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Title VII's Anti-Retaliation Provision Prohibits Any Employer Conduct That Might Dissuade a Reasonable Worker from Making or Supporting a Charge of Discrimination: *Burlington Northern & Santa Fe Railway Co. v. White*

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Title VII's Anti-Retaliation Provision Prohibits Any Employer Conduct That Might Dissuade a Reasonable Worker from Making or Supporting a Charge of Discrimination: *Burlington Northern & Santa Fe Railway Co. v. White*

CIVIL RIGHTS — TITLE VII — RETALIATION — The United States Supreme Court held that Title VII's anti-retaliation provision is not limited to workplace-related conduct that affects the terms and conditions of employment, but rather prohibits any employer conduct constituting a materially adverse action — i.e., one that well might dissuade a reasonable worker from making or supporting a charge of discrimination.

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

In June 1997, Respondent Sheila White was hired as the only female employee of the Maintenance of Way Department at the Tennessee Yard of Petitioner Burlington Northern & Santa Fe Railway Co. (hereinafter "Burlington").[1] White was hired to work as a track laborer, a position that required her to perform primarily manual labor.[2] Shortly thereafter, White was assigned the more prestigious and less arduous position of forklift operator.[3]

In September 1997, White lodged a complaint with Burlington officials alleging that her immediate supervisor, Bill Joiner, had made numerous inappropriate and insulting remarks to her.[4] Burlington investigated White's complaint; as a result of the investigation, Burlington suspended Joiner for ten days and required that he attend a training session on sexual harassment.[5]

On September 26, 1997, Burlington's roadmaster, Marvin Brown, told White of Joiner's disciplinary action and informed her that she was being reassigned from forklift duty to her original

1. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2409 (2006).
2. *Burlington*, 126 S. Ct. at 2409.
3. *Id.*
4. *Id.* According to White, Joiner had repeatedly stated, inter alia, that women should not be permitted to work in the Maintenance of Way Department. *Id.*
5. *Id.*

track laborer position.[6] Brown stated that White's reassignment resulted from co-workers' complaints that the more desirable fork-lift operator position should be given to a male employee with greater seniority.[7]

White filed a charge with the Equal Employment Opportunity Commission (hereinafter "EEOC" or "Commission") on October 10, 1997, alleging that her reassignment constituted unlawful gender-based discrimination and retaliation for her complaint regarding Joiner's remarks.[8] In early December 1997, White filed a second EEOC charge alleging that Brown had subjected her to surveillance and had begun to monitor her daily activities.[9] White claimed that the surveillance and monitoring constituted further retaliation for her September complaint against Joiner.[10]

A few days after White filed her second retaliation charge, she and her immediate supervisor, Percy Sharkey, had a minor dispute, and Brown suspended White that afternoon for insubordination.[11] White challenged her suspension by filing an internal grievance.[12] After Burlington's internal investigation revealed no evidence of insubordination, White was reinstated, receiving backpay for the thirty-seven days during which she had been suspended.[13] As a result of the suspension, White filed a third retaliation charge with the EEOC.[14]

After White exhausted her administrative remedies, she sued Burlington in the United States District Court for the Western District of Tennessee, alleging violations of Title VII of the Civil Rights Act of 1964.[15] White alleged in pertinent part that her reassignment to track laborer duties and her thirty-seven-day suspension constituted acts of retaliation prohibited by Title VII.[16] The jury found in favor of White on both claims, awarding her compensatory damages of $43,500.[17] After trial, the district court denied Burlington's motion for judgment as a matter of law.[18]

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6. *Id.*
7. *Burlington*, 126 S. Ct. at 2409.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* Although the precise nature of the disagreement is not clear, it arose from the matter of which truck would transport White to another location. *Id.*
12. *Burlington*, 126 S. Ct. at 2409.
13. *Id.*
14. *Id.*
15. *Id.* at 2410.
16. *Id.*
17. *Burlington*, 126 S. Ct. at 2410.
18. *Id.*

A divided panel of the United States Court of Appeals for the Sixth Circuit reversed the district court's judgment, finding in favor of Burlington on the retaliation issue.[19] The majority held that neither White's reassignment nor her suspension was an adverse employment action sufficient to support a Title VII claim.[20] However, in a rehearing en banc, the Sixth Circuit Court affirmed the district court's judgment in favor of White.[21] The en banc court held that both White's reassignment and her suspension constituted adverse employment actions.[22]

Both the panel and the en banc court agreed with the district court that the "adverse employment action" standard used in discrimination cases brought under Title VII's substantive discrimination provision[23] must also be applied to retaliation cases brought under the anti-retaliation provision.[24]

An "adverse employment action" is defined in substantive discrimination cases as a "'materially adverse change in the terms and conditions' of employment."[25] However, other circuits have not taken the same approach to retaliation cases.[26] Courts of appeals have disagreed over two issues in particular: (1) whether the anti-retaliation provision of Title VII prohibits only actions related to employment or the workplace, and (2) the degree of harm required in order to constitute retaliation actionable under Title VII.[27] The Supreme Court granted certiorari in order to resolve these two issues.[28]

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

20. *White*, 310 F.3d at 455.

21. White v. Burlington N. & Santa Fe Ry. Co., 364 F.3d 789 (6th Cir. 2004) (en banc) (hereinafter "White II").

22. *White II*, 364 F.3d at 791, 803.

23. The substantive discrimination provision, 42 U.S.C. § 2000e-2(a), provides in pertinent part:

> [i]t shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2(a) (2000).

24. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2410 (2006). The anti-retaliation provision, 42 U.S.C. § 2000e-3(a), provides in pertinent part: "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge . . . under this subchapter." 42 U.S.C. § 2000e-3(a).

25. *Burlington*, 126 S. Ct. at 2410 (quoting *White II*, 364 F.3d at 795).

26. *Id.*

27. *Id.* at 2408.

28. *Id.* at 2411.

Justice Breyer, writing for an eight-member majority of the Court, held that Title VII's anti-retaliation provision is not limited to employer actions that affect the terms and conditions of employment.[29] With respect to the second issue, the Court held that in order to establish a claim of discriminatory retaliation, a plaintiff must show that a reasonable employee would have found the employer's action to be materially adverse.[30] A materially adverse action is one that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[31]

Burlington argued that because Title VII's substantive discrimination provision prohibits only employment-related discrimination, the anti-retaliation provision should be read to apply only to the same category of actions, i.e., employment-related actions.[32] However, the Supreme Court did not accept Burlington's contention that the two pertinent provisions of Title VII should be read *in pari materia*.[33] Rather, the Court found that the language of the two provisions significantly differed.[34] As the Court noted, the substantive discrimination provision provides in pertinent part:

> It shall be an unlawful employment practice for an employer—(1) *to fail or refuse to hire or to discharge* any individual, or otherwise to discriminate against any individual *with respect to his compensation, terms, conditions, or privileges of employment*, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way *which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee*, because of such individual's race, color, religion, sex, or national origin . . . .[35]

The anti-retaliation provision, however, states more simply that "[i]t shall be an unlawful employment practice for an employer *to discriminate against* any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge . . . under this sub-

29. *Id.* at 2412. Justice Alito filed a concurring opinion. *Id.* at 2418.
30. *Burlington*, 126 S. Ct. at 2415.
31. *Id.*
32. *Id.*
33. *Id.* *In pari materia* means "on the same subject; relating to the same matter." BLACK'S LAW DICTIONARY 807 (8th ed. 2004).
34. *Burlington*, 126 S. Ct. at 2411.
35. *Id.* (quoting 42 U.S.C. § 2000e-2(a) (2000)).

chapter."[36] The Court found the scope of actions prohibited by the substantive discrimination provision to be limited by words and phrases such as "hire," "discharge," "compensation, terms, conditions, or privileges of employment," "employment opportunities," and "status as an employee."[37] The Court concluded that, because the anti-retaliation provision contains no such language, there can be no question of reading the two provisions *in pari materia*.[38] Instead, as the Court stated, the proper inquiry is whether Congress intended the linguistic disparity between the two provisions to make a legal difference.[39]

Justice Breyer concluded that Congress did intend such a difference, because in addition to their terminological differences, the two provisions also serve different purposes.[40] According to the Court, the substantive discrimination provision attempts to ensure a workplace free of discrimination, whereas the anti-retaliation provision seeks to prevent employers from interfering with an employee's attempts to pursue such a workplace.[41]

The Supreme Court concluded that the objective of the anti-retaliation provision could not be secured by prohibiting only employer actions related to employment and the workplace.[42] Rather, as Justice Breyer noted, an employer might retaliate against an employee by causing the employee harm away from work.[43] The Court reasoned that a provision that prohibited only workplace or employment-related retaliation would fail to secure the primary purpose of such a provision, namely, preserving employees' freedom to invoke Title VII without fear of retaliation.[44] Therefore, the Court held that, unlike the substantive discrimination provision, Title VII's anti-retaliation provision is not limited to employer actions that affect the terms and conditions of employment.[45]

Having reached this conclusion, Justice Breyer proceeded to address and refute three arguments adduced by Burlington, begin-

36. *Id.* (quoting 42 U.S.C. § 2000e-3(a)).
37. *Id.* at 2411-12.
38. *Id.* at 2412.
39. *Burlington*, 126 S. Ct. at 2412.
40. *Id.*
41. *Id.* Stated otherwise, "the substantive provision seeks to prevent injury to individuals based on who they are, *i.e.*, their status," whereas the "anti-retaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct." *Id.*
42. *Id.*
43. *Id.*
44. *Burlington*, 126 S. Ct. at 2412.
45. *Id.*

ning with the contention that Supreme Court precedent ought to compel a different holding.[46] Burlington argued that according to *Burlington Industries, Inc. v. Ellerth*,[47] Title VII requires a tangible employment action such as termination, failure to promote or hire, or a detrimental reassignment.[48] However, the Court rejected this argument, noting that *Ellerth* sought only to establish a class of hostile work environment harassment cases in which employers should be vicariously liable, without access to an affirmative defense, for harassment committed by supervisors.[49] Furthermore, the Court pointed out that *Ellerth* mentioned neither the substantive discrimination provision nor the anti-retaliation provision of Title VII.[50]

Second, the Court addressed the contention that the EEOC's own interpretation of Title VII requires a tangible employment action.[51] The Court concluded that, although the EEOC stated in its 1991 and 1998 Compliance Manuals that the anti-retaliation provision is limited to "adverse employment-related action," the same manuals also suggest a broader interpretation.[52]

Third, Burlington argued that it would be anomalous to construe Title VII such that victims of retaliation receive greater protection than victims of substantive discrimination.[53] The Court rejected this argument on two grounds.[54] The Court first noted that in the context of the National Labor Relations Act, Congress has provided a broad protection from retaliation without limiting such protection to the kinds of action proscribed by the statute's substantive provisions.[55] Second, the Court reiterated its conclusion that the two relevant provisions of Title VII are intended to achieve different purposes.[56] For these reasons, the Court concluded that it is not anomalous that the anti-retaliation provision

46. *Id.* at 2413.
47. 524 U.S. 742 (1998).
48. *Burlington*, 126 S. Ct. at 2413.
49. *Id.*
50. *Id.*
51. *Id.* at 2413-14.
52. *Id.* at 2413. Furthermore, the Court found that when the EEOC directly addressed the question of whether the anti-retaliation provision concerns only the same conduct prohibited by the substantive discrimination provision, the EEOC concluded that the anti-retaliation provision was not so limited. *Id.* at 2414.
53. *Burlington*, 126 S. Ct. at 2413.
54. *Id.* at 2414.
55. *Id.*
56. *Id.*

should provide a broader scope of protection than the substantive discrimination provision.[57]

The Court then turned to the second major issue in the case: how harmful must an employer's conduct be in order to constitute actionable retaliation under Title VII?[58] The majority elected to adopt the standard articulated by the Seventh and District of Columbia Circuits.[59] According to that formulation, a plaintiff must establish that a reasonable employee would find the alleged action to be "materially adverse," meaning that "it might well have dissuaded a reasonable worker from making or supporting a charge of discrimination."[60]

According to the Court, the material adversity requirement would ensure that only significant harms are addressed by Title VII, which is not intended to function as a general code of conduct for the workplace.[61] Under the material adversity standard, minor acts of interference or annoyance are not a substantial enough deterrent to warrant Title VII protection.[62] Similarly, by employing a "reasonable employee" standard, the Court attempted to ensure that Title VII would be applied objectively and consistently, without undue reference to a particular individual's feelings or perceptions.[63] However, the Court noted that it phrased its holding in general terms so that courts might properly weigh the complex circumstances of each case, rather than rigidly applying a strict formula.[64]

Having determined the scope of the anti-retaliation provision and the required degree of harm, the majority then applied its standard to White's case.[65] The trial judge had instructed the jury to determine whether White had "suffered a materially adverse change in the terms or conditions of her employment."[66] Against

57. *Id.*
58. *Burlington*, 126 S. Ct. at 2414-16.
59. *Id.* at 2414-15.
60. *Id.* at 2415.
61. *Id.*
62. *Id.*
63. *Burlington*, 126 S. Ct. at 2415. Justice Alito suggested in his concurrence that the majority did not stand by its reasonable employee standard, but rather took into account certain individual characteristics of the plaintiff, thereby effectively creating the somewhat confusing standard of "a reasonable worker who shares at least some individual characteristics with the actual victim." *Id.* at 2421 (Alito, J., concurring).
64. *Id.* at 2415-16 (majority opinion).
65. *Id.* at 2416-18.
66. *Id.* at 2416. On appeal, the en banc Sixth Circuit upheld the trial judge's standard and affirmed the jury's determination that both White's reassignment to track laborer duties and her thirty-seven-day suspension constituted actionable retaliation. *Id.*

Burlington's argument that White's reassignment was not a sufficiently adverse employment action, the Supreme Court observed that the EEOC has long considered unfavorable reassignments to be actionable retaliation.[67] As the Court noted, whether a "reassignment is materially adverse" is a fact-specific question that can only be answered in light of the surrounding circumstances.[68] The majority held that, because the position of track laborer was more arduous and less prestigious than that of forklift operator, the jury reasonably concluded that a reasonable employee would have found White's reassignment to be materially adverse.[69]

Burlington also argued that White's suspension did not constitute actionable retaliation because White had been reinstated with backpay and because Title VII historically had not provided equitable relief for employees under such circumstances.[70] The Court rejected these arguments on the ground that injunctions had been granted under Title VII throughout its history to deter future recurrences of discrimination.[71]

Although Justice Breyer noted that the standard applied at trial was excessively stringent inasmuch as it required a change in the terms or conditions of employment, the Court held that the jury's findings of material adversity with respect to both White's reassignment and her suspension were supported by the evidence.[72] Because White's lack of income and job security might well have deterred a reasonable employee from filing a Title VII complaint, the Supreme Court affirmed the decision in favor of White.[73]

Justice Alito filed a concurring opinion.[74] Although he agreed with the majority that White had established a claim of discriminatory retaliation, Justice Alito did not accept the standard established by the majority.[75] First, whereas the majority construed the scope of the word "discriminate" more broadly in the anti-

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67. *Id.*
68. *Burlington*, 126 S. Ct. at 2417.
69. *Id.*
70. *Id.*
71. *Id.* Furthermore, the Court noted that Title VII was amended in 1991 to provide compensatory and punitive damages in cases of intentional discrimination. *Id.* Therefore, the majority held that it would undermine congressional intent to allow Burlington to escape liability for its retaliation against White. *Id.*
72. *Id.* During White's suspension, her family was deprived of income for thirty-seven days during the Christmas season without any indication of when, if ever, White would be reinstated. *Id.* Furthermore, White sought medical treatment for depression resulting from the suspension. *Id.*
73. *Burlington*, 126 S. Ct. at 2417-18.
74. *Id.* at 2418 (Alito, J., concurring).
75. *Id.* at 2418-19.

retaliation provision than in the substantive provision, Justice Alito found no statutory support for the broader construction.[76] In his opinion, where the anti-retaliation provision makes it unlawful to "discriminate against" an employee who has opposed conduct prohibited by Title VII, the words "discriminate against" ought to be given the meaning ascribed to them in the preceding substantive discrimination provision.[77] The substantive discrimination provision limits discrimination to actions affecting the terms and conditions of employment, and Justice Alito suggested that the word "discriminate" should be read the same way in both provisions.[78]

In addition to his preferred construction, Justice Alito noted that White had urged another possible interpretation: discrimination denotes any disparity in treatment.[79] However, Justice Alito rejected this interpretation because it fails to distinguish the legitimate cases of retaliation from the trivial.[80]

Justice Alito observed that the majority did not accept either of these interpretations, but instead adopted a third.[81] He then argued that the majority's justifications for its interpretation were unconvincing.[82] First, Justice Alito suggested that an employer is more likely to retaliate against an employee by taking some action at the workplace.[83] Second, he noted that discrimination affecting the terms and conditions of employment need not occur at the workplace.[84] For example, Justice Alito argued that in *Rochon v. Gonzales*,[85] where the FBI failed to provide off-duty security to an employee whose life had been threatened, the FBI's inaction could be construed as affecting the terms and conditions of employment.[86] Such inaction, although occurring away from the workplace, would therefore constitute actionable retaliation under his interpretation of Title VII if it was based on the employee's race.[87]

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76. *Id.* at 2419.
77. *Id.*
78. *Burlington*, 126 S. Ct. at 2419 (Alito, J., concurring).
79. *Id.* at 2418-19.
80. *Id.*
81. *Id.* at 2419.
82. *Id.*
83. *Burlington*, 126 S. Ct. at 2419 (Alito, J., concurring).
84. *Id.* at 2420.
85. 438 F.3d 1211 (D.C. Cir. 2006).
86. *Burlington*, 126 S. Ct. at 2420 (Alito, J., concurring).
87. *Id.*

Justice Alito also found the practical results of the majority's position to be out of line with Congress' intent.[88] Justice Alito argued that the majority's test, which inquires whether a reasonable worker might be deterred from filing "a charge of discrimination,"[89] would require judges to consider the particular circumstances of the underlying charge in order to determine whether the alleged retaliation would have been sufficient to prevent a reasonable person from filing a charge.[90] This, according to Justice Alito, would lead to the illogical result that a more egregious act of discrimination would require a more substantial and threatening deterrent in order to dissuade a reasonable employee.[91]

Justice Alito's practical objections to the majority's position also included what he considered to be an unclear "reasonable employee" standard, which takes into account unspecified aspects of an employee's personal character.[92] Further, he questioned the standard of causation established by the majority, which refers to an act that "*well might have dissuaded* a reasonable worker."[93] Justice Alito contended that such an uncertain standard would only further complicate an already complex area of the law.[94]

Applying his own standard to White's case, Justice Alito concluded that White's reassignment and suspension both satisfied his definition of an adverse employment action.[95] Justice Alito therefore concurred in the Court's judgment.[96]

Since the enactment of Title VII, courts have disagreed fundamentally over the scope of the anti-retaliation provision, developing three distinct approaches to the question of which employer actions fall within the proscriptive power of the statute.[97] In its consideration of the instant case, the Sixth Circuit adopted the position that the Third and Fourth Circuits had espoused.[98] Those courts have applied the same standard to retaliation claims as they have to substantive discrimination claims: in order for employer conduct to constitute actionable retaliation, it must "re-

88. *Id.*
89. *Id.* at 2415 (majority opinion) (quoting *Rochon*, 438 F.3d at 1219).
90. *Id.* at 2420 (Alito, J., concurring).
91. *Burlington*, 126 S. Ct. at 2420 (Alito, J., concurring).
92. *Id.* at 2421.
93. *Id.*
94. *Id.*
95. *Id.* at 2421-22.
96. *Burlington*, 126 S. Ct. at 2422 (Alito, J., concurring).
97. *Id.* at 2410-11 (majority opinion).
98. *Id.* at 2410.

sult in an adverse effect on the terms, conditions, or benefits of employment."[99]

The Fifth and Eighth Circuit Courts of Appeals have applied an even more stringent standard, finding actionable retaliation only where an employer's conduct results in an "ultimate employment decision," such as hiring, discharge, or an unfavorable decision concerning leave, promotions, or compensation.[100]

The least stringent of the three standards is that employed by the United States Courts of Appeals for the Seventh and District of Columbia Circuits.[101] These courts have required only that the plaintiff employee was subjected to an employer action that "would have been material to a reasonable employee."[102]

The Third Circuit adopted its "adverse employment action" standard in *Robinson v. Pittsburgh*.[103] The plaintiff, Carmen Robinson, was a female police officer employed by the City of Pittsburgh.[104] Robinson alleged that she had been sexually harassed by her supervisor, James Dickerson.[105] After complaining to both the chief and the assistant chief of police, Robinson filed an EEOC charge based upon Dickerson's conduct.[106] Robinson subsequently filed suit in federal district court, alleging, inter alia, that she had been subject to discriminatory retaliation for her EEOC charge.[107]

According to Robinson, following the filing of her EEOC charge, she suffered "reprisals at work."[108] The district court granted the defendant's motion for judgment as a matter of law on the retaliation claim, holding that Robinson had failed to establish a causal connection between her EEOC charge and the alleged reprisals.[109]

Writing for a unanimous panel of the Third Circuit, then-Circuit Judge Samuel Alito affirmed the district court's grant of judgment

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99. *Id.* (quoting Von Gunten v. Maryland, 243 F.3d 858, 866 (4th Cir. 2001)).

100. *Id.* (quoting Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997)).

101. *Burlington*, 126 S. Ct. at 2410-11.

102. *Id.* at 2410-11 (quoting Washington v. Ill. Dep't of Revenue, 420 F.3d 658, 662 (7th Cir. 2005)).

103. 120 F.3d 1286, 1300 (3d Cir. 1997), *abrogated by Burlington*, 126 S. Ct. 2405.

104. *Robinson*, 120 F.3d at 1291.

105. *Id.* According to Robinson, Dickerson had, inter alia, commented on the size of Robinson's breasts, "unhook[ed] her bra, snapp[ed] her bra strap," touched Robinson's leg, ear, hair, and waist, and "describe[ed] the position in which he and Robinson would have sex if they were ever to do so." *Id.*

106. *Id.* at 1292.

107. *Id.*

108. *Id.* at 1299. These alleged reprisals included restrictions of her job duties, reassignment to a position supervised by her alleged harasser, failure to transfer her from that position, and "unsubstantiated oral reprimands." *Id.* at 1300.

109. *Robinson*, 120 F.3d at 1300.

as a matter of law.[110] Judge Alito held that, even if Robinson could establish a causal connection between her EEOC charge and the alleged reprisals, those reprisals could not support a Title VII retaliation claim because they failed to rise to the level of an adverse employment action inasmuch as they did not alter the terms and conditions of Robinson's employment, "deprive [her] of employment opportunities," or "adversely affect [her] status as an employee."[111] Judge Alito, who would later apply the same rationale as author of the sole concurring opinion in *Burlington*,[112] reasoned that the standard applied to substantive discrimination cases must also be applied to retaliation cases.[113]

Four years later, the Fourth Circuit applied the same approach to a Title VII retaliation case in *Von Gunten v. Maryland*.[114] Barbara von Gunten worked as an Environmental Health Aide for the Maryland Department of the Environment (hereinafter "MDE").[115] Von Gunten alleged that almost immediately after they began working together for the MDE, her supervisor, Vernon Burch, began sexually harassing her.[116] Von Gunten's complaints to management were unavailing.[117] Therefore, von Gunten contacted MDE's Fair Practices Office to discuss her complaints and concerns.[118] It was as a result of this contact that von Gunten claimed to have suffered retaliation.[119]

According to von Gunten, following her contact with the Fair Practices Office, her company car was taken away and she was forced to use her own vehicle for work.[120] Furthermore, von Gun-

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110. *Id.* at 1303-04.

111. *Id.* at 1300 (quoting 42 U.S.C. § 2000e-2(a) (2000)).

112. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2418 (2006) (Alito, J., concurring).

113. *Robinson*, 120 F.3d at 1300-01.

114. 243 F.3d 858, 866 (4th Cir. 2001), *abrogated by Burlington*, 126 S. Ct. 2405.

115. *Von Gunten*, 243 F.3d at 861.

116. *Id.* at 862. Burch allegedly made sexually suggestive remarks, stared at and touched parts of von Gunten's body against her will, and urinated from the boat on which they worked. *Id.*

117. *Id.* Von Gunten contacted William Beatty, the head of her division, and complained to him regarding Burch's conduct. *Id.* Thereafter, Beatty met with von Gunten and Burch to discuss and distribute copies of MDE's anti-harassment policy. *Id.* According to von Gunten, Burch's conduct worsened after this meeting. *Id.* In fact, von Gunten alleged that Burch intentionally struck her on the buttocks with an oar, although Burch claimed the contact was accidental. *Von Gunten*, 243 F.3d at 862. Von Gunten again complained to Beatty, who reluctantly assigned her to work on a different boat. *Id.*

118. *Id.*

119. *Id.*

120. *Von Gunten*, 243 F.3d at 862. Von Gunten conceded, however, that she was entitled to reimbursement for the use of her personal vehicle. *Id.*

ten alleged that her year-end performance evaluation was downgraded, that she was reassigned to a different task, and that she suffered retaliatory harassment.[121] Von Gunten filed a charge with the EEOC alleging sex discrimination and retaliation.[122]

After receiving a right to sue letter from the EEOC, von Gunten filed suit in federal court alleging, inter alia, unlawful discrimination in violation of Title VII.[123] The district court granted MDE's motion for summary judgment on von Gunten's retaliation claim.[124] The Fourth Circuit Court of Appeals affirmed the grant of summary judgment against von Gunten.[125] The court relied upon its earlier decision in *Ross v. Communications Satellite Corp.*[126] for the proposition that, absent countervailing policy considerations, "conformity between the provisions of Title VII is to be preferred."[127] Applying the *Ross* standard, the court concluded that none of the allegedly retaliatory acts against von Gunten sufficiently affected the terms and conditions of her employment to constitute an adverse employment action.[128]

Prior to *Burlington*, other courts of appeals had adopted a stricter approach to retaliation cases, holding that Title VII's anti-retaliation provision only prohibits employer conduct that rises to the level of an ultimate employment decision.[129] In *Mattern v. Eastman Kodak Co.*, the plaintiff, Jean Mattern, alleged that her employer, Eastman Kodak Co., retaliated against her after she

121. *Id.* at 862-63.

122. *Id.* at 863. While her EEOC charge was pending, MDE offered von Gunten a different position, which would have required her to work in frequent contact with two of her superiors who had been uncooperative regarding her previous allegations of discrimination. *Id.* Von Gunten rejected this position and, when MDE continued to show little concern for her complaints, she resigned. *Id.*

123. *Id.* at 863.

124. Von Gunten v. Md. Dep't of the Env't, 68 F. Supp. 2d 654, 664 (D. Md. 1999).

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

126. 759 F.2d 355 (4th Cir. 1985).

127. *Von Gunten*, 243 F.3d at 863 n.1 (quoting *Ross*, 759 F.2d at 366). In *Ross*, the plaintiff had alleged that his employer retaliated against him by reducing his job responsibilities and refusing to conduct an annual review of the employee's performance, thereby denying his opportunity for a raise and increased benefits. *Ross*, 759 F.2d at 357. Further, the plaintiff alleged that his employer made false statements to the plaintiff's prospective employers. *Id.* The *Ross* court therefore reversed the district court's grant of summary judgment in favor of the employer and remanded the case for trial, holding that the employee's allegations, if proven, could rise to the level of an adverse employment action. *Id.* at 363. In *Von Gunten*, the Fourth Circuit expressly rejected the stricter "ultimate employment decision" standard and retained *Ross*'s "adverse employment action" test. *Von Gunten*, 243 F.3d at 865. The court stated that, while "ultimate employment decisions" may certainly constitute unlawful retaliation, such a standard is excessively stringent. *Id.*

128. *Von Gunten*, 243 F.3d at 867-70.

129. Mattern v. Eastman Kodak Co., 104 F.3d 702 (5th Cir. 1997), *abrogated by* Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405 (2006).

filed a sexual harassment charge with the EEOC.[130] Mattern alleged numerous retaliatory acts, including an investigatory visit by two supervisors to Mattern's home when she had taken a sick day, a reprimand for being away from her workstation, general hostility from her coworkers, theft of tools from her locker, a lack of concern over Mattern's illness allegedly resulting from her difficulties at work, and a negative performance evaluation that prevented Mattern from receiving a pay increase.[131] Shortly after these allegedly retaliatory acts occurred, Mattern resigned.[132]

At trial, the jury found in favor of Eastman on Mattern's sexual harassment and constructive discharge claims, but found in favor of Mattern on her retaliation claim.[133] The Fifth Circuit reversed on the retaliation issue, holding that none of the allegedly retaliatory acts rose to the level of an ultimate employment decision.[134] According to the Fifth Circuit, in order to violate Title VII's anti-retaliation provision, an employer's allegedly retaliatory conduct must result in an ultimate employment decision, such as "hiring, granting leave, discharging, promoting, and compensating."[135]

The court based this requirement on a comparative reading of Title VII's substantive discrimination and anti-retaliation provisions.[136] Based on the court's reading, the substantive discrimination provision proscribes vague harms which "would tend to deprive [the employee] of opportunities or adversely affect his status," whereas the anti-retaliation provision refers simply to "discrimination," without speaking in such wide-reaching terms.[137] Therefore, the court concluded that the anti-retaliation provision could not be read to include such "vague harms," but rather only ultimate employment decisions.[138]

The court held that Mattern had failed to show employer conduct of the requisite severity for two reasons.[139] First, several of Mattern's allegations — namely, general hostility from her coworkers, the theft of tools from her locker, and the resulting anxiety — clearly failed to reach the level of an ultimate employment

130. *Mattern*, 104 F.3d at 704.
131. *Id.* at 705-06.
132. *Id.* at 706.
133. *Id.* at 704.
134. *Id.* at 707-08.
135. *Mattern*, 104 F.3d at 707 (quoting Dollis v. Rubin, 77 F.3d 777, 781-82 (5th Cir. 1995)).
136. *Id.* at 708-09.
137. *Id.* at 709 (quoting 42 U.S.C. § 2000e-2(a)(1), (2) (2000)).
138. *Id.* at 709.
139. *Id.* at 707-09.

decision.[140] Moreover, these could not reasonably be attributed to Eastman.[141] Although some of Mattern's other allegations — including the reprimand and the pay raise missed as a result of her unfavorable performance review — seemed to be more severe, the court found that these acts were of no real consequence.[142] Second, the court held that, even if some of the allegedly retaliatory acts may have eventually resulted in an ultimate employment decision, Mattern resigned before Eastman could take any such action.[143]

The United States Court of Appeals for the Eighth Circuit followed a similar approach in *Manning v. Metropolitan Life Insurance Co.*[144] The plaintiffs, who worked at a life insurance office, alleged that they had suffered unlawful retaliation as a result of their complaints regarding an adulterous affair between the branch manager, Denise Mitchell, and a management trainee, Charles Craig.[145] According to the plaintiffs, Craig made veiled threats that he would have them killed for complaining about his affair with Mitchell.[146] One of the plaintiffs, Constance Pritchett, also alleged that the subsequent closing of the office was evidence of retaliation against the plaintiff employees.[147]

The district court granted Metropolitan Life's motion for judgment as a matter of law on all retaliation claims except Pritchett's.[148] The Eighth Circuit affirmed the district court's grant of judgment as a matter of law as to the retaliation claims of all plaintiffs other than Pritchett and reversed that court's denial of judgment as a matter of law on Pritchett's retaliation claim.[149] According to the court, the basic prohibition of discrimination set forth in Title VII's substantive discrimination provision also applies to the anti-retaliation provision.[150] For purposes of the anti-retaliation provision, however, the court noted that an ultimate

140. *Mattern*, 104 F.3d at 707.
141. *Id.*
142. *Id.* at 708.
143. *Id.* at 709.
144. 127 F.3d 686 (8th Cir. 1997), *abrogated by* Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405 (2006).
145. *Manning*, 127 F.3d at 688.
146. *Id.* at 689. The plaintiffs further alleged more generally that they had suffered "hostility and personal animus" as a result of their complaints, and that management ignored their complaints regarding the allegedly hostile treatment. *Id.* at 692.
147. *Id.* at 693.
148. *Id.* at 689.
149. *Id.* at 693.
150. *Manning*, 127 F.3d at 692.

employment decision was required.[151] Because the plaintiffs had failed to produce evidence of a "tangible change in duties or working conditions that constituted a material employment disadvantage," the court held that they could not meet the standard of an ultimate employment decision.[152]

In contrast to the "adverse employment action" and "ultimate employment decision" standards, the District of Columbia Circuit and Seventh Circuit have concluded that the standard in Title VII retaliation cases is significantly lower.[153] Employing the standard subsequently adopted by the Supreme Court in *Burlington*, the Seventh Circuit held in *Washington v. Illinois Department of Revenue* that Title VII's anti-retaliation provision proscribes any employer action that "would have been material to a reasonable employee."[154]

A material action, the court stated, is one that would have "dissuaded a reasonable worker from making or supporting a charge of discrimination."[155] The court based its holding on the absence of limiting terms in the anti-retaliation provision.[156] Specifically, the court noted that such terms are present in the substantive discrimination provision's reference to discrimination "with respect to compensation, terms, conditions, or privileges of employment."[157]

The plaintiff in *Washington* had initially complained to state and federal officials about the reassignment of some of her duties to other people, alleging that the reassignment was racially-motivated discrimination.[158] According to the plaintiff, Chrissie Washington, following the filing of this complaint, her supervisors caused her significant difficulties by rescinding the flex-time

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151. *Id.* In previous cases, the same court concluded, respectively, that this standard might have been satisfied where an employer gave negative references to the plaintiff's potential employers, but not where a supervisor's staff had been replaced (thereby decreasing the prestige and status of her position) but her salary and position were unchanged. Ledergerber v. Stangler, 122 F.3d 1142 (8th Cir. 1997); Smith v. St. Louis Univ., 109 F.3d 1261, 1266 (8th Cir. 1997).

152. *Manning*, 127 F.3d at 692.

153. *See* Rochon v. Gonzales, 438 F.3d 1211 (D.C. Cir. 2006); Washington v. Ill. Dep't of Revenue, 420 F.3d 658 (7th Cir. 2005).

154. *Washington*, 420 F.3d at 662.

155. *Id.*

156. *Id.*

157. *Id.* According to the Seventh Circuit, although the proscriptive effect of the anti-retaliation provision is not limited to employment-related actions, "materiality" is an integral part of the term "discrimination" and therefore is a necessary feature of retaliation, which is a species of discrimination. *Id.* at 661.

158. *Id.* at 659.

schedule on which she had been permitted to work for approximately six years and then transferring her to another position where flex time was not available.[159] Washington filed suit, alleging that the decision to rescind her flex-time schedule constituted actionable retaliation under Title VII.[160] The district judge granted the defendant employer's motion for summary judgment on the ground that Washington had not demonstrated that she had suffered an adverse employment action.[161]

On appeal, the Seventh Circuit resolved what it called an "illusory" conflict among the panels of its court, reversing the district court's grant of summary judgment against Washington and remanding the matter for trial.[162] The Seventh Circuit Court concluded that a jury could find that the employer's actions would have been sufficient to dissuade a reasonable employee in Washington's position from making a charge of discrimination.[163] Therefore, the court held that summary judgment was improper because Washington's allegations, if true and if otherwise unexplained, would have constituted a "materially adverse" action.[164]

The District of Columbia Circuit adopted this approach in *Rochon v. Gonzalez*.[165] The plaintiff, Donald Rochon, was employed by the FBI as a Special Agent.[166] Rochon alleged that, after the FBI received evidence of death threats directed toward Rochon and his wife, they failed to provide Rochon with security or to investigate the threats.[167] According to Rochon, the FBI was retaliating against him because he had previously filed two Title VII racial discrimination charges against the FBI.[168] The district court dismissed Rochon's retaliation claim on the ground that he had not suffered an "adverse personnel action" sufficient to support a claim of retaliation.[169]

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159. *Washington*, 420 F.3d at 659. As a result of these decisions, Washington was forced to take sick leave every day from 3:00 PM until 5:00 PM in order to continue taking care of her son who had Down's Syndrome. *Id.* at 658-59. After exhausting her sick leave, Washington had to resort to an unpaid leave of absence until she was assigned to a supervisor who allowed her to return to her flex-time schedule. *Id.* at 659.

160. *Id.*

161. *Id.*

162. *Id.* at 660, 663.

163. *Id.* at 663.

164. *Washington*, 420 F.3d at 663.

165. 438 F.3d 1211 (D.C. Cir. 2006).

166. *Rochon*, 438 F.3d at 1213.

167. *Id.* at 1213-14.

168. *Id.*

169. *Id.* at 1213.

On appeal, Rochon contended that, because Title VII's anti-retaliation provision contains no language limiting its scope to employment-related actions, the district court had construed that provision too narrowly.[170] Although the District of Columbia Circuit Court had not previously considered the precise question of the scope of Title VII's anti-retaliation provision, it had dealt with the analogous problem in the context of the anti-retaliation provision of the Age Discrimination in Employment Act (hereinafter "ADEA").[171] In *Passer v. American Chemical Society*, the court held that retaliation under the ADEA was not limited to adverse employment actions.[172] Applying its ADEA rationale to "the closely related context of Title VII," the *Rochon* court held that the scope of Title VII's anti-retaliation provision is not limited to employment-related actions.[173]

The court found that the FBI's failure to investigate or protect against threats to Rochon's life might well have dissuaded a reasonable FBI agent from making or supporting a Title VII charge.[174] That is, a reasonable agent faced with death threats to himself and his family, finding no protection from his employer, might well have chosen to protect his family's safety rather than pursue his Title VII right to a discrimination-free workplace.[175] Therefore, the court reversed the district court's dismissal of Rochon's claim and remanded it for consideration in light of the newly articulated standard.[176]

Justice Alito's concurring opinion in *Burlington* clearly identified some of the difficulties that lower courts are likely to encounter in their attempts to apply the majority's holding.[177] Justice Alito argued that the majority employed a "loose and unfamiliar" standard of causation, defining a "materially adverse action" as one that "*might well* dissuade a reasonable worker from making or supporting a charge of discrimination."[178] Justice Alito's point is

170. *Id.* at 1214.

171. *Rochon*, 438 F.3d at 1217 (citing Passer v. Am. Chem. Soc., 935 F.2d 322, 330 (D.C. Cir. 1991)).

172. *Id.* (citing *Passer*, 935 F.2d at 331).

173. *Id.* at 1217. As further support for its conclusion, the court relied upon the Supreme Court's pronouncement in *Robinson v. Shell Oil Co.* that the primary purpose of anti-retaliation provisions is to maintain "unfettered access to statutory remedial mechanisms." *Id.* at 1218 (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997)).

174. *Id.* at 1220.

175. *Id.*

176. *Rochon*, 438 F.3d at 1220.

177. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2420-21 (2006) (Alito, J., concurring).

178. *Id.* at 2421 (quoting *id.* at 2415 (majority opinion)) (emphasis added).

well taken. At first blush, it seems as if the majority must have developed a perfectly workable understanding of causation, only to obfuscate it deliberately by substituting the words "might well" for the perhaps more natural choice, "would." Practically speaking, it may be a rare case indeed in which a jury would find that the "might well" standard of causation was met, while the "would" standard was not. However, an unfamiliar standard is not ipso facto unworkable. Furthermore, the standard's subjectivity or unpredictability, although excessive according to Justice Alito, is in fact tempered by the majority's objective "reasonable worker" standard.

Justice Alito was equally dissatisfied with the majority's "reasonable worker" standard.[179] The problem, according to Justice Alito, is that the majority opinion is unclear regarding the degree to which the reasonable worker takes on the plaintiff-employee's personal characteristics.[180] Just as with the causation standard, the "reasonable worker" criterion defies easy application. The majority leaves open the question of which and how many of a plaintiff-employee's characteristics are to be considered by the jury.[181]

Justice Alito's misgivings are likely to strike a chord among legal professionals as well as employers and employees — all of whom would certainly appreciate an easy-to-apply standard. To be sure, clarity and predictability tend to find great favor in the legal community and in the business world. Nevertheless, the alleged theoretical and semantic ambiguities of the majority opinion will likely prove to be *Burlington*'s greatest assets. As much as we might wish to formulate a bright-line test for discriminatory retaliation, the reality of workplace interaction teaches us that such a test is not only impracticable, but undesirable. Try as we might to construct a purely objective, universal "reasonable worker" against whose abstract perception a jury might test all manner of allegedly retaliatory acts, the truth is that such an impersonal standard is ill-suited to the task. An employer's retaliation is rendered actionable not by the objective character of the acts committed, but rather by the effect of those acts on a particular employee.

Therefore, because retaliation depends for its existence upon the perception and experience of an employee, and because each employee's perception and experience are necessarily informed by his personal characteristics, it follows that the "reasonable worker"

179. *Id.* at 2421 (Alito, J., concurring).
180. *Id.*
181. *Id.*

must also incorporate certain subjective characteristics. Justice Alito is correct to say that the majority has left us without a guide to determine which individual features ought to be considered in a particular case. However, this is precisely the strength of the *Burlington* opinion — and its wisdom.

Despite its difficult application, *Burlington* represents the Supreme Court's ongoing commitment to the availability of remedies under Title VII and to the fact-specific kind of analysis that will ensure that the contours of Title VII continue to be sensitive to the unique circumstances of every case. It was with this purpose in mind that the majority reaffirmed the Court's statement in *Oncale v. Sundowner Offshore Services, Inc.*[182] that "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."[183] With its opinion in *Burlington*, the Supreme Court has ensured that lower courts will not have recourse to a tidy formula, but will instead be compelled to consider the circumstances of each case intimately, attending to the unique character not only of the acts committed and suffered, but of the people committing and suffering them.

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182. 523 U.S. 75 (1998).
183. *Burlington*, 126 S. Ct. at 2415 (quoting *Oncale*, 523 U.S. at 81-82).