiently adverse to be actionable. The interpretation adopted by the Court in *White* is not compelled by the statutory language and context, is inconsistent with the

322. Assume for purposes of this illustrative hypothetical scenario that the adverse acts suffered by both employees otherwise constitute actionable discrimination under Title VII.

323. *See supra* notes 13-21 and accompanying text (discussing the interpretation of the language of Title VII).

324. *See supra* Part V.B. (discussing the purposes and policies behind Title VII, as they bear on its interpretation).

325. 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 45:12, at 82-83, 85 (West 6th ed. 2000); *see also* Am. Tobacco Co. v. Patterson, 456 U.S. 63, 71 (1982) ("Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible.").

statute's broader policies and purposes, and is unworkably vague and impractical in the real world.

VI. IN SEARCH OF A CURE: A PROPOSAL FOR CONGRESSIONAL INTERVENTION TO FIX THE PROBLEMS *WHITE* CREATES

While the Court could feasibly fix the over-breadth, vagueness and impracticality problems created by its decision in *White*, it is not likely to do so. First, eight of the Court's nine justices joined in the majority opinion, making that sort of sea change in the Court's direction unlikely to occur any time in the near future. Second, the stare decisis effect of a decision interpreting a statute is especially strong, making a contrary decision all the more improbable.[326] Thus, the most plausible fix to the problems *White* creates requires Congress to step in. With just a few minor revisions to the statute, Congress could easily implement a clearer, more workable standard that better comports with the purposes and policies supporting Title VII as a whole.

A. A Proposal for Congressional Action: Minor Revisions to Bring About Greater Clarity

Congress should revise the anti-retaliation provision of Title VII to make clear that its scope is identical to that of the statute's core substantive provision and that the relevant adverse-action standard under both provisions is therefore the same. To effect such a change would not require substantial rewriting. Congress need only add a few key words to the anti-retaliation provision to make clear that its scope is intended to mirror that of its core substantive counterpart. I propose that Congress revise section 704 of Title VII by adding the underlined language as follows:

> (a) It shall be an unlawful employment practice for an employer *to fail or refuse to hire, to discharge, or otherwise* to discriminate against any of his employees or applicants for employment *with respect to any such individual's compensation, terms, conditions, or privileges of employment*, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to *so* discriminate against any individual, or for a labor organization to *so* discriminate against any member thereof or applicant for

326. *See* Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 362-63 (2000) ("The policy of *stare decisis* is at its most powerful in statutory interpretation (which Congress is always free to supersede with new legislation)." (citation omitted)); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998) (discussing the binding effect of prior Supreme Court precedents interpreting Title VII, especially in light of fact that Congress has amended Title VII substantially in the meantime without affecting the rule of such precedents).

> membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

The insertion of these few additional terms should reverse the Court's decision in *White* in two important ways: (1) by making clear that the scope of the anti-retaliation provision is identical to the scope of the core substantive provision so that both sections apply only to those employer actions that impact the terms, conditions, or privileges of the employee's employment; and (2) by indicating that, because the provisions employ the same language, the Court's interpretations of the core substantive provision should inform interpretation of the anti-retaliation provision, and vice versa. Revision of the anti-retaliation provision in this manner, especially if accomplished soon, would not cause any drastic change in the law, as it would bring the scope and standard under the anti-retaliation provision in line with that in place in the majority of jurisdictions before the Court decided *White*.[327] Moreover, such a revision would come closer to the clarity needed in an otherwise vague area of the law, would promote achievement of the statute's primary goals, and would comport with standards of reasonableness that the practicalities of the real world demand.

B. *Why Bigger Is Not Always Better: An Explanation of the Proposed Statutory Revision*

The revision I propose narrows the scope of the anti-retaliation provision but improves its enforceability and effectiveness in the process, thereby demonstrating that a bigger or broader, as the case may be, scope or standard is not always better. Indeed, the revised standard departs little from the approach followed in most jurisdictions before *White*, and changes the outcome under *White* as to only a small subset of adverse actions that an employer might take. Envisioning the range of actions an employer might take against an employee along a spectrum from what the Court might term "petty slights" or "minor annoyances"[328] on one end, to "ultimate employment decisions"[329] like failure to hire and discharge on the

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327. *See supra* Part III. (discussing the circuit split that preceded the Supreme Court's decision in *White* and showing that the majority approach called for the interpretation of the anti-retaliation provision consistent with the interpretation of the core substantive provision).

328. *See* Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2415 (2006) (indicating that Title VII does not protect employees "from those petty slights or minor annoyances that often take place at work and that all employees experience" (citation omitted)); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) (emphasizing that Title VII is not "a general civility code").

329. *See White*, 126 S. Ct. at 2414 (internal quotation marks omitted) (rejecting the

other end, facilitates explanation of this concept. Employer decisions that lie at either end of this spectrum receive the same treatment under the Court's standard in *White and* under the revised standard I propose, so that my revision has no effect on decisions of either sort. "Petty slights" and "minor annoyances" are too insignificant to warrant statutory remedy or judicial involvement and therefore fall outside the scope of actionable conduct under either standard, while "ultimate employment decisions" have such a profound effect on employment that both formulations readily encompass them. It is the vast grey area in between these two poles that needs definition, and the standard I propose better provides that definition than the highly subjective approach approved by the Court in *White*.

Job transfers, duty reassignments, negative performance evaluations, and poor treatment by co-workers or supervisors occupy much of this expanse between the poles anchored by "petty slights" and "ultimate employment decisions." It is employment actions that have some impact on an employee's job but are not so clearly either minor or substantial enough that their actionability is beyond doubt, that cause the most uncertainty, both for well-meaning employers attempting to manage the workplace and for courts adjudicating claims. Thus, it is within this grey area that definition is most needed. The standard offered by the Court in *White*, however, fails to provide the necessary level of clarity. As discussed above, the Court implements a standard that purports to be objective but also injects substantial subjectivity into the adversity inquiry.[330] In this standard, the Court states that "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have "dissuaded a reasonable worker from making or supporting a charge of discrimination."'"[331] This standard, as discussed above, is facially unclear insofar as the Court provides no indication what its "well might dissuade" standard means.[332] The lack of clarity is magnified, however, when the Court goes on to instruct that a court should not only ensure that the conduct complained of would be "materially adverse" to a reasonable employee, but that it would be so to one in the plaintiff's specific

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adverse-action standard limited to "so-called 'ultimate employment decisions'" (citing *Id.* at 2410)).

330. *See supra* notes 203-07 and 309-17 and accompanying text (criticizing the Court's standard in *White* for its heavy reliance on the subjective state of plaintiff's mind and plaintiff's own unique circumstances).

331. *White*, 126 S. Ct. at 2415 (emphasis removed) (citing Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006)(quoting Washington v. Ill. Dep't of Revenue, 420 F.3d 658, 662 (7th Cir. 2005)).

332. *Id.* at 2421; *see supra* notes 318-320 and accompanying text (discussing the vague nature of the Court's "well might dissuade a reasonable worker" standard (quoting *id.* at 2421)).

position.[333] The Court's first example here makes evident that this subjective inquiry is wholly dependent of the objective one, as the Court suggests that a schedule change that would make "little difference to many workers," i.e., would not be materially adverse to a reasonable worker, "may matter enormously to a young mother with school age children."[334]

The revised standard I propose offers greater clarity than the Court's vague "well might dissuade" formulation with a highly subjective component, in that it limits actionable conduct to that which affects the terms, conditions, or privileges of the plaintiff's employment and thereby mirrors the statute's core substantive provision. As such, the same adverse-action standard would apply under the revised anti-retaliation provision as currently applies under the core substantive provision, so that only those employer actions that rise to a threshold level of materiality could support a claim.

The Supreme Court has not clearly defined the adverse-action element of a Title VII claim but has instructed as to its scope on numerous occasions. As discussed in more detail above,[335] the Court has repeatedly held that the core substantive provision's reference to the "compensation, terms, conditions, or privileges of employment" does not limit actionable conduct to that which affects the employee's "'terms' and 'conditions' in the narrow contractual sense" but rather is much broader, encompassing even some harms without any tangible or economic consequence.[336] The Court has made clear, though, that there are limits to this expansive approach, that is, not every intangible and non-economic harm is actionable. Instead, for an intangible or non-economic harm to support a claim, it must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment.'"[337] Thus, under the revised anti-retaliation provision I propose, those employer actions that directly impact an employee's compensation, or the terms, conditions, or privileges of his employment, i.e., those that result in tangible or economic harms, will support a claim. Also actionable are those employer decisions resulting in

333. *White*, 126 S. Ct. at 2415-16 (providing examples that require the court to take account of plaintiff's unique circumstances and indicating that the court should assess materiality of the alleged adverse action from "the perspective of a reasonable person in the plaintiff's position").

334. *Id.* at 2415.

335. *See supra* notes 22-40 and accompanying text (highlighting Supreme Court cases interpreting certain parts of Title VII).

336. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 77, 78 (1998) (citations omitted) (internal quotation marks omitted); Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986); *see also supra* notes 22-40 and accompanying text (discussing Supreme Court cases defining adverse action under Title VII's anti-discrimination clause).

337. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) (alteration in original) (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

intangible or non-economic harms, so long as they are sufficiently severe or pervasive to alter the conditions of the plaintiff's employment.

Admittedly, this is still not a black and white test. Key terms like "tangible," "severe," and "pervasive" remain relatively undefined and provide room for disagreement and debate. Even the somewhat clearer term "economic" leaves some room for doubt as to whether, for example, the economic effect must be direct or immediate. Indeed, the Court is correct that "'[t]he real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a single recitation of the words used or the physical acts performed.'"[338] As such, it would be impossible to formulate a standard that provides a clear answer in every case. The revised standard, though, would allow both courts and compliance-ready employers to draw upon the developing body of case law interpreting Title VII's core substantive provision to assist in answering questions about the scope of actionable retaliation. *Meritor Savings Bank* and its progeny begin to lay this framework. *Ellerth* could help here too, as the Court might become more comfortable importing its definition of "tangible employment action" so that the same definition applies in this context as well.[339]

Moreover, other cases further define the parameters. For instance, the Court made clear in *Oncale* that Title VII does not set forth "a general civility code" and "does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex."[340] The *Harris* Court likewise emphasized that Title VII has strict outer limits: "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview."[341] The Court further elaborated in *Faragher v. City of Boca Raton* that "simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment."[342]

The Court's decision in *White* is not entirely inconsistent with these precedents. Indeed, in support of its "*material* adversity" standard, the *White* Court cited both *Oncale* and *Faragher* for the proposition that Title VII does not afford a remedy for "trivial harms" and explained that "petty slights" and "annoyances" are not encompassed by Title VII's core

338. *White*, 126 S. Ct. at 2415 (quoting *Oncale*, 523 U.S. at 81-82).
339. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 753 (1998).
340. *Oncale*, 523 U.S. at 80-81.
341. Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993).
342. 524 U.S. 775, 788 (1998) (citation omitted) (internal quotation marks omitted).

substantive provision.[343] In this respect, the revised standard I propose would not depart substantially from the standard announced by the Court in *White*. Instead, just as suggested by the Court, the revised provision would incorporate these same limitations into the anti-retaliation provision that have developed under the statute's core substantive provision, so that the standards would be the same. Both would require what the Court terms "*material* adversity."[344]

My proposed revision would, however, improve upon the Court's standard in that it would clear up the most substantial source of confusion in *White*: its imposition of a subjective component that operates as an alternative, not just a supplement, to the objective one. As discussed above, the Court announces a nominally objective standard, but substantially clouds the picture by offering an example that requires a wholly subjective inquiry.[345] The revised provision would fix this problem by incorporating *Harris*' more workable objective-plus-subjective test without sacrificing either component. In *Harris*, the Court held that a Title VII plaintiff could prevail only upon showing not only that her work environment is objectively hostile or abusive *but also* that it is subjectively perceived by her as such.[346] This hybrid approach offers substantially greater clarity than the objective-or-subjective alternative approach at least implicitly endorsed by the Court in *White*. Where the statute prohibits only those employer decisions that meet a threshold level of objectively-viewed materiality, a well-intentioned employer can more readily assess whether a proposed course of action will run afoul of statutory requirements. Likewise, such a standard better meets the *White* Court's stated goal of being "judicially administrable" in that it "avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings."[347]

My proposed revision would not only clear up the confusion created by the Court's subjective adverse-action standard but would also reverse the Court's overly-expansive reading of the statutory language to encompass non-workplace harms. The Court's holding on this point in effect converts Title VII into a catchall tort statute, protecting an employee who has engaged in protected activity from any adverse treatment whatsoever, whether employment-related or not. For example, the Court's

343. *White*, 126 S. Ct. at 2415.

344. *Id.*

345. *Id.*

346. *Harris*, 510 U.S. at 21-22; *see also Faragher*, 524 U.S. at 787 ("So, in *Harris*, we explained that in order to be actionable under the statute, a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." (citation omitted)).

347. *White*, 126 S. Ct. at 2415.

decision could afford a Title VII claim to a restaurant employee who has engaged in protected activity and is subsequently served rotten food while dining there during non-working hours. Title VII is an *employment* statute and should not reach so far. To do so will only dilute its effectiveness in its intended sphere.

Moreover, the revised anti-retaliation provision would accomplish much of what the Court apparently intended. The Court cited two cases in support of its conclusion that because "[a]n employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace," the anti-retaliation provision should encompass non-workplace harms.[348] In one of those cases, the D.C. Circuit upheld a Title VII retaliation claim by an FBI agent who alleged that his employer failed to provide off-duty security in the face of death threats.[349] In the other, the Tenth Circuit permitted recovery against a car dealership that filed false criminal charges against a former employee who had complained of discrimination.[350] The former of these cases readily illustrates that it was not necessary for the Court to expand the reach of the statute so far in order to satisfy its concerns, as off-duty security is surely at least a "privilege," if not a "condition," of an FBI agent's employment.[351] The same could be said of the Tenth Circuit case as well, where the charges filed against the former employee alleged that he had stolen from the employer during his employment, thus connecting his claim directly to his employment and obviating the need for a more expansive remedy. Therefore, adding to the anti-retaliation provision the qualifying language that appears in the core counterpart would accomplish much the same result as desired by the Court, but without expanding the statute's reach too far.

C. *Maintaining Access While Equalizing Treatment: Policy Justifications for the Proposed Statutory Revision*

The statutory revision I propose would not only make the anti-retaliation provision more readily enforceable, and therefore more effective, but it would also better comport with Title VII's policies and purposes. First, the revision would not detract from the statutory purpose the *White* Court relied upon as primary: the maintenance of unfettered

348. *Id.* at 2412 (citations omitted).

349. *Id.* (citing Rochon v. Gonzales, 438 F.3d 1211, 1217-18 (D.C. Cir. 2006)); *see also supra* notes 96-98 and accompanying text (discussing *Rochon*).

350. *White*, 126 S. Ct. at 2412 (citing Berry v. Stevinson Chevrolet, 74 F.3d 980, 984, 986 (10th Cir. 1996)).

351. *See id.* at 2420 (Alito, J., concurring) ("[F]or an FBI agent whose life may be threatened during off-duty hours, providing security easily qualifies as a term, condition, or privilege of employment.").

access to the statute's remedial mechanisms. The Court accords sufficiently broad protection under the statute's core substantive provision that a consistent interpretation of the anti-retaliation provision would amply promote this goal. The core substantive provision does not limit actionable misconduct to "'economic' or 'tangible' discrimination" or to that which affects the "'terms' and 'conditions' [of employment] in the narrow contractual sense."[352] Instead, it reaches much farther, encompassing any employer act that exposes a protected employee to "disadvantageous terms or conditions of employment to which [employees outside the protected class] are not exposed."[353] Granted, such conduct "must be extreme to amount to a change in the terms and conditions of employment," as Title VII is not intended to operate as a "general civility code" and therefore does not reach petty slights, minor annoyances, simple teasing, offhand comments and other such insufficiently adverse treatment.[354] However, the Court has repeatedly upheld these limitations on what actions may support a claim of discrimination against an employee based on his or her protected trait (race, sex, religion, etc.). Surely, then, what is not sufficiently wrong to afford an employee a remedy for discrimination based on his protected trait is likewise insufficiently wrong to support a claim of discrimination based on his protected conduct.

The Court in *White* disagrees, and suggests that because "[a]n employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm outside the workplace," the scope of the anti-retaliation provision must be broader.[355] However, the examples the Court provides here, which are discussed above, fail to demonstrate that the anti-retaliation provision's goals cannot be met by affording employees the same protection under it as under the statute's core counterpart.[356] Were the statute revised as I suggest, the employee-plaintiffs in both cases cited by the Court would remain protected.[357] Moreover, White would remain protected too, at least as to her suspension, which deprived her of income for an extended period of time, thereby having an objective, material adverse effect on her compensation. The slightly narrower protection I propose would still deter the vast majority of retaliation against protected employees, but would not

352. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 78 (1998); Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986); *see also supra* Part III. (describing Supreme Court precedents interpreting Title VII's core substantive provision).

353. *Oncale*, 523 U.S. at 80 (internal quotation marks omitted) (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (6th Cir. 1993) (Ginsburg, J., concurring)).

354. Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1988) (internal quotation marks omitted) (citing *Oncale*, 523 U.S. at 80).

355. *White*, 126 S. Ct. at 2412 (emphasis omitted).

356. *See supra* notes 309-13 and accompanying text.

357. *Id.*

expand Title VII beyond the employment-centered bounds upon which it was enacted.

Moreover, the proposed revision would better promote Title VII's other statutory goals. First and foremost among these, as discussed above, is the assurance of equality in the workplace.[358] Equating the protection afforded to employees who engage in protected activity with that afforded to the minorities the statute exists to protect certainly does not hinder this central legislative policy. Indeed, as the examples discussed above demonstrate, affording broader protection under the anti-retaliation provision than its substantive counterpart actually contravenes this goal by causing employers to treat employees who engage in protected activity more favorably than any others, including those who would otherwise benefit from the statute's core provision.[359] Thus, revising the statute as I propose would cure this problem by equalizing the protection afforded individuals in each of these groups.

My revision would also encourage employer forethought and promote maintenance of management prerogatives. For instance, because case law interpreting the core provision would apply equally to the anti-retaliation provision, employers would be incentivized by the Court's holdings in *Ellerth* and *Faragher* to implement and publicize policies strictly prohibiting retaliation. The revision would also encourage an employer to consider carefully any potentially adverse action it might take against an employee who has engaged in protected activity, as the standard's objective threshold would permit a well-intentioned employer to assess more accurately whether its proposed action would be unlawful or not. Further, employers would be freer to make decisions about how to run the workplace within the confines of the law because their hands would not be tied by an overbroad, vague, and highly subjective standard. The courts charged with the statute's judicial administration would also benefit similarly from this clearer, more objective standard. In addition, any docket congestion that might result from potentially substantial collateral litigation over personal traits as part of the courts' administration of *White*'s "subjective" standard would be avoided. The greater clarity and objective threshold offered by the core provision's standard would prevail, benefiting employers, employees, and courts alike.

358. *See supra* notes 292-305 and accompanying text.

359. *Id.*

D. *A Standard We Can All Live With: Practical Justifications for the Proposed Statutory Revision*

Finally, the proposed revision makes sense, practically speaking. The subjective standard imposed by the Court in *White* leaves employers guessing about how to treat employees who engage in protected activities, requiring employers to conduct extensive fact-finding of some unspecified scope before making any management decisions that might somehow impact any protected employee.[360] Its vagaries, reflected in the Court's mysterious "well might dissuade" causation standard, cast further shadows on the already wavering line between prohibited and permissible conduct.[361] The revised standard, however, avoids these pitfalls. It implements the clearer objective-plus-subjective inquiry espoused by the Court in cases like *Harris v. Forklift Systems, Inc.*,[362] and avoids entirely the vague causation standard implemented in *White*. The statutory revision I propose therefore offers greater clarity to employers and courts, while continuing to protect employees who engage in protected activity to the extent they deserve.

VII. CONCLUSION

The strict enforcement of Title VII necessary for maintenance of equality in the workplace depends heavily upon complaints by and information from employees, who come closer than most anyone else to witnessing employer conduct firsthand. These employees, in turn, cannot effectively aid the enforcement process without sufficient protection from employer retaliation. The anti-retaliation provision offers this protection, but because its language is not specific as to its intended scope, courts have struggled to define clear standards of conduct by which employers could then readily abide. The Supreme Court had the opportunity to offer some much-needed clarity when it decided *Burlington Northern & Santa Fe Railway Co. v. White* in June 2006, but its efforts fell short of the task. The standard announced by the Court in that case, while nominally objective, injects substantial subjectivity into the adverse-action inquiry. Moreover, the Court's discussion of its standard raises more questions than it answers, leaving well-intentioned employers, potentially aggrieved employees, and courts alike, without the direction they need to uphold the important goals Title VII seeks to accomplish.

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360. *See supra* Part V.B.

361. *Id.*

362. 510 U.S. 17 (1993); *see also supra* Part VI.B. (discussing greater clarity of proposed standard).

The problems the *White* decision creates are not without remedy, though. Congress could step in to cure these problems by amending the anti-retaliation provision to make clear that the same standards govern there as under the statute's core anti-discrimination provision. While such a revision might not resolve every ambiguity, as open questions remain under the core provision's standard as well, it would nevertheless bring to the table substantially greater clarity than the Court's vague and subjective standard in *White*. Although only time will tell just how difficult the Court's standard will be to administer, the continued enhancement of the Title VII enforcement process is too important to wait. Congress should step in now, and provide the executors of Title VII's equality-based will—employers and courts—with the direction they need in order to better fulfill their duties.