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Burlington Northern & Santa Fe Railway Co. v. White: Retaliation Clarified

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I. INTRODUCTION

A. Title VII

Title VII of the Civil Rights Act of 1964's antidiscrimination provision proscribes employment discrimination based on "race, color, religion, sex, or national origin."[1] Its antiretaliation provision proscribes "discriminat[ion] against . . . employees or applicants for employment" because they have "made a charge, testified, assisted, or participated in any manner in [a Title VII] investigation, proceeding, or hearing."[2] In *Burlington Industries, Inc. v. Ellerth*, the Supreme Court stated that "Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms."[3] A primary purpose of Title VII's antiretaliation provision is "[m]aintaining unfettered access to statutory remedial mechanisms."[4] It seeks to accomplish this objective "by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of [Title VII's] basic guarantees."[5] In other words, Title VII's antiretaliation provision seeks to "prevent employers from engaging in retaliatory measures that dissuade employees from engaging in protected conduct."[6]

B. Circuit Split

Prior to the Supreme Court's decision in *Burlington Northern & Santa Fe Railway Co. v. White*, the scope of Title VII's antiretaliation provision was the subject of considerable disagreement between the circuits. They reasoned differently about whether the challenged retaliatory action had to be employment or workplace related and about how harmful the retaliatory action had to be to amount to retaliation.[7] In

1. 42 U.S.C. § 2000e-2(a)(1) (2000).
2. § 2000e-3(a).
3. 524 U.S. 742, 764 (1998).
4. Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997).
5. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2412 (2006).
6. *Id.* at 2420 (Alito, J., concurring).
7. *Id.* at 2406.

Burlington, the Supreme Court resolved the dispute.

C. Burlington: *The Facts*

Sheila White ("White") was the only woman working in Burlington Northern & Santa Fe Railway Company's ("Burlington's") Maintenance of Way department in its Memphis, Tennessee yard.[8] Although White was hired as a "track laborer," a position that involved "removing and replacing track components, transporting track material, cutting brush, and clearing litter and cargo spillage from the right-of-way," her primary responsibility was operating the company forklift.[9]

In September 1997, White complained to Burlington officials that her immediate supervisor had made inappropriate and insulting remarks to her in front of her male colleagues.[10] As a result, Burlington suspended the supervisor for ten days and ordered him to attend a sexual-harassment training session.[11] On September 26, Burlington's roadmaster, Marvin Brown, told White that he was reassigning her from operating the forklift to performing only standard track laborer tasks.[12] He explained that the reassignment was a reflection of co-workers' complaints that, in fairness, a "more senior man" should have the "cleaner" and "less arduous" job of operating the forklift.[13]

On October 10, White filed a complaint with the Equal Employment Opportunity Commission ("EEOC") alleging that the reassignment constituted unlawful gender-based discrimination and retaliation for her initial complaint about her supervisor's inappropriate remarks.[14] In December, White filed another retaliation complaint with the EEOC, alleging that Brown had placed her under increased supervision and was scrutinizing her activities from day to day.[15]

A few days after the second EEOC complaint was mailed to Brown, White had a disagreement with her immediate supervisor.[16] Her immediate supervisor told Brown that White had been insubordinate.[17] Consequently, Brown suspended White without pay. White appealed to

8. *Id.* at 2409.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* (quoting White v. Burlington N. & Santa Fe Ry. Co., 364 F.3d 789, 792 (6th Cir. 2004)).
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*

Burlington's internal grievance procedures.[18] This led Burlington to decide that White had not been insubordinate.[19] Accordingly, Burlington reinstated White to her position and paid her for the thirty-seven days she was suspended.[20] White filed a third retaliation claim with the EEOC based on the suspension.[21]

After filing the three EEOC claims, White filed a Title VII action against Burlington in federal court.[22] She claimed that Burlington retaliated against her, in violation of Title VII, first when it reassigned her, and again, when it suspended her.[23] A jury found against Burlington on both retaliation claims and awarded White $43,500 in compensatory damages.[24] After the trial, Burlington filed a motion for judgment as a matter of law, which the district court denied.[25] The Court of Appeals for the Sixth Circuit, sitting en banc, affirmed the district court's judgment in favor of White on both retaliation claims.[26] Although all of the members of the en banc court agreed to affirm the district court's judgment, they failed to agree on the retaliation standard to apply.[27]

Before *Burlington*, the circuits disagreed as to the standards applicable in Title VII cases.[28] The circuits answered two fundamental questions in different ways: (1) whether the challenged employer action had to be employment or workplace related, and (2) how harmful the retaliatory action had to be to amount to actionable retaliation.[29] The disagreement ended in *Burlington*.

On the question of whether the challenged employer action had to be employment or workplace related, the Supreme Court answered that Title VII's antiretaliation provision extends beyond retaliatory acts and harms that are related to the workplace or employment.[30] And on the question of how harmful the retaliatory action had to be to amount to actionable retaliation, the Court answered that a plaintiff must show that a reasonable employee would have found the challenged action materially adverse.[31] The Court explained that this means the action "well might

18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at 2410.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 2414.
31. *Id.* at 2415.

have dissuaded a reasonable employee from making or supporting a charge of discrimination."[32] This paper asserts that although *Burlington*'s helpfulness is somewhat undermined by the questions it left unanswered and the potential problems that may follow, the answers it *did* provide are significant. They offer desperately needed relief to retaliation law, improving it in a manner consistent with the purpose and design of Title VII. Section II will give a detailed overview of the circuit split prior to *Burlington*. Section III will discuss *Burlington's* resolution to that split. Section IV will discuss the importance of *Burlington's* answers and introduce the limits to their helpfulness. Finally, Section V will offer a brief conclusion.

II. THE CIRCUIT SPLIT PRIOR TO *BURLINGTON*

A. The "Adverse Employment Action" Standard

Prior to *Burlington*, some circuits required that the retaliatory action be somehow related to employment or the workplace.[33] These circuits followed the "adverse employment action" standard. For example, the Sixth Circuit majority in *White v. Burlington Northern & Railway Co.* stated that a plaintiff must prove the existence of an "adverse employment action" to support a Title VII claim.[34] The Sixth Circuit defined "adverse employment action" as a "materially adverse change in the terms and conditions" of employment.[35] In addition, the Second Circuit in *Torres v. Pisano* stated that the existence of an "adverse employment action" is essential to a plaintiff's Title VII claim.[36] Then the court explained that to show that the plaintiff "suffered an adverse employment action," she had to show that she "suffered 'a materially adverse change in the terms and conditions of employment.'"[37] Similarly, in *Von Gunten v. Maryland*, the Fourth Circuit held that the challenged retaliatory action had to result in an adverse effect on the "terms, conditions, or benefits" of employment.[38] Taking the same approach, in *Robinson v. Pittsburgh*, the Third Circuit held that the

32. *Id.*

33. *Id.* at 2410.

34. 364 F.3d 789, 795 (6th Cir. 2004).

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

36. 116 F.3d 625, 639 (2d Cir. 1997) (quoting Tomka v. Seiler Co., 66 F.3d 1295, 1308 (2d Cir. 1995)).

37. *Id.* at 640 (quoting McKenney v. New York City Off-Track Betting Corp., 903 F.Supp. 619, 623 (S.D.N.Y. 1995)).

38. 243 F.3d 858, 866 (4th Cir. 2001) (quoting Munday v. Waste Mgmt. of N. Am., Inc., 126 F.3d 239, 243 (4th Cir. 1997)).

challenged retaliatory conduct violates Title VII only if it alters the employee's "compensation, terms, conditions, or privileges of employment," deprives the employee of "employment opportunities," or adversely affects the employee's status as an employee.[39] Thus, these circuits required that the challenged retaliatory action be somehow related to employment or the workplace.

B. The "Ultimate Employment Decision" Standard

Other circuits took an even more restrictive approach. The Fifth and Eighth Circuits, for example, used the "ultimate employment decision" standard. In *Mattern v. Eastman Kodak Co.*, the Fifth Circuit stated that "Title VII was designed to address ultimate employment decisions."[40] It defined "ultimate employment decisions" as acts "such as hiring, granting leave, discharging, promoting, and compensating."[41] The Eighth Circuit took the same approach in *Manning v. Metropolitan Life Insurance Co*.[42] In rejecting a retaliation claim brought by several Metropolitan Life employees against the company, the court explained that the employees "did not present sufficient evidence to demonstrate any adverse employment action that would amount to the type of ultimate employment decision intended to be actionable under Title VII."[43] The court suggested that evidence of a "tangible change in duties or working conditions that constituted a material employment disadvantage" may have satisfied the standard.[44] Thus, as compared to the "adverse employment action" standard, the "ultimate employment decision" standard represented a more restrictive approach, prohibiting retaliation only if it resulted in an ultimate employment decision.[45]

39. 120 F.3d 1286, 1300 (3d Cir. 1997).

40. 104 F.3d 702, 707 (5th Cir. 1997) (quoting Dollis v. Rubin, 77 F.3d 777, 781 (5th Cir. 1995)).

41. *Id.* (quoting *Dollis*, 77 F.3d at 782).

42. 127 F.3d 686, 692 (8th Cir 1997).

43. *Id.*

44. *Id.*

45. The Fourth Circuit explicitly rejected the Fifth and Eighth Circuits' ultimate employment decision standard: "'ultimate employment decision' is not the standard in this circuit. . . . [W]e have expressly rejected distinctions, like those drawn by the *Mattern* court, between § 2000e-2 and § 2000e-3, reasoning that 'conformity between the provisions of Title VII is to be preferred.' Moreover, in *Ross*, we also implicitly rejected the *Mattern* court view that nothing less than an 'ultimate employment decision' can constitute adverse employment action under § 2000e-3." Von Gunten v. Maryland., 243 F.3d 858, 865 (4th Cir. 2001) (quoting Ross v. Commc'ns Satellite Corp., 759 F.2d 355, 366 (4th Cir. 1985)).

C. The "Threshold Level of Substantiality" Standard[46]

The Eleventh Circuit implicitly rejected the "ultimate employment decision" standard. In *Bass v. Board of Commissioners*, the court first stated that a plaintiff must show an "adverse employment action" as part of their prima facie case of retaliation.[47] The court then explained that "[a]n adverse employment action is an ultimate employment decision, such as discharge or failure to hire, or other conduct that alters the employee's compensation, terms, conditions, or privileges of employment, deprives him or her of employment opportunities, or adversely affects his or her status as an employee."[48] However, the court went on to say that conduct that did not amount to an ultimate employment decision had to meet a "threshold level of substantiality" to fall within the purview of the antiretaliation provision of Title VII.[49] Since the court explicitly recognized the possibility that an actionable retaliation claim might fall short of alleging an ultimate employment decision, it implicitly rejected the ultimate employment decision standard. The court further explained that although "'not everything that makes an employee unhappy is an actionable adverse action,' conduct that alters an employee's compensation, terms, conditions, or privileges of employment does constitute an adverse action under Title VII."[50] Thus, the Eleventh Circuit applied a standard more akin to the "adverse employment action" standard than the "ultimate employment decision" standard.

46. The Eleventh Circuit never labeled its retaliation standard as the "threshold level of substantiality" standard. Nor has the phrase been used in other circuits to refer to the Eleventh Circuit's standard of retaliation. The phrase is used here simply to draw a line between the Eleventh Circuit's standard and the more general "adverse employment action" standard.

47. 256 F.3d 1095, 1117 (11th Cir. 2001) (quoting Gupta v. Fla. Bd. of Regents, 212 F.3d 571, 587 (11th Cir. 2000)).

48. *Id.* at 1118 (11th Cir. 2001) (quoting *Gupta*, 212 F.3d 571, 587).

49. *Id.* (quoting Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1456 (11th Cir. 1998)).

50. *Bass*, 256 F.3d at 1118 (quoting Smart v. Ball Univ., 89 F.3d 437, 441 (7th Cir. 1996) and citing Graham v. State Farm Mut. Ins. Co., 193 F.3d 1274, 1283 (11th Cir. 1999) and Robinson v. Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997)).

D. Conformity Among the Second, Third, Fourth, Fifth, Sixth, Eight, and Eleventh Circuits

Although these circuits came to different conclusions on how harmful the retaliatory action had to be to amount to actionable retaliation all of them generally agreed that the action and any consequent harms had to be related to the workplace or employment.[51] Other circuits took a more expansive approach.

E. The "Material to a Reasonable Employee" Standard

The Seventh, Ninth, and the District of Columbia Circuits did not insist upon a close relationship between the retaliatory action and the workplace or employment.[52] The Seventh Circuit and the District of Columbia Circuit simply required that the plaintiff show that the "employer's challenged action would have been material to a reasonable employee."[53] In *Washington v. Illinois Department of Revenue*, and in *Rochon v. Gonzales*, the Seventh Circuit and the District of Columbia Circuit explained that an employer's action is material to a reasonable employee if the challenged action would "have dissuaded a reasonable worker from making or supporting a charge of discrimination."[54] In *Rochon v. Gonzales*, the District of Columbia Circuit agreed with the Seventh Circuit that "in order to support a claim of retaliation a plaintiff must demonstrate the 'employer's challenged action would have been

51. This conclusion follows from the language used to articulate their respective retaliation standards. Note that this language used to articulate their respective retaliation standards expressly limited Title VII's scope to employment-related or workplace-related actions and consequent harms. For example, the Second and Sixth Circuits defined "adverse employment action" as action that resulted in a materially adverse change in the terms and conditions of employment. *See* White v. Burlington N. & Santa Fe Ry. Co., 364 F.3d 789, 795 (6th Cir. 2004). The Third and Fourth Circuits defined "adverse employment action" as action that resulted in an adverse effect on the terms, conditions, or benefits of employment. *See* Von Gunten v. Maryland, 243 F.3d 858, 866 (4th Cir. 2001); *Robinson*, 120 F.3d at 1300. And the Fifth, Eighth, and Eleventh Circuits defined "adverse employment action" as action that resulted in an ultimate employment decision. *See Bass*, 256 F.3d at 1118 (quoting *Gupta*, 212 F.3d at 587); Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997) (quoting Dollis v. Rubin, 77 F.3d 777, 781(5th Cir. 1995)); Manning v. Metropolitan Life Insurance Co., 127 F.3d 686, 692 (8th Cir. 1997); *see also* discussion *supra* Parts II.A, II.B, II.C.

52. *See* Ray v. Henderson, 217 F.3d 1234, 1242 (9th Cir. 2000) (holding that retaliation includes "any adverse treatment that is based on a retaliatory motive.") (quoting EEOC.E.O.C. Compliance Manual § 8, "Retaliation," ¶ 8008 (1998)); Aviles v. Cornell Forge Co., 183 F.3d 598, 606 (7th Cir. 1999) (holding that Title VII's antiretaliation provision is broad enough to proscribe retaliatory actions "that are not ostensibly employment related").

53. 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)); *Washington*, 420 F.3d at 662.

54. *Washington*, 420 F.3d at 662; *Rochon*, 438 F.3d at 1219 (quoting *Washington*, 420 F.3d at 662).

material to a reasonable employee.'"[55] Quoting the Seventh Circuit, the District of Columbia Circuit defined "material to a reasonable employee" as action that "well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'"[56]

The Ninth Circuit also took a protective approach. Following EEOC guidance, the Ninth Circuit simply required that the plaintiff establish "adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity."[57]

F. Conformity Among the Seventh, Ninth, and District of Columbia Circuits

These circuits generally agreed that the retaliatory action had to be materially adverse to a reasonable employee and did *not* have to be employment or workplace related in order to state a retaliation claim.

In sum, prior to *Burlington* the circuits disagreed on whether the challenged employer action had to be employment or workplace related and how harmful the action had to be to amount to retaliation. Some required that the challenged employer action be employment or workplace related (i.e., the Second, Third, Fourth, Fifth, Sixth, Eighth, and Eleventh). Some did not (i.e., the Seventh, Ninth, and District of Columbia). Of those that required the challenged employer action to be employment or workplace related, some required the action to result in an "ultimate employment decision" (i.e., the Fifth and Eighth), and some did not (i.e., the Second, Third, Fourth, Sixth, and Eleventh).

III. *BURLINGTON'S* RESOLUTION

In *Burlington*, the Supreme Court resolved the disagreement. On the question of whether the challenged employer action had to be employment or workplace related, the Court held that the "scope of the antiretaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm."[58] In so holding, the Court expressly rejected the "ultimate employment decision[]" standard and "the standards applied in the Courts of Appeals that have treated [Title VII's] antiretaliation provision as forbidding the same conduct prohibited

55. 438 F.3d at 1219.

56. *Id*. (quoting *Washington*, 420 F.3d at 662).

57. *Ray*, 217 F.3d at 1242–43 (9th Cir. 2000) (quoting EEOC Compliance Manual § 8, "Retaliation," ¶ 8008 (1998)).

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

by the antidiscrimination provision" (i.e., the standards that required a relationship between the challenged act and the workplace or employment, specifically the standards in the Second, Third, Fourth, Fifth, Sixth, Eighth, and Eleventh Circuits).[59] On the question of how harmful the retaliatory action had to be to amount to actionable retaliation, the Court held that "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse."[60] The Court explained that a plaintiff must show that the challenged action "well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'"[61]

A. The Scope of Title VII's Antiretaliation Provision Extends Beyond Workplace-Related or Employment-Related Retaliatory Acts and Harm

The Court relied on several bases to conclude that the scope of Title VII's antiretaliation provision can reach retaliatory acts that are not related to employment or the workplace. First, the Court examined the language of Title VII's antidiscrimination and antiretaliation provisions.[62] The Court determined that the antidiscrimination provision contains words limiting its scope to actions that affect employment or change the conditions of the workplace.[63] In contrast, the antiretaliation provision contains no such limiting words.[64] The Court concluded that Congress likely "intended the different words to make a legal difference."[65] The Court based its conclusion in part on the presumption that where particular language is used in one section of a statute but omitted in another section of the same Act, the disparate inclusion or exclusion is intentional.[66]

Second, the Court compared the purpose of Title VII's antidiscrimination provision to the purpose of its antiretaliation provision and determined that the two provisions have different purposes.[67] The Court explained that the purpose of the antidiscrimination provision is to prevent harm to individuals based on their status, which Congress could accomplish without prohibiting anything other than employment-related

59. *Id.*
60. *Id.* at 2415.
61. *Id.* (quoting Rochon v. Gonzales 438 F.3d 1211, 1219 (D.C. Cir. 2006)).
62. *Id.* at 2411–12 (comparing 42 U.S.C. § 2000e-3 (2000) and § 2000e-2(a)(2)).
63. *Id.*
64. *Id.* at 2412.
65. *Id.*
66. *Id.* (quoting Russello v. United States, 464 U.S. 16, 23 (1983)).
67. *Id.* at 2412.

discrimination.[68] The purpose of the antiretaliation provision, on the other hand, is to prevent harm to individuals based on what they do, which Congress could not accomplish by prohibiting only employer actions and harm that relate to employment or the workplace.[69] If Congress prohibited only employer actions and harm that are employment related or workplace related, an employer could retaliate against an employee by causing the employee harm outside the workplace or taking acts not directly related to employment.[70] Accordingly, if the antiretaliation provision were limited to employment-related actions, it would fail to deter the many forms that retaliation can take.[71] Thus, the Court determined that the antiretaliation provision is not limited to employment-related or workplace-related discriminatory actions.[72]

Third, the Court turned to precedent and determined that no prior Supreme Court case required a contrary result.[73] The Court conceded that *Burlington Industries, Inc. v. Ellerth* spoke of "a Title VII requirement that violations involve . . . 'hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'"[74] However, the Court explained that *Ellerth* spoke of the requirement only to "'identify 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."[75] The Court emphasized that *Ellerth* did not address the scope of Title VII's antidiscrimination provision and did not even bring up Title VII's antiretaliation provision.[76] Thus, the Court maintained that the decision in *Ellerth* did not compel a contrary result in *Burlington*.

Fourth, the Court examined the EEOC's interpretations of the antiretaliation provision.[77] Although the Court admitted that the EEOC's 1991 and 1988 Compliance Manuals expressly limited the antiretaliation provision's scope to adverse employment-related action, it emphasized that in those same manuals the EEOC used language suggesting a

68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 2412–13.
73. *Id.* at 2413.
74. *Id.* (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998)).
75. *Id.* (quoting *Ellerth*, 524 U.S. at 760).
76. *Id.*
77. *Id.* at 2413–14 (finding no "significant support for [*Ellerth*'s] view in the EEOC's interpretations of the provision").

broader interpretation.[78] The Court explained that "both before and after publication of the 1991 and 1988 manuals, the EEOC similarly expressed a broad interpretation of the antiretaliation provision."[79] It also noted that in the 1998 Manual, the EEOC addressed the question of whether the antiretaliation provision of Title VII is limited to employment-related activity and concluded that it is not.[80] Thus, the Court determined that the EEOC's interpretations of the antiretaliation provision did not support the view that the challenged retaliatory act must be employment related to support a Title VII retaliation claim.[81]

After finding support for its conclusion on those four bases, the Court stated its defense to the argument that it would be "anomalous" to interpret Title VII "to provide broader protection for victims of retaliation than for those whom Title VII primarily seeks to protect, namely, victims of . . . discrimination."[82] It noted that "Congress has provided similar kinds of protection" in other statutes "without any judicial suggestion that those provisions are limited to the conduct prohibited by the primary substantive provisions."[83] The Court went on to explain that "differences in the purpose of the antiretaliation and antidiscrimination provisions remove any perceived 'anomaly,' for they. . . [] justify [the] difference of interpretation."[84] It reemphasized that "interpreting the antiretaliation provision to provide broad protection from retaliation" furthers the primary objective of the statute—securing a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status—because it helps assure the "cooperation of employees [in] . . . fil[ing] complaints and act[ing] as witnesses."[85]

Given that defense, and support from the language, purpose, precedent, and EEOC interpretations of Title VII, the Court concluded that Title VII's antiretaliation provision is *not* limited to employment-related or workplace-related retaliatory acts and harms.[86]

78. *Id.* at 2413.
79. *Id.*
80. *Id.* at 2413–14.
81. *Id.* at 2413.
82. *Id.* at 2414.
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*

B. To Violate Title VII's Antiretaliation Provision, the Plaintiff Must Show that a Reasonable Employee Would Have Found the Challenged Action Materially Adverse

After deciding the first issue, whether the challenged retaliatory action had to be employment related, the Court turned to the issue of how harmful the action had to be to constitute retaliation. The Court concluded that "a plaintiff must show that a reasonable employee would have found the challenged retaliatory action materially adverse," which means that "it well might have dissuaded a reasonable employee from making or supporting a charge of discrimination."[87] In speaking of "material" adverseness, the Court explained that it is meant to distinguish "significant from trivial harms."[88] In speaking of reactions of a "reasonable" employee, the Court noted, it intended to set forth an "objective standard."[89] The Court phrased the standard in broad terms, it explained, "because the significance of any given act of retaliation will often depend on the particular circumstances."[90] By way of example, the Court noted that "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 small children."[91] Thus, the Court concluded, "a legal standard that speaks in general terms rather than specific prohibited acts is preferable . . . ."[92]

C. Application of the New Standard

In applying the new standard to the facts of the case at bar, the Court concluded that based on the record, a jury could reasonably conclude that both challenged acts of retaliation—the reassignment of responsibilities and the thirty-seven day suspension without pay—would have been materially adverse to a reasonable employee.[93] Accordingly, the Court affirmed the judgment of the court of appeals.[94]

87. *Id.* at 2415 (quoting Rochon v. Gonzales 438 F.3d 1211, 1219 (D.C. Cir. 2006)).
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 2416.
93. *Id.* at 2417.
94. *Id.*

IV. LIMITS TO *BURLINGTON'S* HELPFULNESS

Burlington provided answers to the two fundamental questions that split the circuits—(1) whether the challenged employer action had to be employment or workplace related, and (2) how harmful the retaliatory action had to be to amount to actionable retaliation. However, *Burlington* left some questions unanswered. For example, it did not explicitly state a legal basis for the retaliation standard it adopted. Nor did it explain why the standard only proscribes those employer actions that well might have dissuaded a reasonable employee from making or supporting a charge of discrimination. It did not explain what subjective factors are appropriate for consideration under the standard. Nor did it explain how the standard's causation element can be satisfied.

Although *Burlington's* helpfulness is somewhat undermined by the questions it left unanswered and the potential problems that may follow, the answers it *did* provide are significant. To illustrate the point, Subsection A will discuss a case decided by the Fifth Circuit prior to *Burlington*, using the ultimate employment decision standard. It will assert that the ultimate employment decision standard was flawed by positing the likely result of the case if it had been before any other circuit and noting the disparity between the likely results in those circuits and the actual result in the Fifth. Finally, it will show how *Burlington* addressed the flaws in the Fifth Circuit's ultimate employment decision standard. Subsection B will offer a brief overview of some of the questions *Burlington* left unanswered and explain why they may not be as problematic as they seem.

A. Answers

Burlington is helpful in the sense that it resolved the disagreement among the circuits about whether a challenged retaliatory action had to be employment or workplace related and about how harmful that action had to be to amount to retaliation. Prior to *Burlington*, retaliation was a very confused area of law. Different circuits applied different standards. Some insisted that the challenged employer action result in an ultimate employment decision and others recognized less extreme employer actions. By holding that the challenged employer action does *not* have to be related to the workplace or employment and by setting forth a test for determining if the action is harmful enough to amount to retaliation, *Burlington* created uniformity and provided at least some clarity to retaliation law. Theoretically, then, cases with similar facts will now have similar results, no matter the circuit. Prior to *Burlington*, cases with

similar facts could easily have different results, depending entirely on the circuit. *Mattern v. Eastman Kodak Co.* is a perfect case in point.

1. The Fifth Circuit's decision in Mattern v. Eastman Kodak Co.

The Fifth Circuit decided *Mattern v. Eastman Kodak Co.* nine years prior to the Supreme Court's decision in *Burlington*.[95] Applying the ultimate decision standard, the Fifth Circuit rejected a retaliation claim based on the type of discriminatory changes in the plaintiff's terms, conditions, and benefits of employment that most other courts would have easily recognized as sufficient to amount to retaliation under Title VII.[96] Jean Mattern was registered in Eastman's mechanic's apprenticeship program, which consisted of hands-on training and classroom instruction.[97] The program incorporated "Major Skills Tests" as well as fourteen "review cycles."[98] Successful completion of the review cycles led to regular salary increases.[99] On the other hand, apprentices who performed poorly on three review cycles or failed three skills tests could be dismissed from the program.[100]

In March, 1993, Mattern filed a Title VII charge with the EEOC, claiming that two senior mechanics had sexually harassed her and that her supervisors were aware of it.[101] After learning of the charge, Eastman transferred Mattern to another crew where she worked under a different immediate supervisor but the same departmental supervisors.[102] She continued to experience "difficulties."[103] She eventually resigned and filed an action against Eastman, alleging, among other things, that it "had a policy and practice of approving and condoning a hostile work environment," and that it "had retaliated, and allowed its employees to retaliate, against her for reporting the harassment to the EEOC and for filing [the] action."[104] A jury found that, although Eastman employees had harassed Mattern, Eastman had taken timely corrective action in response.[105] Consequently, Mattern lost her hostile work environment

95. 104 F.3d 702 (5th Cir. 1997).
96. *Id.* at 710; *see* Von Gunten v. Maryland, 243 F.3d 858, 864 (4th Cir. 2001).
97. *Mattern*, 104 F.3d at 703.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 704.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*

sexual harassment claim.[106] However, the jury found in Mattern's favor with respect to her retaliation claim and awarded damages.[107]

Eastman appealed the jury's decision to the Fifth Circuit.[108] The Fifth Circuit majority held that the retaliation evidence was insufficient and reversed the jury's verdict.[109] The court divided Mattern's retaliation evidence into five parts. First, on a day Mattern had taken vacation leave after complaining of a work-related illness, Eastman sent two supervisors, one of whom was named in the EEOC charge, to her home to tell her to return to Eastman Medical if her illness was work-related.[110] In similar situations, supervisors were rarely, if ever, sent to an employee's home.[111] Second, Mattern was disciplined for leaving her work station to report the harassment to Eastman's Human Resources Department.[112] Third, in the aftermath of Mattern's EEOC charge, her coworkers repeatedly harassed her.[113] Mattern testified that one of her supervisors threatened to fire her.[114] She also testified that her coworkers broke into her locker, stole some of her tools, and told her "accidents happen."[115] Fourth, the harassment made Mattern physically sick.[116] Fifth, after Mattern's EEOC charge, Mattern's work received poor reviews, resulting in a missed pay increase and a "final warning" of dismissal from the apprenticeship program.[117] Many of the negative reviews, which were coming from supervisors who had praised Mattern's work in the past, resulted from her "apparent" inability to rebuild and realign pumps.[118] For instance, prior to her resignation, Mattern was assigned to rebuild a pump.[119] Although the mechanic who worked on the pump with her testified that Mattern rebuilt it correctly, another coworker, whom Mattern had named in her EEOC charge, told Mattern's supervisor that the pump was *not* rebuilt correctly.[120] As a result, Mattern

106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 709–10.
110. *Id.* at 705.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *See id.* at 706 (explaining that Mattern's doctor thought her illness was a result of the hostility at Eastman).
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*

failed the assignment.[121] In another instance, Mattern's supervisor told her to realign a pump while he watched.[122] The pump was resting on a wooden pallet, which made it more difficult to realign.[123] Mattern was unable to complete the assignment.[124] She testified that the pump was purposefully placed on the wooden pallet, as opposed to a more solid base, to derail her.[125]

Despite all of this evidence offered in support of Mattern's retaliation claim, the Fifth Circuit majority held it insufficient. The court emphasized that "Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions."[126] The court explained that none of the events Mattern complained of amounted to an ultimate employment decision, "such as hiring, granting leave, discharging, promoting, and compensating."[127] The visit to her home, the reprimand for being away from her work station, the missed pay increase, and the placement on "final warning" all lacked consequence.[128] The same analysis applied to Mattern's other problems. Failing two Major Skills Tests and having reprimands documented in her file may have increased her chances of being discharged, but they did not *result* in her being discharged or in any other ultimate employment decision.[129] Therefore, all of Mattern's retaliation evidence was deemed insufficient to amount to retaliation.[130]

2. The Fifth Circuit standard's flaws

The Fifth Circuit's ultimate employment decision standard was flawed in at least two respects. First, it interpreted Title VII's antiretaliation provision to proscribe only ultimate employment decisions and not the "vague" harms contemplated by its antidiscrimination provision.[131] Accordingly, under the Fifth Circuit's standard, an

121. *See id.* (explaining that Mattern's supervisor documented the pump failure).
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 707 (quoting Dollis v. Rubin, 77 F.3d 777, 781–82 (5th Cir. 1995)).
127. *Id.* (quoting *Dollis*, 77 F.3d at 782).
128. *Id.* at 708.
129. *Id.*
130. *Id.*
131. *See id.* at 709–10 (explaining that the antiretaliation provision speaks only of "discrimination," and therefore does not contemplate the vague harms—such as the deprivation of employment opportunities or an adverse affect on an employee's status—that Title VII's antidiscrimination provision does).

employer could effectively retaliate against an employee, even if the retaliatory actions deprived the employee of opportunities or adversely affected their status, so long as the actions did not result in an ultimate employment decision.[132] Second, the Fifth Circuit's ultimate employment decision standard effectively eliminated consideration of hostile work environment harassment as a separate basis for retaliation. Thus, under the Fifth Circuit's standard, an employer could successfully retaliate against an employee for filing a hostile work environment harassment claim (or any other discrimination claim) by creating a hostile work environment.[133] Although it is unclear whether the Fifth Circuit intended these results, it *is* clear that those results were inconsistent with the purpose and design of Title VII's antiretaliation provision.

The Fifth Circuit standard's flaws can be illustrated by positing how the *Mattern* decision might have had a different result if it had been decided by another circuit. Arguably, had the same retaliation evidence been presented to any other circuit, Mattern's favorable jury verdict would have been upheld. In *Ross*, decided by the Fourth Circuit, a Communications Satellite Corporation ("COMSAT") employee brought action against the company, alleging that it retaliated against him for filing a sex discrimination claim with the EEOC.[134] The employee contended that, after he filed the EEOC claim, he experienced harassment by COMSAT superiors.[135] He also alleged that COMSAT essentially demoted him, "denied [him] a performance review and annual pay and benefit increases," and misrepresented his employment record to other employers.[136] In addition, the employee alleged that his performance evaluations fell after the filing of the EEOC claim, even though he had received generally positive evaluations before it.[137] Because the Fourth Circuit determined that the district court had improperly relied on the preclusive effect of a state administrative decision in granting summary judgment to the employer, it reversed and remanded the employee's retaliation claim "for reconsideration of the propriety of summary judgment" and "for trial," if necessary.[138] In doing

132. *See id.*

133. Note that although, under the Fifth Circuit's standard, an employer could theoretically retaliate against an employee by creating a hostile work environment, the creation of a hostile work environment could subject the employer to liability for discrimination. Of course, the employer could avoid an adverse finding on a subsequent hostile work environment discrimination claim by taking remedial action *after* retaliating.

134. Ross v. Commc'ns Satellite Corp., 759 F.2d 355, 356–57 (4th Cir. 1985).

135. *Id.* at 357.

136. *Id.*

137. *Id.*

138. *Id.* at 363.

so, the court recognized that the alleged acts, if proved, could constitute unlawful retaliation under Title VII.[139]

The retaliatory acts alleged in *Ross* were similar to those alleged in *Mattern*. Both employees alleged that following their respective EEOC charges, their work was evaluated more negatively, their coworkers harassed them, and they were denied a pay increase. Given that the Fourth Circuit in *Ross* recognized that the alleged retaliatory acts, if proved, could constitute retaliation, and that the alleged acts were similar to those complained of in *Mattern*, if the Fourth Circuit had decided *Mattern*, it likely would have found retaliation. This follows not only from a comparison between the retaliatory acts in the two cases, but also from the Fourth Circuit's criticism of the Fifth Circuit's retaliation standard.

In *Von Gunten*, the Fourth Circuit noted that *Ross* implicitly rejected the *Mattern* court's view that only an ultimate employment decision can amount to retaliation under Title VII.[140] The court rejected the *Mattern* court's interpretation of Title VII's antiretaliation provision (proscribing only ultimate employment decisions and excluding the vague harms contemplated by the antidiscrimination provision), stating that conformity between the two provisions was to be preferred.[141] In other words, the Fourth Circuit suggested that Title VII's antiretaliation provision proscribes the same conduct proscribed by its antidiscrimination provision, not just conduct that results in an ultimate employment decision. Considering this criticism, the Fourth Circuit's decision in *Ross*, and the retaliatory acts in *Ross* compared to those in *Mattern*, the *Mattern* decision probably would have been different if the case had been before the Fourth Circuit. The Fourth Circuit recognized that the alleged acts in *Ross*, if proved, could constitute retaliation. The alleged acts in *Ross* were similar to those in *Mattern*. In addition, the Fourth Circuit implicitly rejected the ultimate employment decision standard applied by the Fifth Circuit in *Mattern*, suggesting that retaliatory acts do *not* have to result in an ultimate employment decision to constitute retaliation. Arguably, then, if the Fourth Circuit had decided *Mattern*, it would have found retaliation.

Had *Mattern* been decided by other circuits, again, the result probably would have been different. This follows not only from the fact

139. *Id.*; *see* Von Gunten v. Maryland, 243 F.3d 858, 865 (4th Cir. 2001). Note that if the Fourth Circuit had determined that the alleged acts, if proved, could *not* constitute retaliation, remand would have been unnecessary.

140. *Von Gunten*, 243 F.3d at 865 (citing Ross v. Commc'ns Satellite Corp., 759 F.2d 355, 366 (4th Cir. 1985)).

141. *Id.* (quoting *Ross*, 759 F.2d at 363 (stating that conformity between the antidiscrimination and antiretaliation provisions of Title VII is to be preferred)).

that other circuits' standards would not have required Mattern to show that she suffered an ultimate employment decision, but also from their recognition of hostile work environment as a separate type of retaliation. In finding against Mattern on her retaliation claim, the Fifth Circuit noted that the jury found against her on her sexual harassment and constructive discharge claims.[142] The court then explained that those two adverse findings limited the possibility of finding retaliation.[143] Although the court did not explicitly dismiss consideration of Mattern's hostile work environment claim as not qualifying as retaliation, it implicitly did so by limiting the bases for finding retaliation to the jury's findings in her favor. In other words, by reviewing Mattern's retaliation claim in the context of the jury's adverse findings on her sexual harassment claim,[144] which was based on the creation of a hostile work environment, the Fifth Circuit effectively precluded consideration of the alleged creation of a hostile work environment as a separate type of retaliation. Essentially, the Fifth Circuit majority relied on the outcome of the substantive discrimination claim to decide the retaliation issue, considering the two claims (discrimination and retaliation) as not only related, but inextricably tied.

The dissent criticized this approach, arguing that, contrary to the majority's interpretation, "§ 704(a) affords an employee an independent hostile work environment retaliatory discrimination cause of action upon which she may recover in a proper case regardless of the outcome of her § 703 sex discrimination and constructive discharge claims."[145] In other words, the dissent viewed Mattern's discrimination and retaliation claims as separate and distinct. From that perspective, the dissent determined that the jury's verdict in favor of Mattern on her retaliation claim was not clearly erroneous and should have been affirmed.[146]

Concerning Mattern's sexual harassment claim, the jury had been instructed that Title VII proscribes "unwelcome sexual advances, requests for sexual favors, [and] other verbal or physical conduct of a sexual nature where the conduct has the purpose or effect of unreasonably interfering with the individual's work performance or creating an intimidating, hostile or offensive work environment."[147] The jury was further instructed that for Eastman to be liable to Mattern for

142. Mattern v. Eastman Kodak Co., 104 F.3d 702, 704 (5th Cir. 1997).

143. *Id.*

144. *See id.* (stating that Mattern's retaliation claim must be viewed in the context of the jury's adverse findings on her sexual harassment and constructive discharge claims).

145. *Id.* at 710 (Dennis, J., dissenting). Note that section 704 is Title VII's antiretaliation provision and section 703 is its antidiscrimination provision.

146. *Id.*

147. *Id.* at 706.

the actions of its employees, Mattern had to prove: "that she was subjected to unwelcome harassment in the form of sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature; . . . that the harassment was based on her sex; . . . that the harassment affected a term, condition or privilege of her employment; and . . . [that] Eastman either knew or should have known that [Mattern] was being sexually harassed and failed to take prompt reasonable measures to stop the harassment."[148]

Because the jury found that Eastman had acted promptly in taking remedial action, and therefore Mattern failed to make one of the necessary findings required for Eastman to be held liable for sexual harassment for the acts of its employees against her, the jury found against Mattern on her hostile work environment sexual harassment claim. The majority assumed, without discussion, that the jury's adverse decision on the hostile work environment sexual harassment claim was simultaneously an adverse decision on whether Eastman created a hostile work environment.[149] In other words, the majority assumed that *because* the jury found against Mattern on her hostile work environment sexual harassment claim, Eastman did *not* create an intimidating, hostile, or offensive working environment.

Given that Title VII proscribes sexual harassment, that the creation of a hostile work environment *is* a type of sexual harassment, and that the jury found against Mattern on her sexual harassment claim, the majority's assumption makes sense. The premise was that if the jury had found the creation of a hostile working environment it would have had to find unlawful sexual harassment. If the premise were sound, it would follow that if the jury had found any other type of sexual harassment, for instance, unwelcome sexual advances or requests for sexual favors, it also would have had to find sexual harassment. However, that is not necessarily true. A finding of unwelcome sexual advances or requests for sexual favors, or other sexual conduct having the purpose or effect of creating a hostile work environment was only the first step in the analysis. Before the jury could find that any of those types of sexual harassment amounted to unlawful sexual harassment, it had to find, in addition, that the harassment was based on sex, that it affected a term, condition, or privilege of employment, and that Eastman knew, or had reason to know, about it and failed to take prompt action to stop it. Thus, the majority's premise was flawed. The jury *could* have found that Mattern suffered unwelcome sexual advances, requests for sexual favors,

148. *Id.*
149. *Id.* at 704.

or other sexual conduct that had the purpose or effect of creating a hostile work environment and simultaneously found *no* sexual harassment.

In sum, an adverse finding on a hostile work environment sexual harassment claim does not necessarily preclude a favorable finding on the underlying question of whether there was a hostile work environment. In *Mattern*, the jury found against Mattern on her sexual harassment claim based on its finding that Eastman took prompt action to stop the harassment, not based on a finding that there was no harassment, which may have created a hostile work environment. To the contrary, the jury found that there was harassment.[150] However, based on the instructions, the jury could not find Eastman liable for sexual harassment for the acts of its employees if it found that Eastman took prompt action to stop the harassment. Because the jury found that Eastman did take prompt action to stop the harassment, it had to find against Mattern on her hostile work environment sexual harassment claim.[151] In other words, Mattern's hostile work environment sexual harassment claim could not provide a basis for unlawful *discrimination*. The majority assumed, without articulating any basis for the assumption, that Mattern's hostile work environment sexual harassment claim could not provide a basis for unlawful retaliation either. However, its assumption was inconsistent with its interpretation of Title VII's antiretaliation and antidiscrimination provisions.

The *Mattern* majority relied on the language of Title VII's antidiscrimination provision compared to the antiretaliation provision to support its ultimate employment decision standard.[152] The majority specifically noted that the first subpart of Title VII's antidiscrimination provision states that it is unlawful to "fail or refuse to hire or to discharge any individual . . . with respect to his compensation, terms, conditions or privileges of employment."[153] The majority explained that "[t]his type of employer action contrasts sharply with the . . . vague proscription, found in the next subpart."[154] The next subpart states that it is unlawful for an employer to limit, segregate, or classify their employees or applicants for employment in any way that would deprive or tend to deprive them of employment opportunities or otherwise adversely affect their status as an employee.[155] The majority noted that the second subpart reaches much

150. *See supra* note 105 and accompanying text.
151. *See supra* notes 105–106 and accompanying text.
152. 104 F.3d at 708–709.
153. *Id.* (quoting 42 U.S.C. § 2000e-2(a)(1) (2000)).
154. *Id.* at 709.
155. 42 U.S.C. § 2000e-2(a)(2) (2000).

farther than the first, extending to employer acts that simply "tend" to affect employees.[156] The majority then turned to the antiretaliation provision and noted that it "speaks only of discrimination" and does not mention the vague harms contemplated by the second subsection of the antidiscrimination provision.[157] Accordingly the majority held that the antiretaliation "provision can only be read to exclude such vague harms, and to include only ultimate employment decisions."[158]

By describing as vague only those harms listed in the antidiscrimination provision's second-subpart, and holding that the antiretaliation provision does not extend to such vague harms, the majority implicitly recognized that the antiretaliation provision *does* extend to non-vague harms, like those described in the antidiscrimination provision's first subpart. Arguably, the creation of a hostile work environment is the type of harm more akin to that described by the antidiscrimination provision's first subpart—discrimination with respect to an employee's terms, conditions, or privileges of employment—than to the type of vague harm contemplated by the provision's second subpart. Indeed, the creation of a hostile work environment does more than merely "tend" to affect an employee. Therefore, it follows that discrimination in the form of the creation of a hostile work environment is a "non-vague" harm that is covered by Title VII's antiretaliation provision, and the *Mattern* majority's refusal to consider Mattern's hostile work environment sexual harassment claim as a separate basis for retaliation was inappropriate even by its own standards. To be sure, the *Mattern* dissent spoke of the majority's misinterpretation of Title VII's antiretaliation provision and determined that Mattern's hostile work environment sexual harassment claim should have been considered as an independent cause of action for retaliation and, furthermore, could have provided a basis for finding in Mattern's favor on her retaliation claim.[159]

The majority of other circuits probably would have agreed. Prior to *Burlington*, what separated the majority of other circuits from the Fifth Circuit (and the Eighth, for that matter) was the Fifth Circuit's insistence that the challenged retaliatory action result in an ultimate employment decision. Thus, in *Mattern*, the Fifth Circuit would not recognize Mattern's hostile work environment claim as an appropriate basis for asserting unlawful retaliation, in part, because it simply did not recognize harassment as constituting an ultimate employment decision. Therefore, a retaliation claim could never be predicated on a harassment claim,

156. *Mattern*, 104 F.3d at 709 (citing 42 U.S.C. §§ 2000e-2(a)(1), (2) (2000)).

157. *Id.* (comparing 42 U.S.C. § 2000e-3 (2000) with 42 U.S.C. § 2000e-2(a)(2) (2000)).

158. *Id.*

159. *Id.* at 710 (Dennis, J., dissenting).

regardless of the type of harassment (unwelcome sexual advances, requests for sexual favors, creation of a hostile work environment, etc.) because such a claim, without more, would always fall short of the ultimate employment decision standard.

The majority's logic led to perverse results. Under the Fifth Circuit's standard, an employer could effectively retaliate against an employee who filed a hostile work environment harassment claim (or any other discrimination claim) by creating a hostile work environment. This was clearly inconsistent with Title VII's design to encourage the creation of antiharassment policies and effective grievance mechanisms.[160] Furthermore, it was inconsistent with Title VII's purpose to prevent employers from engaging in retaliatory measures that dissuade employees from engaging in protected conduct.[161]

In contrast to the Fifth Circuit, other circuits—those that applied less restrictive standards of retaliation—certainly would have recognized Mattern's hostile work environment claim as an independent cause of action for retaliation, and possibly would have found retaliation on that basis, if not on another. In *Jensen v. Potter*, for example, the Third Circuit cited to its decision in *Robinson* to hold that a retaliation claim predicated upon a hostile work environment claim is actionable under Title VII.[162] The court explained that Title VII's antidiscrimination provision proscribes "a quantum of discrimination coterminous with that prohibited by [its antiretaliation provision]."[163] Accordingly, the court concluded that since Title VII's antidiscrimination provision applied to hostile work environment claims, so did its antiretaliation provision.[164] Other circuits, specifically the First, Ninth, and Tenth Circuits, have also recognized retaliation claims, predicated on hostile work environment claims, as cognizable under Title VII.[165] Arguably, then, these circuits (the First, Third, Ninth, and Tenth Circuits) would have considered Mattern's hostile work environment claim in evaluating her retaliation claim, and may have used it as a separate basis for affirming the jury's verdict. Of course, these circuits may have affirmed the jury's verdict simply by finding that the challenged retaliatory acts met their respective standards of retaliation on a basis apart from hostile work environment sexual harassment.[166]

160. *See supra* note 3 and accompanying text.

161. *See supra* notes 4–6 and accompanying text.

162. 435 F.3d 444, 448–49 (3d Cir. 2006).

163. *Id.* at 448 (citing Robinson v. Pittsburgh, 120 F.3d 1286, 1300–01 (3d Cir. 1997).

164. *Id.* at 449.

165. *See, e.g.*, Noviello v. City of Boston, 398 F.3d 76, 95 (1st Cir. 2005); Ray v. Henderson, 217 F.3d 1234 (9th Cir. 2000); Gunnell v. Utah Valley State Coll., 152 F.3d 1253 (10th Cir. 1998).

166. This is especially true for the Ninth Circuit, whose standard is especially broad, requiring

Even the Eighth Circuit, notwithstanding its restrictive position prior to *Burlington*, would probably have reached a different conclusion than the Fifth Circuit if it had decided *Mattern*. Although the Eighth Circuit expressly adopted the ultimate employment decision standard, it often applied a broader standard. For example, in *Manning v. Metropolitan Life Insurance Co.*, the court recognized that evidence of a "tangible change in duties or working conditions that constituted a material employment disadvantage" could amount to the sort of ultimate employment decision proscribed by Title VII.[167]

As previously noted, in *Mattern*, part of Mattern's retaliation evidence consisted of her testimony regarding Eastman's, and its employees', harassment toward her. In one instance, Mattern was assigned to rebuild a pump, and although the mechanic who worked on the pump with her testified that Mattern rebuilt it correctly, another coworker, whom Mattern had named in her EEOC charge, told Mattern's supervisor that the pump was *not* rebuilt correctly.[168] As a result, Mattern failed the reassembly assignment.[169] In sustaining the jury's verdict on Mattern's retaliation claim, and commenting on that particular incident, the district court noted that "[t]ampering with another employee's work by another employee could reasonably be construed as sabotage condoned or directed by an employer for the purpose of establishing cause for discharge, demotion, reprimand or refusal to promote. This sabotage could have reasonably taken place in response to . . . Mattern's actions regarding her complaints of sexual harassment."[170]

In addition, Mattern testified that on another occasion her supervisor asked her to realign a pump while he watched.[171] The pump was resting on a wooden pallet, which made it more difficult to realign.[172]

only that the plaintiff establish "adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity." *Ray*, 217 F.3d at 1242–43 (quoting EEOC Compliance Manual § 8, "Retaliation," ¶ 8008 (1998)). The Ninth Circuit could easily interpret Mattern's experiences following her EEOC charge—the visit from her supervisors, the reprimand for being away from her work station to report the harassment she was experiencing, being placed on final warning, missing a pay increase, etc.—as adverse treatment that stemmed from a retaliatory motive and was reasonably likely to derail her or others from engaging in protected activity.

167. 127 F.3d 686, 692 (8th Cir. 1997). *See also* Kim v. Nash Finch Co., 123 F.3d 1046, 1060 (8th Cir. 1997) (recognizing employment consequences including the reduction of duties, lower performance evaluations, required special remedial training, and papering of the employee's file with negative reports as serious enough to satisfy the ultimate employment decision standard, even though the employee was not discharged, demoted, or suspended).

168. Mattern v. Eastman Kodak Co., 104 F.3d 702, 706 (5th Cir. 1997).

169. *Id.*

170. *Id.* at 713–14 (Dennis, J., dissenting) (quoting District Court's September 12, 1995, Order at 2–3).

171. *Id.* at 706.

172. *Id.*

Consequently, Mattern failed the assignment.[173] She testified that she felt the pump had been deliberately placed on the wooden pallet to derail her.[174] If heard by the Eighth Circuit, this testimony could have presented evidence of the type of tangible change in working conditions that constitutes a material employment disadvantage and is therefore intended to be actionable under Title VII. Indeed, the Fifth Circuit recognized that Mattern's negative reports, including her missed pay increase, resulted directly from her "apparent inability" to rebuild and realign pumps."[175] Given that the negative reports jeopardized Mattern's placement in Eastman's apprenticeship program,[176] they certainly disadvantaged her. The missed pay increase alone likely constituted the type of material employment disadvantage that, according to the Eighth Circuit, Title VII was intended to proscribe. Therefore, had the Eighth Circuit decided *Mattern*, the case likely would have had a different result.

3. Burlington's *response*

In sum, prior to *Burlington*, a case brought in one circuit could easily have a different result in another. *Mattern* is simply one example. This was the inevitable consequence of the absence of a uniform standard of retaliation. By creating a uniform standard, *Burlington* largely eliminated the potential for disparity between the results in one circuit compared to the results in another. It is therefore helpful in that sense. Since *Burlington*, retaliation plaintiffs no longer have to demonstrate that a challenged retaliatory action constituted an ultimate employment decision. They do not even have to show that the action was in any way connected to their employment. *Burlington* made that crystal clear: "[t]he scope of the antiretaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm."[177] Thus, *Burlington* fixed the first flaw in the Fifth Circuit's standard. An employer can no longer effectively retaliate against an employee by taking retaliatory actions that deprive the employee of opportunities or adversely affect their status, just because those actions do not result in an ultimate employment decision. *Burlington* fixed the Fifth Circuit standard's second flaw in the same breath. Neither the Fifth Circuit, nor any other court, can refuse to recognize a hostile work environment harassment claim as a separate basis for retaliation based on the fact that hostile

173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.* at 708.
177. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2414 (2006).

work environment harassment is not an ultimate employment decision. These results are consistent with Title VII's design—to encourage the creation of antiharassment policies and effective grievance measures, and with Title VII's purpose—to prevent employers from engaging in retaliatory measures that dissuade employees from engaging in protected conduct.[178]

In addition, *Burlington* specified the type of employer actions that are covered by Title VII's antiretaliation provision. Now, plaintiffs have an identified threshold level of substantiality that they must meet: they "must show that a reasonable employee would have found the challenged action materially adverse," which means that the challenged action "well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'"[179] This point also fixed the Fifth Circuit standard's second flaw. Hostile work environment harassment is likely action that well might dissuade a reasonable employee from making or supporting a charge of discrimination. Thus, the Fifth Circuit, and every other court, will probably have to recognize hostile work environment harassment as a separate basis for retaliation. Accordingly, an employer will no longer be able, theoretically, to retaliate against an employee who files a hostile work environment harassment claim (or any other discrimination claim) by creating a hostile work environment. Again, these results are consistent with the design and purpose of Title VII.

In sum, *Burlington* is helpful because it created a uniform standard of retaliation that specifically addressed the flaws in the ultimate employment decision standard, applied by the Fifth and Eighth Circuits, in a manner consistent with the design and purpose of Title VII. However, *Burlington's* helpfulness has limits. Even though the answers it provided are significant, they are somewhat undermined by the questions it left unanswered and by the potential problems that may follow.

178. *See supra* notes 3–6 and accompanying text.

179. *Burlington*, 126 S. Ct. at 2415 (quoting Rochon v. Gonzales 438 F.3d 1211, 1219 (D.C. Cir. 2006)).

B. Questions

Unfortunately, the answers *Burlington* provided compel various questions. But since *Burlington* implied answers to some of the more troubling questions, they may not be as problematic as they seem.

1. What is the legal basis for the "well might have dissuaded a reasonable worker" standard?

First, the majority did not explain how its interpretation of Title VII's antidiscrimination and antiretaliation provisions compelled the standard it adopted. The majority examined the language of the antiretaliation provision and the language of the antidiscrimination provision and found that, as opposed to the antidiscrimination provision, the antiretaliation provision contains no words limiting its scope to workplace-related or employment-related retaliatory actions.[180] Based on the language itself and on the different purposes behind the two provisions, the majority concluded that Congress intended the difference.[181] Therefore, it held that the antiretaliation provision is *not* limited to employment-related or workplace-related retaliatory acts and harm.[182]

The majority also held, however, that the antiretaliation provision proscribes those retaliatory actions that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[183] The majority did not state that the antiretaliation provision proscribes *only* those retaliatory actions that well might have dissuaded a reasonable worker from making or supporting a charge of discrimination, but the conclusion follows from the fact that "a plaintiff *must* show that a reasonable employee would have found the challenged action materially adverse," which means that the challenged action "well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'"[184] Thus, a plaintiff cannot succeed on a retaliation claim *unless* they can demonstrate that the retaliatory action would have dissuaded a reasonable worker from making or supporting a charge of discrimination. Accordingly, under the majority's standard, Title VII proscribes "*only* those retaliatory acts that 'well might have dissuaded a reasonable worker from making or supporting a charge of

180. *Id.* at 2411–12; *see also supra* notes 62–64 and accompanying text.

181. *Burlington*, 126 S. Ct. at 2411-12; *see also supra* notes 62–72 and accompanying text.

182. *Burlington*, 126 S. Ct. at 2414.

183. *Id*.

184. *Id.* (quoting *Rochon*, 438 F.3d at 1219) (emphasis added).

discrimination.'"[185] In contrast to its conclusion that the retaliatory action does not have to be employment related, the majority reached this conclusion without explicitly providing a basis for it.

As Justice Alito suggested in his concurrence, "[t]he language of [the antiretaliation provision], which employs the unadorned term 'discriminate,' does not support [the majority's] test. The unstated premise of the majority's reasoning seems to [have] be[en] that [the antiretaliation provision's] only purpose is to prevent employers from taking those actions that are likely to stop employees from complaining about discrimination, but this unstated premise is unfounded."[186] Alito continued:

> While surely *one of the purposes* of [the antiretaliation provision] is to prevent employers from engaging in retaliatory measures that dissuade employees from engaging in protected conduct, there is no reason to suppose that this is [the antiretaliation provision's] only purpose. Indeed, the majority itself identifies another purpose of the antiretaliation provision: 'to prevent harm to individuals' who assert their rights.[187]

2. Why is the "well might have dissuaded a reasonable worker" standard so limited?

Thus, a second question left unanswered is why the majority's test proscribes *only* those employer actions that well might have dissuaded a reasonable employee from making or supporting a charge of discrimination.[188] Under the majority's test, "employer conduct that causes harm to an employee is permitted" as long as the "conduct is not so severe as to dissuade a reasonable employee from making or supporting a charge of discrimination."[189] In other words, consistent with *Burlington*, an employer *can* retaliate against an employee who makes or supports a charge of discrimination. The employer simply has to limit its retaliatory actions to actions that would not dissuade a reasonable employee from making or supporting a charge of discrimination.

Although it is true that the *Burlington* majority did not explicitly address these first two questions, it implicitly did. One possible basis for its "well might have dissuaded a reasonable worker" standard is simply

185. *Id.* at 2420 (Alito, J., concurring).
186. *Id.*
187. *Id.*
188. *See supra* notes 185, 187 and accompanying text.
189. *Burlington*, 126 S. Ct. at 2420 (Alito, J., concurring).

its consideration of the various standards used by the circuits and its conclusion that the "well might have dissuaded a reasonable worker" standard was the best one. Indeed, in formally adopting the standard, the majority noted its agreement with the Seventh and District of Columbia Circuits, which, prior to *Burlington*, used the "well might have dissuaded a reasonable worker" standard.[190] Another possible basis for the standard is the majority's effort to articulate a standard that effectively serves the purpose of Title VII. A primary purpose of Title VII is to prevent employers from engaging in retaliatory measures that dissuade employees from engaging in protected conduct.[191] Thus, the majority's standard, which proscribes actions that well might dissuade a reasonable employee from asserting their rights, furthers that purpose. Alito suggested that the majority's standard does not protect all employees who assert their rights because it proscribes only those employer actions that well might have dissuaded a reasonable employee from making or supporting a charge of discrimination.[192] However, Alito's argument is flawed. It is true that the standard permits retaliatory conduct that is not so severe as to dissuade a reasonable employee from making or supporting a charge of discrimination, but such retaliatory conduct is not contemplated by Title VII. As the majority emphasized before articulating the standard, Title VII protects an individual not from all retaliation, but from retaliation that results in an injury or harm.[193] Thus, if the standard does not protect employees who assert their rights, it is because the employees are mistaken in assuming that their "rights" have been violated.

The majority implied as much. After it introduced the standard by noting that Title VII's antiretaliation provision does not protect employees from all retaliation,[194] the majority then explained its use of the term "material" in the standard to separate significant harms, which are proscribed by Title VII, from trivial harms, which are not. Thus, the majority implied that its standard proscribes only those employer actions that are severe enough to dissuade a reasonable employee from asserting their rights because those are the only types of actions that Title VII proscribes. In sum, although the majority did not explicitly assert a legal basis for its adoption of the "well might have dissuaded a reasonable worker" standard, it did offer support for it, at least by implication.

190. *Id.* at 2415.

191. *See supra* note 6 and accompanying text.

192. *See supra* note 185 and accompanying text.

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

194. *Id.*

3. What subjective factors does the objective "well might have dissuaded a reasonable worker" standard contemplate, and how much weight should they be given?

Unfortunately, even given the possible rationale for the majority's "well might have dissuaded a reasonable worker" standard, the standard itself is vague. Thus, a third question asks about the subjective component of the theoretically objective standard. The majority initially stated that the standard focuses on the reactions of a "*reasonable* employee" in determining whether a retaliatory action violates Title VII's antiretaliation provision, and explained that the standard references the reactions of a reasonable employee because the majority believed that the antiretaliation provision's standard for judging harm "must be objective."[195] The majority then explained that an objective standard "avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings."[196] However, the majority then suggested that at least some of a plaintiff's subjective feelings are to be considered. The majority emphasized that "context matters," and by way of example, explained that "[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."[197]

As Alito argued in his concurrence, this example suggests that the majority's "might have dissuaded a reasonable worker" standard does not ask whether a retaliatory action well might have dissuaded the average reasonable (i.e., objective) employee, laying aside all individual characteristics, but instead, asks whether the retaliatory action well might have dissuaded a reasonable employee who shares at least some of the retaliation victim's individual characteristics.[198] This example alone introduces three individual characteristics—age, gender, and family responsibilities—that may be appropriate characteristics for courts and juries to consider when applying the "well might have dissuaded a reasonable worker" standard.[199] The majority suggested as much. However, the majority said nothing with respect to how many other characteristics may or must be considered, or what those characteristics are.[200] Nor did the majority provide any guidance for weighing any

195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.* at 2421 (Alito, J., concurring).
199. *Id.*
200. *Id.*

individual characteristics, including the characteristics it implicitly recognized in its example. It said nothing of how strong the subjective component of its objective test is. Given this lack of clarity, courts will have to address the issue case by case.

However, courts have at least one example to reference in deciding the issue. Since the majority recognized that a schedule change may matter enormously to a young mother with school age children, it implicitly recognized that consideration should be given to an employee's age, gender, and family responsibilities. Moreover, it implied that the weight to be given those subjective factors, at least when considered together, is substantial. That is, the three subjective factors distinguishing the young mother from other employees, added together, were enough for the court to suggest that a schedule change for her could dissuade her from asserting her rights. That determination, in turn, would satisfy the new standard. Thus, although the majority did not enumerate the subjective factors that may or must be considered in applying the "well might have dissuaded a reasonable worker" standard, or state how the factors should be weighed, it did provide at least some guidance.

4. What does "well" mean?

The admittedly vague "well might have dissuaded a reasonable worker" standard poses at least one more question: what does "well" mean? As Alito argued, the majority's use of the terms "well might have dissuaded" introduces a "loose and unfamiliar causation standard . . . . in an area of law in which standards of causation are already complex."[201] The standard says only that a plaintiff must show that the challenged action well might have dissuaded a reasonable employee from making or supporting a charge of discrimination. It does not say what "well" means. Thus, it is unclear how probable it must be that the challenged retaliatory action would have dissuaded a reasonable employee from making or supporting a charge of discrimination for the action to constitute retaliation.

Again, although the majority did not explicitly address this issue, it implicitly did. Since the majority's standard is designed to distinguish between trivial and significant harms, it follows that the causation element is satisfied once a plaintiff establishes that the challenged harm is more than trivial. Perhaps the question is not as much a question of probability as it is a question of classification. If the asserted harm can be

201. *Id.*

classified as trivial, the causation element cannot be satisfied because the harm cannot be severe enough to sufficiently dissuade a reasonable worker from reporting it. On the other hand, if the harm can be classified as significant, it automatically satisfies the causation element because it is, by definition, severe enough to dissuade a reasonable worker from reporting it. Thus, by providing guidance for distinguishing between trivial and significant harms—by requiring that the challenged action be materially adverse—the majority simultaneously provided guidance for determining whether causation is satisfied.

In sum, even though *Burlington's* answers raise some questions, some answers to those questions can be drawn from the majority's opinion. Thus, the questions may not be as problematic as they may seem.

V. CONCLUSION

The Court's decision in *Burlington* provided a resolution to the disagreement among the circuits regarding the proper standard of retaliation. Although its resolution is not free of complications, it is significant, and it is progress.

Prior to *Burlington*, the success of a plaintiff's retaliation case didn't depend as much on its facts as on the circuit that heard it. *Burlington* largely fixed that because it created a uniform standard of retaliation. And, arguably, it created a better standard than those used by some of the circuits prior to *Burlington*. This is almost certainly true with respect to the standard applied in the Fifth and Eighth Circuits. To be sure, *Burlington* fixed at least two flaws in their ultimate employment decision standard.

First, prior to *Burlington*, plaintiffs in these circuits had to show that the challenged employer actions resulted in an ultimate employment decision. Accordingly, employers could effectively retaliate against employees by engaging in whatever adverse actions they wished, so long as none of them amounted to an ultimate employment decision. *Burlington* fixed that. Plaintiffs no longer have to show that the retaliatory actions resulted in an ultimate employment decision.

Second, prior to *Burlington*, some circuits did not recognize hostile work environment as a separate basis for retaliation. As a result, employers could respond to an employee's assertion of Title VII rights by creating a hostile work environment. *Burlington* fixed that as well. Now, as long as an employee can show that the creation of a hostile work environment well might have dissuaded a reasonable worker from making or supporting a charge of discrimination, they can use hostile

work environment harassment as a separate basis for retaliation, regardless of its success as a basis for discrimination.

Both of these results are consistent with Title VII's antiretaliation provision's purpose to prevent employers from taking retaliatory actions that dissuade employees from engaging in protected conduct. To the extent that they force employers to create antiharassment policies and effective grievance mechanisms, they are also consistent with Title VII's design. In sum, although the answers *Burlington* provided may invite further questions, they did provide much needed clarity to retaliation law. They provided uniformity. They provided consistency. They provided . . . relief.

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