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Burlington Northern & (and) Santa Fe Railway Co. v. White Getting on the Right Track

Lindsay Conway Thomas

BURLINGTON NORTHERN & SANTA FE RAILWAY CO. V. WHITE: GETTING ON THE RIGHT TRACK

*Lindsay Conway Thomas**

I. INTRODUCTION

Congress enacted Title VII to prevent and remedy employment discrimination based on race, color, sex, religion and national origin.[1] Additionally, Title VII forbids retaliatory discrimination against employees who have engaged in an activity protected by the Act.[2] Recently, the Supreme Court of the United States moved onto the right track to protect employees from retaliation. In *Burlington Northern & Santa Fe Railway Co. v. White*, the Court defined the scope and severity of retaliation cognizable under Title VII, resolving a split among the United States Circuit Courts of Appeal.[3] Previously, some courts had required higher threshold conduct for actionable retaliation than others.[4] In *White*, the Court adopted an expansive approach in accord with the courts that had deemed less severe retaliation cognizable.[5] The standard enunciated in *White* reflects the Court's appreciation for the many forms that retaliation may assume and the chilling effect retaliation has on the overall purpose of Title VII. This Note will analyze the majority holding and concurring opinion in *White*, as well as the interplay between the current standards for retaliation, hostile work environment harassment, and constructive discharge.

II. FACTS AND PROCEDURAL HISTORY

In 1997, Shelia White was the only female employed in the Maintenance of Way department at Burlington's Tennessee Yard.[6] In June of that year, White was hired as a "track laborer," a position that entails manually removing and replacing track components and clearing debris such as

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1. 42 U.S.C. § 2000e-2(a) (2000).
2. 42 U.S.C. § 2000e-3(a) (2000).
3. 126 S.Ct. 2405 (2006).
4. *Compare* Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997) (holding cognizable retaliation includes only "ultimate employment decisions includ[ing] acts such as hiring, firing, granting leave, discharging, promoting, or compensating") *with* Ray v. Henderson, 217 F.3d 1234, 1243 (9th Cir. 2000) (holding an "adverse employment action" meaning "any adverse treatment that is based on a retaliatory motive and reasonably likely to deter the charging party or others from engaging in a protected activity" is actionable retaliation).
5. *White*, 126 S.Ct. at 2415.
6. *Id* .at 2409.

spilled cargo and brush.[7] Given her previous experience operating forklifts, White was promptly assigned to a forklift operator position, a more prestigious and sought-after job.[8]

In September 1997, White complained to Burlington officials that her supervisor had repeatedly made sex-based, inappropriate comments to her in the presence of her male co-workers.[9] Following an investigation, Burlington temporarily suspended White's supervisor and required that he attend sexual-harassment training.[10] Simultaneously, Burlington removed White from forklift operation and reassigned her to a track labor position on the grounds that "a more senior man should have the less arduous and cleaner job of forklift operator."[11] Although White earned the same wages for both positions, the track laborer position was admittedly more arduous and less desirable.[12]

Following the reassignment, White filed two complaints against Burlington with the Equal Employment Opportunity Commission (EEOC). In October 1997, White's complaint alleged that reassignment to track laborer constituted "unlawful gender-based discrimination and retaliation" because of her previous complaint of gender discrimination and sexual harassment.[13] In December 1997, White filed another retaliation charge with the EEOC that alleged Burlington's roadmaster had "placed her under surveillance and was monitoring her daily activities."[14]

Approximately three days after copies of the second EEOC complaint were mailed to Burlington,[15] White was suspended indefinitely without pay following a disagreement with a supervisor who claimed that she was insubordinate.[16] At this time, White invoked internal grievance procedures through which Burlington determined that she had not been insubordinate and should not have been suspended.[17] White was then reinstated as a track laborer and provided backpay in compensation for her thirty-seven day suspension.[18] Subsequently, White filed a third charge with the EEOC which alleged that the suspension was retaliatory.[19]

After she exhausted all administrative remedies, White filed a lawsuit in the United States District Court of Western Tennessee alleging, *inter alia*, that the reassignment of her job duties and thirty-seven day suspension without pay constituted an unlawful retaliation in violation of section

7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *White*, 126 S.Ct. at 2409.
12. White v. Burlington N. & Santa Fe Ry. Co., 364 F.3d 789, 793 (6th Cir. 2005).
13. *White*, 126 S.Ct. at 2409.
14. *Id.*
15. *White*, 364 F.3d at 794.
16. *White*, 126 S.Ct. at 2409.
17. *Id.*
18. *Id.*
19. *Id.*

704 of Title VII.[20] A jury found for White on both retaliation claims and awarded her $43,500 in compensatory damages, which included $3,250 in medical expenses.[21] Burlington filed a post-trial motion for judgment as a matter of law, which was denied by the district court.[22] Burlington appealed.[23] A Sixth Circuit panel reversed the judgment and found for the company on the grounds that White had failed to support her retaliation claim because neither her transfer nor her suspension met the court's requisite "adverse employment action" standard.[24] Upon rehearing en banc, however, the full Court of Appeals vacated the panel's decision and then affirmed the jury's findings on both retaliation claims.[25]

The en banc court unanimously affirmed the district court's judgment; however, the judges failed to agree on the applicable retaliation standard.[26] Writing for the majority, Judge Gibbons adhered to the moderate Sixth Circuit "adverse employment action" standard requiring conduct materially affecting terms or conditions of employment, but not necessarily an ultimate employment action.[27] Judge Gibbons relied heavily on *Kocsis v. Multi-Care Management,*[28] explaining that the Supreme Court had also relied on *Kocsis* in *Burlington Industries v. Ellerth*, which defines a tangible employment action as requiring "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with different responsibilities or a decision that causes a significant change in benefits."[29] Under the Sixth Circuit standard, the terms "adverse employment action" and "tangible employment action" were interchangeable.[30] To resolve the existing circuit split concerning the proper applicable standard, the Supreme Court of the United States granted certiorari.[31]

III. Background and History of the Law

A. *Title VII Overview*

Title VII of the Civil Rights Act of 1964 is the principal federal statute proscribing employment discrimination. Congress enacted Title VII as a catalyst to rouse Americans to put a stop to discrimination in the workplace. While Title VII provides redress "to make persons whole for injuries suffered on account of employment discrimination, its primary objective . . . is not to provide redress but to avoid harm."[32] To that effect, Title

20. *Id.* at 2410.
21. *Id.*
22. *White*, 126 S.Ct. at 2410.
23. *Id.*
24. *White*, 364 F.3d at 795.
25. *Id.* at 809.
26. *Id.*
27. *Id.* at 795-98.
28. 97 F.3d 876 (6th Cir. 1996).
29. *White,* 364 F.3d at 798 (quoting Burlington Indus. v. Ellerth, 524 U.S. 742, 761 (1998)).
30. *Id.* at 796 n.1. (citing Bowman v. Shawnee State Univ., 220 F.3d 456, 461 n.5 ("Courts use the terms tangible employment detriment and materially adverse employment action interchangeably.")).
31. *White*, 126 S.Ct. at 2411.
32. Faragher v. City of Boca Raton, 524 U.S. 775, 805-06 (1998).

VII generally serves a prophylactic purpose.[33] When employers implement anti-discrimination / anti-retaliation policies, inform personnel of impermissible conduct, and establish effective complaint procedures, the primary objective of Title VII is effectuated.[34]

Title VII contains two primary provisions, Section 703 or the anti-discrimination provision,[35] and Section 704 or the anti-retaliation provision.[36] While both provisions are chiefly prophylactic, individually, they strive toward different goals, and thus have required divergent applications by employers and courts.

1. The Anti-Discrimination Provision

The anti-discrimination provision prohibits discrimination against job applicants and employees on the basis of that individual's "race, color, religion, sex, or national origin."[37] In *McDonell Douglas Corp. v. Green*, the Supreme Court explained that the primary goal of Section 703 is "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered . . . stratified work environments to the disadvantage of minority citizens."[38] The express language of the provision limits its coverage to employment-related discrimination affecting the "terms, conditions, or privileges of employment."[39] In pertinent part, Section 703(a) of Title VII provides:

> It shall be an unlawful employment practice for an employer –
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any which 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.[40]

33. *Id.*
34. Kolstad v. Am. Dental Ass'n , 527 U.S. 526 (1999); *Faragher*, 524 U.S. at 806.
35. 42 U.S.C. § 2000e-2(a)(2000).
36. 42 U.S.C. § 200e-3(a)(2000).
37. 42 U.S.C. § 2000e-2(a)(2000).
38. 411 U.S. 792, 800 (1973)(2000).
39. 42 U.S.C. § 2000e-2(a)(2000).
40. *Id.*

2. The Anti-Retaliation Provision

The anti-retaliation provision of Title VII prohibits retaliation against employees and applicants for employment "who have either availed themselves of Title VII's protections or assisted others in so doing."[41] In *Robinson v. Shell Oil Co.*, the Supreme Court declared that the "primary purpose" of the anti-retaliation provision is "[m]aintaining unfettered access to statutory and remedial mechanisms."[42]

Both current and former employees are afforded protection under the anti-retaliation provision.[43] Section 704(a) provides absolute protection to employees who have participated in any way in an investigation of a Title VII violation. Employees who oppose unlawful employment practices through complaint or protest are also afforded protection under Section 704(a).[44] An employee is generally not required to prove that the employer's underlying action unlawful to be protected under the anti-retaliation provision, provided that the employee has a reasonable belief that the employer was engaged in an unlawful employment practice.[45] In pertinent part, Section 704(a) mandates:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practices made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this subchapter.[46]

B. Proving Unlawful Retaliation Under Title VII

1. The Requisite Elements of Retaliatory Discrimination

The plaintiff in an unlawful retaliation case must satisfy the preliminary burden of proving a prima facie case of retaliation.[47] Prior to the Supreme Court's decision in *White*,proving a prima facie case of retaliation required that the plaintiff show (1) she was engaged in a statutorily protected expression under Title VII; (2) she suffered an adverse employment action; and (3) that there is a causal connection between the protected expression and the adverse action.[48] A plaintiff may prove such causal connection through either direct evidence of retaliatory intent or through

41. 519 U.S. 337, 339 (1997).
42. *Id.* at 346.
43. *Id.* at 345.
44. 42 U.S.C. § 2000e-3(a)(2000).
45. *See, e.g.*, Payne v. McLemore's Wholesale & Retail Stores, 654 F.2d 1130 (5th Cir. 1981); *see also* Clark County School District v. Breeden, 532 U.S. 268, 269-70 (2001) (per curium).
46. 42 U.S.C. § 2000e-3(a)(2000).
47. *E.g.*, Ray v. Henderson, 217 F.3d 1234, 1240 (9th Cir. 2000).
48. *Id.*

circumstantial evidence.[49] The *McDonnell Douglas* burden-shifting scheme operates when the plaintiff seeks to prove a causal connection through circumstantial evidence.[50]

Under the *McDonell Douglas* scheme, if a plaintiff proves a prima facie case of retaliation, the burden then shifts to the employer to produce admissible evidence of "a legitimate, non-discriminatory reason for the adverse action."[51] Should the employer satisfy this burden, the presumption of retaliation is eliminated, and the burden shifts back to the plaintiff to demonstrate that the employer's proffered reason was merely pretextual.[52] A plaintiff may prove the employer's reason was pretextual by showing: "(1) [it] has no basis in fact; (2) did not actually motivate the adverse action; or (3) was insufficient to motivate the adverse action."[53] Under this burden-shifting scheme, the plaintiff always bears the ultimate burden of persuasion.[54]

2. The Three Approaches for Defining an Adverse Employment Action in a Retaliatory Context

Although the Circuit Courts of Appeals have consistently applied the burden-shifting scheme in the analysis of retaliation claims, the circuits have previously applied vastly different requirements for the satisfaction of each element of a plaintiff's prima facie case.[55] For the purposes of this Note, attention will be focused on the circuit split concerning the definition of the second element of a prima facie retaliation claim, an adverse employment action.

The Circuit Courts of Appeals have propounded three distinct approaches in defining an adverse employment action in the retaliation context.[56] Previously, the Courts of Appeals for the First, Seventh, Ninth, Tenth, Eleventh, and District of Columbia Circuits, along with the EEOC, employed an expansive approach.[57] Under this approach, an adverse employment action broadly consists of "any action that is reasonably likely to

49. *See* Swierkiewicz v. Sorema, 534 U.S. 506, 511 (2002); Laderach v. U-Haul of Northwestern Ohio, 207 F.3d 825, 829 (6th Cir. 2000).

50. *E.g.*, *Ray*, 217 F.3d at 1240.

51. *McDonnell Douglas Corp.*, 411 U.S. at 802.

52. *Id.* at 804.

53. Abbott v. Crown Motor Co., 348 F.3d 537, 542 (6th Cir. 2003) (citing Manzar v. Diamond Shamrock Chem. Co., 29 F.3d 1078, 1084 (6th Cir. 1994)).

54. *Id.* (citing St. Mary's Honor Cntr. v. Hicks, 509 U.S. 502, 511 (1993)).

55. *Ray*, 217 F.3d at 1240-42; Brian Riddell & Richard A. Bales, *Adverse Employment Action in Retaliation Cases*, 34 U. BALT. L. REV. 313, 316-20 (2005).

56. *Id.*

57. Rochon v. Gonzales, 438 F.3d 1211, 1219-20 (D.C. Cir. 2006) (holding the FBI's failure to investigate death threats against a former agent constituted adverse employment action); *Ray*, 217 F.3d at 1243-44 (holding elimination of employee meetings, elimination of flex-time policies, "workplace lockdown," reduction of workload, and creation of a hostile work environment constituted adverse employment action); Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1452, 1455-56 (11th Cir. 1998) (holding adverse employment actions may include requiring an employee to work through his lunch break, assigning a one-day suspension, soliciting express negative remarks about an employee from co-workers, changing an employee's schedule without notice, voicing negative remarks about an employee, and delaying approval for medical treatment without cause); Knox v. Indiana, 93 F.3d 1327, 1334 (7th Cir.

deter the charging party or others from engaging in future protected activities."[58] Conversely, the Courts of Appeals for the Second, Third, Fourth, and Sixth Circuits previously adopted a moderate approach, whereby an adverse employment action must "materially affect the terms and conditions of employment."[59] However, the Courts of Appeals for the Fifth and Eighth Circuits previously employed a restrictive approach, whereby only "ultimate employment decisions" created a cognizable adverse employment action.[60]

a. The Expansive Approach

The expansive approach, as previously adopted by the First, Seventh, Ninth, Tenth, and Eleventh Circuits and the EEOC, defines an "adverse employment action" as any action "reasonably likely to deter the charging party or others from engaging in protected activity."[61] While the aforementioned circuits employed a broad definition of "adverse employment action," materiality of the retaliation was also keenly emphasized by all except the Ninth Circuit and the EEOC.[62] The Seventh Circuit explained, "[a]lthough the anti-retaliation rule in § 2000e-3(a) is broader than the anti-discrimination rule in § 2000e-2(a) in the sense that it extends beyond

1996) (holding adverse employment actions include "moving the person from a spacious, brightly lit office to a dingy closet, depriving the person of previously available support services . . . or cutting off challenging assignments"); Berry v. Stephenson Chevrolet, 74 F.3d 980, 986 (10th Cir. 1996) (holding malicious prosecution constitutes an adverse employment action); Wyatt v. City of Boston, 35 F.3d 13, 15-16 (1st Cir. 1994) (holding adverse employment actions include "demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations and toleration of harassment by other employees"); Riddell & Bales, *supra* note 55, at 333.

58. *See* cases cited *supra* note 57.

59. *See* White v. Burlington Northern & Sante Fe Railway Co., 364 F.3d 789, 799 (6th Cir. 2005) (holding reassignment of job duties to a dirtier and less prestigious position and indefinite suspension without pay constituted an adverse employment action); Von Gunten v. Maryland, 243 F.3d 858, 866 (4th Cir. 2001) (holding "[a]dverse employment action includes any retaliatory act or harassment if, but only if, that act or harassment results in an adverse effect on the 'terms, conditions, or benefits' of employment"); Richardson v. New York State Dept. of Corr. Services, 180 F.3d 426, 444 (2d Cir. 1999) (holding a prison employee's "transfer and reassignment which involved different job responsibilities . . . involving contact with the prison population constituted an adverse employment decision"); Robinson v. City of Pittsburgh, 120 F.3d 1286, 1301 (3d Cir. 1997) (holding unsubstantiated oral reprimands and unnecessary derogatory comments following [a] complaint do not rise to the level of the adverse employment action"). For a good discussion of the circuit split see Irene Gamer, *The Retaliatory Harassment Claim: Expanding Employer Liability in Title VII Lawsuits*, 3 SETON HALL CIRCUIT REV. 269, 295 (2006).

60. *See* Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997) (holding "hostility from fellow employees, having tools stolen, and resulting anxiety, without more, do not constitute[e] ultimate employment decisions, and therefore are not the required adverse employment actions"); Manning v. Metro. Life Ins. Co., 127 F.3d 686, 692-93 (8th Cir. 1997) (holding that co-worker harassment did not constitute an adverse employment action since it did not cause a "tangible change in duties or working conditions that constitute a material employment disadvantage"); Riddell & Bales, *supra* note 55, at 331-32.

61. *See* cases cited, *supra* note 57.

62. *E.g.*, *Rochon*, 438 F.3d at 1219 ("materiality is implicit in the term 'discriminate' as it is used in Title VII"); *see Ray*, 217 F.3d at 1243 (applying the EEOC standard that interprets "adverse employment action' to mean 'any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity" but no mention of materiality requirement).

pay and other tangible employment actions, nothing in § 2000e-3(a) says or even hints that the significance or materiality requirement has been dispensed with."[63] Additionally, the context of the retaliatory situation is important in the materiality analysis because what may be immaterial in certain situations may be material in others.[64]

Under the expansive standard, retaliation does not have to alter the terms or conditions of employment, provided that the action is materially adverse or reasonably likely to discourage an employee from participating in a protected activity.[65] Examples of materially adverse actions under this approach have included providing unfavorable job references, lateral transfers, unfounded performance evaluations, toleration of harassment by other employees,[66] discontinuation of challenging assignments, moving an employee from a nice office to a dingy closet,[67] malicious prosecution of a former employee,[68] refusal to investigate death threats against a former FBI agent,[69] creation of a hostile work environment, cancellation of flex-time policies or other scheduling changes,[70] requiring an employee to work through her lunch break, assigning a one-day suspension, and causing undue delay in the authorization of medical treatment.[71]

Proponents of the expansive approach have relied on the text and purpose of Title VII to support their view.[72] Proffering a textual argument, the Ninth Circuit asserted, "[a]ccording to 42 U.S.C § 2000e-3(a), it is unlawful 'for an employer to discriminate' against an employee in retaliation for engaging in a protected activity. This provision does not limit what type of discrimination is covered, nor does it proscribe a minimum level of severity for actionable discrimination."[73] Using the expansive approach, courts reasoned that confining adverse employment actions to the terms and conditions of employment frustrates the "primary purpose" of the anti-retaliation provision, which the Supreme Court has declared is "maintaining unfettered access to statutory remedial mechanisms."[74] Courts that subscribed to this view maintained that it focuses on the deterrent effects of retaliatory conduct, rather than the ultimate employment action, thus "effectuates the letter and purpose of Title VII."[75]

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63. *Washington v. Illinois Dept. of Revenue*, 420 F.3d 658, 661 (7th Cir. 2005).

64. *See id.* at 662 (finding flex-time schedule vital to an employee caring for a son with Down syndrome); *Ray*, 217 F.3d at 1245-46 (finding removal of "self-management policy" critical to an employee caring for an ill spouse).

65. *E.g.*, *Washington*, 420 F.3d at 660.

66. *Wyatt*, 35 F.3d at 15-16.

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

68. *Berry*, 74 F.3d at 986.

69. *Rochon*, 438 F.3d at 1219.

70. *Ray*, 217 F.3d at 1243-44.

71. *Wideman*, 141 F.3d at 1455-56.

72. *Ray*, 217 F.3d at 1243; *Knox*, 93 F.3d at 1334; *Rochon*, 438 F.3d at 1216-17.

73. *Ray*, 217 F.3d at 1243.

74. *Rochon*, 438 F.3d at 1218 (citing *Robinson*, 519 U.S. at 347).

75. *Ray*, 217 F.3d at 1243; *see Rochon*, 438 F.3d at 1218.

b. The Moderate Approach

The moderate approach, previously adopted by the Second, Third, Fourth, and Sixth Circuit Courts of Appeal, defines an "adverse employment action" as an act that materially affects "the terms, conditions, or benefits" of the plaintiff's employment.[76] Ultimate employment actions, such as hiring, discharging, or refusing to promote, certainly fell within the moderate approach; however, such actions were not required, provided that the requisite "terms or conditions of employment" standard was satisfied.[77] This approach also emphasized the materiality requirement, as the Third Circuit explained, ". . . objectionable conduct attributable to an employer is not always sufficient to alter an employee's terms, conditions, or privileges of employment and is thus not always sufficient to violate Title VII."[78]

Recognizing the moderate approach, courts have held that an array of adverse employment actions may impact the terms of conditions of employment, while falling short of an ultimate employment action.[79] In defining an adverse employment action, moderate approach courts seemed to rely on the "tangible employment action" standard set forth by the Supreme Court in *Ellerth*.[80] For example, a diminution in job duties or status, unsubstantiated poor performance evaluations, or refusal of salary or benefits, along with other significant employment actions comprised adverse employment actions.[81]

The moderate approach courts acknowledged that retaliatory harassment, including supervisor-created hostile work environment harassment, may constitute an adverse employment action, provided the harassment satisfies the "severe or pervasive" standard.[82] An employer may be held liable for supervisor-created hostile work environment retaliation, but the employer may also be afforded an affirmative defense.[83] Moreover, the Second Circuit has held "unchecked retaliatory co-worker harassment" that is so "severe or pervasive" that a reasonable person would find the terms or conditions of employment altered is cognizable.[84] Liability may

76. *See* cases cited *supra* note 59.

77. *E.g.*, *Von Gunten*, 243 F.3d at 865.

78. *Robinson*, 120 F.3d at 1297.

79. *See* cases cited *supra* note 59.

80. *White*, 364 F.3d at 796, n.1 (noting that the terms tangible employment action and adverse employment action are interchangeable).

81. *See* cases cited *supra* note 59.

82. *Von Gunten*, 243 F.3d at 869-70 (holding retaliatory harassment creating a hostile work environment can constitute an adverse employment action where there is evidence that the conduct was "'severe or perverse enough' to create 'an environment that a reasonable person would find hostile or abusive'"); Morris v. Oldham County Fiscal Court, 201 F.3d 784, 792 (6th Cir. 2000) (modifying the second prong of plaintiff's prima facie case of retaliation to include adverse employment action or "severe or pervasive retaliatory harassment by a supervisor").

83. *Morris*, 201 F.3d at 792 (holding employer is entitled to raise *Ellerth* affirmative defense to sufficiently severe or pervasive harassment by a supervisor).

84. *Richardson*, 180 F.3d at 446 (holding retaliatory harassment by co-workers including putting manure in employee's parking space, hair in employee's food, shooting rubber bands at employee, and scratching employee's car satisfied the adverse employment action standard).

be imputed to an employer in a co-worker retaliatory harassment scenario according to general negligence principles.[85]

In support of the adverse employment action standard, moderate approach courts have relied on coterminous statutory construction and congressional intent.[86] As the Fourth Circuit explained, ". . . Congress has not expressed a stronger preference for preventing retaliation under §2000e-3 than for preventing actual discrimination under § 2000e-2" and "[i]n the absence of strong policy considerations, conformity between the provisions of Title VII is to be preferred."[87]

c. The Restrictive Approach

The restrictive approach courts, including the Fifth and Eighth Circuit Courts of Appeals have held that only "ultimate employment actions," such as "hiring, granting leave, discharging, promoting, and compensating" constitute adverse employment actions in the retaliation context.[88] Under this approach, "interlocutory or mediate employment decisions" did not constitute adverse employment actions.[89] Therefore, threats of being fired, being verbally reprimanded, lateral transfers, poor evaluations, or missed pay increases, likewise did not qualify as adverse employment actions under the restrictive approach.[90] Applying the restrictive approach, courts failed to recognize retaliatory hostile work environment harassment as a cognizable adverse employment action.[91]

Courts have relied on the purpose and text of Title VII to justify the restrictive approach.[92] As the Fifth Circuit explained, "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 decisions."[93] In *Mattern v. Eastman Kodak Co.*, the court reasoned that characterizing "interlocutory or mediate employment actions" as adverse employment actions would subject the employer to liability for "anything which *might* jeopardize employment in the future," and thus contravened the purpose of Title VII.[94] Moreover, the *Mattern* court asserted that proper statutory construction of the anti-retaliation provision restricts coverage to ultimate employment actions only.[95] In *Mattern*, the court relied on the main anti-discrimination provision in interpreting the

85. *Id.* (holding employer may be liable for retaliatory co-worker harassment if he knows or reasonably should have known about the harassment but failed to take prompt remedial action).

86. *Von Gunten*, 243 F.3d at 863-64; *Morris*, 201 F.3d at 787 (relying on the "common rule of statutory construction: namely that [a] term appearing in several places in a statutory text is generally read the same way each time it appears").

87. *Von Gunten*, 243 F.3d at 863, n.1 (quoting *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 366 (4th Cir.1985)).

88. *See* cases cited *supra* note 60.

89. *Mattern*, 104 F.3d at 708.

90. *Id.*; *Manning*, 125 F.3d at 692.

91. *Id.*

92. *Mattern*, 104 F.3d at 707-09; *see Manning*, 125 F. 3d at 692.

93. *Mattern*, 104 F.3d at 707 (quoting *Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir.1995)).

94. *Id.*at 708.

95. *Id.* at 708-09.

anti-retaliation provision.[96] The court explained that subsection (a)(1) which proscribes discrimination based on express terms "contrasts sharply" with subsection (a)(2) which is vague and consequentially broader in its proscriptions.[97] The *Mattern* court deduced, "[t]he anti-retaliation provision speaks only of 'discrimination;' there is no mention of the vague harms contemplated in [anti-discrimination provision] (a)(2). Therefore, this provision can only be read to exclude such vague harms, and to include only ultimate employment decisions."[98]

IV. INSTANT CASE

The Supreme Court granted certiorari to resolve the split among the circuits regarding whether Section 704 of Title VII proscribes only workplace or employment-related retaliatory actions and to illustrate the severity of harm cognizable under the provision.[99] The Supreme Court affirmed the Sixth Circuit's ultimate finding, but rejected the rule applied in favor of an expansive standard.[100] The Justices unanimously agreed that Burlington's actions constituted unlawful retaliatory conduct.[101] Justice Alito concurred in the judgment but rejected the majority's standard in favor of a moderate definition of retaliatory conduct.[102]

A. Justice Breyer's Opinion

Writing for the Court, Justice Breyer concluded that Burlington had indeed retaliated against White in violation of Title VII.[103] The Court disagreed with the retaliation standard applied by the Sixth Circuit, instead opting for a more liberal standard as employed in the Seventh and District of Columbia Circuits.[104] The Court held that Title VII's "anti-retaliation provision does not confine the actions and harms that it forbids to those that are related to employment or occur at the workplace."[105] The Court further held that a cognizable retaliatory action is "materially adverse to the reasonable employee or applicant" and "the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making a charge of discrimination."[106] In other words, a fact-finder is no longer required to find that the alleged retaliatory conduct is related to the "terms and conditions of employment," as long as the conduct meets the "materially adverse action" standard.[107]

96. *Id.*
97. *Id.*
98. *Id.*
99. *White*, 126 S.Ct. at 2411.
100. *Id.* at 2408.
101. *Id.*
102. *Id.* at 2421 (Alito, J., concurring).
103. *Id.* at 2417.
104. *Id.* at 2411-12 (citing *Washington*, 420 F.3d at 662; *Rochon*, 438 F.3d at 1217-18).
105. *White*, 126 S.Ct. at 2409.
106. *Id.*
107. *Id.* at 2416.

Justice Breyer engaged in careful analysis of both the language and purpose of Tile VII and rejected both the petitioner's and the Solicitor General's arguments that the substantive and anti-retaliation provisions should be read *in pari materia*.[108] Commencing with a textual argument, Justice Breyer noted that the language in Section 703(a) of Title VII diverges from the language used in Section 704(a) in important ways.[109] The Court explained that the substantive anti-discrimination provision expressly contains the limiting language "hire, discharge, compensation, terms, conditions or privileges of employment, employment opportunities, and status as an employer," whereas the anti-retaliation provision does not contain such limiting language.[110] Relying on *Rusello v. United States*, the Court followed the presumption that where Congress uses different language in the provisions of a statute they have acted "intentionally and purposefully in the disparate inclusion or exclusion."[111] The Court reasoned that the anti-retaliation provision was not aimed merely at the terms and conditions of employment and thus has a broader sweep than the substantive provision.

Next, Justice Breyer bolstered his argument with a thorough examination of the purpose of the two provisions.[112] Relying on *McDonnell Douglas Corp. v. Green*, the Court reasoned that the purpose of the anti-discrimination provision is to ensure a work environment free of discrimination based on one's race, ethnicity, religion, or gender.[113] Whereas, the purpose of the anti-retaliation provision is to prevent workplace discrimination by ensuring employee's have access, free of retaliation, to implement the "Act's basic guarantees."[114] In other words, "[t]he substantive provision seeks to prevent injury to individuals based on who they are, *i.e.*, their status. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct."[115]

In order to achieve these different objectives, the Court reasoned that the anti-discrimination and anti-retaliation provisions require different constructions.[116] The Court cited examples of how an employer may effectively retaliate against an employee through conduct "not directly related to his employment or by causing him harm *outside* the workplace."[117] Thus, the Court explained that limiting construction of the anti-retaliation

108. *Id.* at 2411-12.

109. *Id.* at 2211.

110. *Id.* (internal quotations omitted).

111. *White*, 126 S.Ct. at 2211 (quoting 464 U.S. 16, 23 (1983)).

112. *Id.* at 2412.

113. *Id.* (citing 411 U.S. 792, 800-01 (1973)).

114. *Id.*

115. *Id.*

116. *Id.*

117. *White*, 126 S.Ct. at 2412 (citing *Rochon*, 438 F.3d at 1213 (FBI retaliation against employee "took the form of the FBI's refusal, contrary to policy, to investigate death threats a federal prisoner made against [the agent] and his wife"); *Berry*, 74 F.3d at 986 (finding actionable retaliation where employer filed false criminal charges against the former employee who complained about discrimination)).

provision to only the terms and conditions of employment could not deter the various manifestations retaliation may assume.[118] As Justice Breyer noted, such narrow construction would cause the anti-retaliation provision to fail in its essential purpose of "maintaining unfettered access to statutory remedial mechanisms."[119] Rejecting the argument of both petitioner and Solicitor General, Justice Breyer explained that the statutes' different purposes resolve any averred "anomaly," and further validates the different constructions.[120]

Further substantiating the Court's view, Justice Breyer emphasized that neither precedent nor the EEOC manual compel a more restrictive construction.[121] The Court noted the absence of binding precedent on the issue and distinguished the *Ellerth* "tangible employment action" standard on the grounds that *Ellerth* did not deal with Title VII's retaliation provision, but rather dealt with vicarious liability issues.[122] Additionally, the Court explained that the EEOC 1998 Manual, which provides the only express statement on whether the anti-retaliation provision is limited to the activity addressed in the anti-discrimination provision, affirms that it is not so limited.[123]

After establishing that the anti-retaliation provision extends beyond employment or workplace-related actions, the Court set forth the standard for the severity of harm actionable under the provision.[124] Relying on *Rochon v. Gonzales* and *Washington v. Il. Dept. of Revenue*, the Court explained, "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means that it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'"[125] Consistent with *Oncale v. Sundowner Offshore*, Justice Breyer emphasized the standard of "material adversity" as crucial in delineating actionable harms from occasional teasing and trivial harms which occur in virtually all workplaces.[126] In establishing this standard, the Court looked again to the purpose of the statute in providing employees "unfettered access" to remedial measures.[127] The Court reasoned that normally trivial slights and "simple lack of good manners" do not so hinder employee access.[128]

The Court further explained that the material adverse action standard is objective and thus judicially administrable.[129] Additionally, the Court emphasized the importance of contextual considerations in the analysis

118. *Id.*
119. *Id.* (quoting Robinson Shell Oil Co., 519 U.S. 337, 346 (1997)).
120. *Id.* at 2414.
121. *Id.* at 2413.
122. *Id.*
123. *White*, 126 S.Ct. at 2413.
124. *Id.* at 2415.
125. *Id.* (citing *Rochon*, 438 F.3d at 1219 (quoting *Washington*, 420 F.3d at 662)).
126. *Id.* (citing *Oncale v. Sundowner Offshore Services, Inc.*, 118 S.Ct. 998, 1002 (1998)).
127. *Id.*
128. *Id.*
129. *White*, 126 S.Ct. at 2415.

under the standard.[130] Finally, the Court rejected Justice Alito's argument that the standard would require a court to review the type of discrimination that resulted in the original discrimination charge.[131] As Justice Breyer stated, "the standard is tied to the challenged retaliatory act, not the underlying conduct that forms the basis of the Title VII complaint" and as such will serve as an effective filter for actionable retaliation claims.[132]

In conclusion, the Court applied the new standard to the facts of the case and found sufficient evidence to support of the jury verdict on White's retaliation claims.[133] First, the Court found that White's reassignment constituted retaliation; although both duties were within the same job description, the forklift operator position was more prestigious and less arduous than the track labor position.[134] Second, the Court held that White's thirty-seven day suspension constituted retaliation despite the fact that she was reinstated with backpay.[135] The Court explained that a reasonable employee would view the economic hardship that accompanies indefinite suspension as a deterrent to engaging in protected activities.[136]

B. Justice Alito's Concurrence

Concurring in the Court's judgment, Justice Alito rejected the majority's interpretation of the anti-retaliation provision of Title VII, as well as the standard established for cognizable retaliation.[137] Justice Alito agreed with the Sixth Circuit's construction and contended that the anti-retaliation provision should be interpreted *in pari materia* with the substantive anti-discrimination provision.[138] Advocating a harmonious interpretation of discrimination under the two provisions, he stated, "discrimination under § 704(a) means the discriminatory acts reached by § 703(a) – chiefly, discrimination 'with respect to . . . compensation, terms, conditions, or privileges of employment."[139] Justice Alito further contended that this interpretation affords an objective, judicially administrable standard that offers sufficient protection to employees with valid retaliation claims while filtering out those with trivial claims.[140]

Justice Alito noted that the previous Sixth Circuit or moderate "materially adverse employment action" definition was appropriately expanded

130. *Id.* (citing *Oncale*, 118 S.Ct. at 998 (explaining the real impact of workplace behavior can only be ascertained by examining the particular context of the action, including the surrounding circumstances, expectations, and relationships in the workplace); *Washington*, 420 F.3d at 662 (finding flex-time schedule is critical to employee with a disabled child)).

131. *Id.* at 2416 (rejecting Justice Alito's argument that the majority's interpretation implied that the protection afforded a retaliation victim was inversely proportional to the severity of the discrimination that led to the retaliation).

132. *Id.*

133. *Id.*

134. *Id.*

135. *White*, 126 S.Ct. at 2417.

136. *Id.*

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

138. *Id.*

139. *Id.* at 2419.

140. *Id.*

to a new context in *Ellerth* and advocated the test be "imported to the retaliation context."[141] He argued that the moderate "materially adverse employment action" test is not as restrictive as the majority contended.[142] First, Justice Alito reasoned that it is more probable that an employer would retaliate against an employee on the job due to the abundance of opportunities in that setting and the fear that off-the-job retaliation may be criminal.[143] Second, he argued that the moderate "materially adverse employment action" standard is not restricted to on-the-job retaliation as the majority maintained because it applies to "terms, conditions, and privileges of employment."[144] Illustrating his point, Justice Alito explained that in *Rochon* the FBI's failure to provide off-duty security, that would have otherwise been furnished, easily qualifies as a "term, condition, or privilege of employment," thus satisfied the "materially adverse employment" standard although the incident did not technically occur on the job.[145] Therefore, interpreting the statutes as coterminous would preclude the need to expand the scope of the anti-retaliation provision.[146]

Justice Alito argued that the majority's test raises "practical consequences" contrary to congressional intent.[147] First, he contended that the standard presents "perverse results" because it implies that the amount of protection offered a retaliation victim is "inversely proportional to the severity of the original act of discrimination that prompted the retaliation."[148] Justice Alito reasoned that it would be more difficult to dissuade a reasonable employee who was severely discriminated against from filing a complaint than it would be to dissuade a reasonable employee who was less severely discriminated against; therefore the latter category of employee is actually afforded more protection.[149] Second, he argued that the majority's concept of a "reasonable worker" is imprecise because it involves individual characteristics of the alleged victim such as age, gender, and family obligations.[150] Justice Alito suggested that this will ultimately confuse courts as to the relevance of other potential characteristics.[151] Finally, he criticized the causation standard as "loose and unfamiliar" and implied it will further complicate an "already complex" area of the law.[152]

Applying the interpretation that Section 704(a) extends only to those discriminatory acts shielded by Section 703(a), Justice Alito would vote to

141. *White*, 126 S.Ct. at 2419.
142. *Id.*
143. *Id.*
144. *Id.* at 2420.
145. *Id.*
146. *Id.*
147. *White*, 126 S.Ct. at 2420.
148. *Id.* at 2420-21.
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*

affirm the Court of Appeal decision that White's transfer and suspension constituted an unlawful retaliation.[153]

V. ANALYSIS

In establishing the "material adverse action" standard, the Court has adhered to the text and purpose of Title VII. Adopting the expansive approach, the Court has set forth an objective standard that is realistic in its approach to preventing retaliation. Importation of the *Ellerth* standard or moderate approach, as advocated by Justice Alito, would have contravened both the text and purpose of the Act and would have proved less effective for the prevention of retaliation. The inadequacy of Justice Alito's proffered standard reflects a general misunderstanding of the plight of employees subjected to retaliation and the ultimate chilling effect that retaliation has on Title VII's objectives. Furthermore, importation of the *Ellerth/Faragher* affirmative defense would compound the problems of Justice Alito's proffered standard.

A. The Contextually-Driven "Material Adverse Action" Standard Advances the Primary Purpose of the Anti-Retaliation Provision.

The "material adverse action" standard furthers the primary purpose of the retaliation provision, and advances the ultimate objective of Title VII. Recognizing the myriad of forms of retaliation existing outside the realm of the terms and conditions of employment, the "material adverse action" standard promotes the primary purpose of Section 704 in providing "unfettered access" to Title VII's remedial mechanisms.[154] Had the Court adopted either the moderate or restrictive approaches, the focus would be placed on the ultimate outcome of the employment action rather than on the deterrent effects of retaliation. Such an outcome-based focus ignores the profound chilling effect that retaliation triggers for those protected under the statute and on other co-workers as well. Because of this chilling effect, a less expansive standard would defeat the ultimate prophylactic purpose of Title VII. By adopting an expansive, deterrent-focused approach, the Court has precluded employers from maintaining a laundry list of harms, which although judicially sanctioned, are nonetheless retaliatory.[155] As the Amici reiterate in their brief to the Supreme Court, "[i]f the employee's right to claim unlawful discrimination is not absolutely protected, the substantive protections offered by Title VII ring hollow."[156]

By adopting a contextually-driven standard, the Court continues its deterrent focus and further advances the purpose of Title VII. Recognizing

153. *White*, 126 S.Ct. at 2421-22.

154. *Robinson*, 519 U.S. at 346.

155. *See* Brief for the Lawyers' Committee for Civil Rights Under the Law et al. as Amici Curiae Supporting Respondent, Burlington Northern & Santa Fe Railway Co. v. White, 126 S.Ct. 2405 (2006) (No.05-259).

156. *Id.*

that harms immaterial in certain circumstances may be material in others, the Court has adopted a practical approach to remedying retaliation. As expressed by the Amici in their brief to the Supreme Court, ". . .one can not exhaustively catalogue abuses of employer power prior to knowing what tools that supervisor has at his or her disposal, and without understanding how employees rely upon the workplace benefits or rules being used for the purpose of retaliation."[157] For example, changing an employee's work schedule may be immaterial to certain workers, but may be of critical importance to mother with a disabled child.[158] Without a contextual understanding of an employee's reliance upon, for instance, a flex-time schedule, a court may be unable to fully ascertain whether such a scheduling change constituted material retaliation. Additionally as the Court notes, requiring materiality of the harm prevents making a federal case of trivial harms and transforming Title VII into a "general civility code."[159]

While requiring consideration of the context of the situation, the "materially adverse action" standard is, as the Court notes, objective and judicially administrable.[160] Notwithstanding criticism by commentators,[161] the standard enunciated in *White* is workable and necessary. The Supreme Court has adopted a robust stance against retaliation by holding that *any* action that an employer takes that has a retaliatory animus, and is likely to deter a reasonable worker in that situation from engaging in a statutorily protected activity is unlawful retaliation.[162]

One commentator has raised particular concerns regarding the application of the material adverse action standard in the retaliatory harassment context.[163] Retaliatory harassment was not at issue in *White*, thus it was not expressly addressed by the Court. However, it stands to reason that if the creation of a hostile work environment "well might dissuade a reasonable worker from making or supporting a charge of discrimination" then it would fit squarely within the "materially adverse action" standard set forth in *White*.[164]

157. *Id.*

158. *White*, 126 S.Ct. at 2415 (citing *Washington*, 420 F.3d at 662).

159. *Id.* (citing *Oncale*, 523 U.S. at 80).

160. *Id.*

161. Gamer, *supra* note 59, at 296-302 (criticizing the *White* standard as unclear and unfair to employers); Harvard Law Review Association, *Standard for Retaliatory Conduct*, 120 HARV. L. REV. 312, 321 (2006) (criticizing the "stark contrast" between the scope of Section 703 and Section 704 as implying a narrow definition of 703 inconsistent with prior precedent and congressional intent).

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

163. Gamer, *supra* note 59, at 269-302 ("Burlington Northern did not address whether HWE [hostile work environment] harassment standards apply to retaliation claims. Consequently, employers remain unguided on their liability for retaliatory harassment.").

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

B. Importing the Hostile Work Environment or Constructive Discharge Requirements into the Retaliation Context Defeats the Purpose of the Anti-Retaliation Provision.

Following the Court's decision in *White*, there are now three levels of actionable harassing conduct: (1) conduct sufficient to constitute retaliation; (2) conduct sufficient to create a hostile work environment; and (3) conduct sufficient to constitute a constructive discharge. While the multi-tiered levels of liability may be complicated, they are necessary as a result of the Court's ill advised decisions regarding hostile work environment[165] and constructive discharge.[166] The Court could have applied the material adverse action standard in hostile work environment cases and then ratcheted up that standard in the constructive discharge actions. However the Court has chosen otherwise, and we now have a continuum of conduct for three different levels of liability.

One commentator has opined that the *White* standard requires clarification in retaliatory hostile work environment claims and urged that the *Ellerth/Faragher* affirmative defense be offered to employers in this context.[167] As noted previously, the Court did not explicitly address retaliatory hostile work environment in *White*, but the Court did expressly reject the application of the holdings of *Ellerth*, *Faragher*, and *Pennsylvania State Police v. Suders* on the grounds that those cases dealt with vicarious liability of employers.[168] Moreover, the *White* Court emphasized that the anti-discrimination provision and the anti-retaliation provisions serve distinct purposes, thus require different interpretations.[169] Therefore, it seems that the Court has rejected the importation of the additional requirements for hostile work environment and constructive discharge claims in the discrimination context into the retaliation context.

Application of the additional judicially-imposed requirements, as well as the affirmative defense offered employers in hostile work environment and hostile-environment constructive discharge claims would directly contravene the primary purpose of the anti-retaliation provision. Analysis of the hostile work environment and the hostile-environment constructive discharge requirements in comparison to requirements for a retaliation claim may be illustrative on this point.

1. Hostile Work Environment.

Under Section 703, hostile work environment harassment may occur where a tangible employment action is absent, provided that the conduct

165. *Ellerth*, 524 U.S. at 743-46 (importing tangible employment action standard rather than material adverse action standard).

166. Pennsylvania State Police v. Suders, 542 U.S. 129, 145 (2004) (establishing the threshold for constructive discharge claims as "facts alleging constructive discharge must be so intolerable that a reasonable person would be forced to quit").

167. Gamer, *supra* note 59, at 302.

168. *White*, 126 S.Ct. at 2413.

169. *Id.*

was sufficiently "severe or pervasive" so as to alter the terms or conditions of employment.[170] The Supreme Court has defined such conduct as "creat[ing] an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive."[171]

One commentator has explored how the "severe or pervasive" requirement has been exploited in some lower courts "to excuse harassment against women."[172] The "severe or pervasive" standard arose out of dicta from a Fifth Circuit case and this language is overdramatic in light of the definition provided in *Harris v. Forklift Systems, Inc.*[173] After *Harris*, however, lower courts have misapplied the "severe or pervasive" standard and excused egregious sexual harassment.[174] By requiring conduct that is both severe *and* pervasive in hostile work environment cases, certain lower courts have excused conduct constituting sexual assault or attempted sexual assault under criminal law,[175] while other courts have misused the standard by requiring proof that the "conduct tangibly affected the plaintiff's job performance."[176] Furthermore, other courts have parsed the evidence and ignored retaliatory conduct in the determination of whether harassment was sufficiently "severe or pervasive" leaving the plaintiff in a "Catch-22."[177] For the harassment to be sufficiently "severe or pervasive,"

170. Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993).

171. *Id.*

172. Judith J. Johnson, *License to Harass Women: Requiring Hostile Environment Sexual Harassment To Be "Severe or Pervasive" Discriminates Among the "Terms and Conditions" of Employment.* 62 MD. L. REV. 85, 85-6 (2003).

173. *Id.* at 95-100 (explaining that "severe of pervasive" terminology arose from dicta in Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971)).

174. *Id.*

175. *Id.* at 111-15 (citing Blough v. Hawkins Market, Inc., 51 F. Supp.2d 858, 862 (N.D. Ohio 1999) (court held that a co-worker grabbing another co-workers buttocks and crotch, trying to kiss her, and engaging in stimulation in front of her was not severe and pervasive because the incidents occurred over nine month period); Hannigan-Hass v. Bakers Life & Casualty Co., No. 95 C 7408, 1996 WL 650419 (N.D.Ill. Nov. 6, 1996) (court held that an incident in which the vice president of the company locked the plaintiff in his office, pushed her against a wall, told her to open her mouth, and then tried to kiss her, touch her breast, and put his hands under her pantyhose was not severe or pervasive because it was only one incident); Crenshaw v. Delray Farms, 968 F. Supp. 1300 (N.D. Ill. 1997) (holding that the following conduct which occurred over a four month period did not constitute a hostile work environment: co-worker grabbed plaintiff's breast, told plaintiff he needed someone like her to have sex with, grabbed her buttocks, called her "an ignorant ass bitch," then another co-worker rubbed his penis on her back, then a third co-worker offered her money to have sex with him, tried to kiss her, pried the lock off of a bathroom door from where she was hiding and tried to grab her, then a fourth co-worker told plaintiff "that the pants she was wearing made his groins growl" and that he wanted to go to a hotel and perform lewd sexual acts on her)).

176. *Id.* at 115-18 (citing Kenyon v. Western Extrusions Corp., No. Civ. A 3:98CV2431L, 2000 WL 12902 (N.D. Tex. Jan. 7, 2000) (holding that fifty alleged incidents of sexual harassment, including plaintiff's supervisor staring at her breasts, touching her bodily in a sexually explicit way, rubbing his genitals on her, inquiring if she was wearing panties, and telling her to "hike up [her] dress" were not severe or pervasive because her "workplace competence" was intact); McGraw v. Wyeth-Ayerst Laboratories, Inc., No. Civ. A. 96-5780, 1997 WL 799437 (E.D. Pa. Dec. 30, 1997) (holding that supervisor forcing plaintiff to kiss him, asking her out constantly, had retaliated against her, and screamed at her after she announced her engagement did not alter the terms or conditions of her employment and did not impede her job performance)).

177. *Id.* at 129-139 (citing Vargas-Harrison v. Waukegan Community Unit School District #60, No. 97 C 1071, 1998 WL 831837 (N.D. Ill. Nov. 25, 1998); Dudley v. Metro-Dade County, 989 F. Supp. 1192 (S.D. Fla. 1997)).

courts insist that the conduct must go on for a significant time period. Thus, if a plaintiff reports the harassment too soon it will not satisfy the "severe or pervasive" standard.

This "Catch-22" scenario is particularly salient when considered in light of the Supreme Court's decision in *Clark County School District v. Breeden*.[178] In this case, the plaintiff reported a single incident as sexual harassment, and was allegedly retaliated against.[179] The Court held that no reasonable person would believe this particular single incident rose to the level of "severe or pervasive," and dismissed the retaliation claim.[180] When looking merely at the facts of the case, the holding is appealing. However, considering the legal ramifications of the decision, it is problematic because the Court has imputed knowledge of a legal standard, "severe or pervasive" to the plaintiff.[181] Under *Breeden*, when a victim makes a flawed assessment of a legal standard, and then reports the conduct, she may be retaliated against with impunity by her employer.[182] Under *Ellerth*, however, if the plaintiff does not report the harassment the court may find that she has not mitigated the harm and she may be denied recovery all together.[183]

In light of the abuses tolerated under the "severe or pervasive" standard, the Court should not impose this requirement upon plaintiffs making a *retaliatory* hostile work environment claim. The discordance of the "severe or pervasive" standard and the "material adverse action" standard established in *White* is patent.

The lower courts seem to recognize this dissonance in employer-created retaliatory hostile work environment cases. In *Spector v. Board of Trustees of Community Technical College,* a Connecticut District court denied defendant's motion to dismiss plaintiff's retaliatory hostile work environment claim on the grounds that, "*White*, not *Harris*, sets the standard for determining whether an employer's actions constitute an adverse employment action. [Plaintiff] has alleged facts sufficient to allow a reasonable inference that the defendants created a hostile work environment in retaliation for [plaintiff's] protected speech."[184] In *Moore v. City of Philadelphia*, the Third Circuit Court of Appeals explained that prior to *White*, employees claiming retaliation through workplace harassment bore the burden of showing that the harassment was severe or pervasive enough to create a hostile work environment in violation of Section 703 in order to be

178. Johnson, *supra* note 172, at 139 (citing 532 U.S. 268 (2001)(per curium).
179. *Breeden*, 532 U.S. at 269-71.
180. *Id.*
181. Johnson, *supra* note 172, at 134.
182. *Id.*
183. *Id.*
184. No. 3:06-cv-129(JCH), 2006 WL 3462576, at *13 (Civ. Disc. Ct. D. Conn. Nov. 29, 2006).

protected under Section 704; however under *White* that is no longer required.[185] However, the First and Sixth Circuits have continued to impose the "severe or pervasive" standard in retaliatory hostile work environment cases.[186]

The lower court's treatment of co-worker retaliatory harassment is a bit murkier. The lower courts recognize the concept of co-worker retaliatory harassment as a valid claim, but in accord with tradition, liability to the employer under a general negligence framework.[187]

In *White* the Supreme Court declared, "[a] plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[188] This declaration makes no mention whatsoever that the materially adverse action be severe or pervasive. It contravenes the purpose of the anti-retaliation provision to arbitrarily import such requirements from the discrimination context into the retaliation context.

2. The *Ellerth/Faragher* affirmative defense.

In *Ellerth v. Burlington Industries*[189] and *Faragher v. City of Boca Raton*,[190] the Supreme Court examined the scope of employer liability in hostile work environment cases. In both of these cases the plaintiffs sought to impute liability to their employers for sexual harassment from their supervisors, although the plaintiffs "suffer[ed] no adverse, tangible job consequences."[191]

As noted *supra*, the Court defined a "tangible employment action" as "a significant change in employment status, such as hiring firing, failing to promote, reassignment with significantly different job responsibilities, or a

185. Moore v. City of Philadelphia, 461 F.3d 331, 341 (3d Cir. 2006); *see* Hoffelt v. Ill. Dept. of Human Rights, No. 1-05-1629, 2006 WL 29973369 (Ill. App.1 Dist. Oct. 20, 2006) (holding the cumulative effects of harassment, including retaliatory harassment, to be considered part of plaintiff's claim of hostile work environment and finding supervisory retaliatory harassment was a materially adverse action without mention of severe of pervasive standard); *see* Hare v. Potter, 220 Fed. Appx. 120, 131 (3d Cir. 2007) (rejecting the severe or pervasive standard in retaliatory hostile work environment cases in light of *White*).

186. Riveria-Martinez v. Commonwealth of Puerto Rico, 2007 WL 16069, *4 (1st Cir. Jan. 4, 2007) ("For a plaintiff to prove retaliation based on an employer's toleration of harassment, she must show that the employer tolerated severe or pervasive harassment motivated by the plaintiff's protected conduct."); *Randolph v. Ohio Dep't of Youth Services*, 453 F.3d 724, 736 (6th Cir. 2006) (defining the third element of a *prima facie* case of retaliatory harassment as "the defendant subsequently took an adverse, retaliatory action against the plaintiff, or the plaintiff was subjected to severe or pervasive retaliatory harassment by a supervisor').

187. Juarez v. Utah, 2008 WL 313671, *8 (10th Cir. Feb. 5, 2008); EEOC v. Body Firm Aerobics, Inc., No. 2:03 CV 846 TC, 2006 WL 1993784 (D. Utah, July 14, 2006) (recognizing co-worker retaliatory harassment if sufficiently severe); Juarez v. Utah Department of Health, No. 2:05CV0053PGC, 2006 WL 2623905 (D. Utah, Sept. 11, 2006) (imputing liability to employer for co-worker retaliatory harassment only where the employer orchestrated or had knowledge of the harassment).

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

189. 524 U.S. 742 (1998).

190. 524 U.S. 775 (1998).

191. *Ellerth*, 524 U.S. at 747.

change in benefits."[192] In *Ellerth* and *Faragher*, the Court defined two types of hostile work environment claims: (1) harassment that "culminates in a tangible employment action," in which employers are to be held strictly liable and (2) harassment that does not involve a tangible employment action, in which employers may assert an affirmative defense.[193]

When no tangible employment action has occurred, an employer may avoid vicarious liability for supervisor harassment by establishing an affirmative defense if (1) "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and (2) "the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise."[194] Under this doctrine, the plaintiff has a duty to mitigate harm and the defendant bears the burden to prove that the plaintiff unreasonably failed to do so.[195]

3. Hostile Environment Constructive Discharge

Constructive discharge occurs when "an employee's reasonable decision to resign because of unendurable working conditions is assimilated to a formal discharge for remedial purposes."[196] *Pennsylvania State Police v. Suders* is the seminal case on hostile environment constructive discharge, which occurs when a plaintiff advances a "compound claim" of a hostile work environment that culminated in the plaintiff feeling compelled to quit her job.[197] In *Suders*, the Supreme Court explained, "[a] hostile-environment constructive discharge claim entails something more [than mere hostile work environment or sexual harassment]: A plaintiff who advances such a claim must show working conditions so intolerable that a reasonable person would have felt compelled to resign."[198]

Constructive discharge claims are often tied to underlying sexual harassment and retaliation. As one commenter notes, often with constructive discharge cases, the plaintiff was exposed to sexual harassment, reported the harassment, the harassment continued and worsened until culminating in the plaintiff feeling coerced to quit.[199] This is a likely scenario considering statistics that reveal sixty-two percent of state employees who filed formal complaints of sexual harassment reported being retaliated against.[200]

192. *Id.* at 761.

193. *Ellerth*, 524 U.S. at 765; *accord Faragher*, 524 U.S. at 807-08.

194. *Id.* at 756; *accord Faragher*, 524 U.S. at 807.

195. *Suders*, 542 U.S. at 146.

196. *Id.* at 141 (citing 1 B. Lindemann & P. Grossman, Employment Discrimination Law 838-839 (3d ed.1996).

197. *Id.* (importing the *Ellerth/Faragher* framework, the employer is held strictly liable when an "official action" underlies the constructive discharge the employer is held strictly liable, but where no "official action" occurred the employer is entitled to an affirmative defense).

198. *Id.* at 144.

199. Martha Chamallas, *Title VII's Midlife Crisis: The Case of Constructive Discharge*, 77 S. CAL. L. REV. 307, 334 (2004).

200. *Id.* (citing Louise F. Fitzgerald, Suzanne Swan & Karla Fischer, *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. SOC. ISSUES 117, 122 (1995)).

C. *The Interplay of Retaliation, Hostile Work Environment Harassment, and Constructive Discharge.*

As noted *supra*, claims of hostile work environment followed by retaliation are often the stepping stones for constructive discharge claims. The hierarchy of the legal thresholds in these cases is as follows: (a) under *White*, retaliation requires a material adverse action that "well might dissuade a reasonable worker from making or supporting a charge of discrimination;"[201] (b) under *Harris*, hostile work environment claims must rise to the level of sufficiently "severe or pervasive" so as to "create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile of abusive;"[202] and (c) under *Suders*, to support a hostile-environment constructive discharge claim a plaintiff must show "working conditions bec[a]me so intolerable that a reasonable person in the employee's position would have felt compelled to resign."[203] Although the "severe or pervasive" and "so intolerable" thresholds have been abused by some courts to excuse intolerable sexual harassment against women, the differences between those thresholds and the threshold for retaliation make sense. As the *White* Court explained, the anti-retaliation provision has a broader sweep than the anti-discrimination provision because the provisions serve different individual goals.[204] For this reason alone, importation of the *Ellerth/Faragher* affirmative defense from the discrimination context into the retaliation context is illogical.

In *Suders*, the Court acknowledged that its motivation for implementing the *Ellerth/Faragher* framework stemmed from its desire to further Title VII's deterrent purpose by "encourag[ing] employees to report harassing conduct before it becomes severe or pervasive."[205] The Court has further acknowledged that the impetus for linking liability to the effectiveness of the employer's grievance policy was to implement effective grievance procedures.[206] However, in a retaliatory situation, an employee has already reported discriminatory conduct and seemingly the employer's grievance procedures have failed her. Thus, the victim in a retaliation context has already fulfilled the objective of the *Ellerth/Faragher* framework. As the *White* Court explained, the primary purpose of the anti-retaliation provision is providing "unfettered access to remedial mechanisms."[207] If the *Ellerth/Faragher* affirmative defense is imported into the retaliation context, it would impede access rather than promote it.

By adopting an expansive approach in *White*, the Court has moved onto the right track to protect employees from retaliation. One may speculate whether the robust protection offered by the Court, stems in part from

201. *White*, 126 S.Ct. at 2415.
202. *Harris*, 510 U.S. at 17.
203. *Suders*, 542 U.S. at 141.
204. *White*, 126 S.Ct. at 2412-13.
205. *Suders*, 542 U.S. at 145 (quoting *Ellerth*, 524 U.S. at 764).
206. *Id.*
207. *White*, 125 S.Ct. at 2412 (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997)).

its desire to have sexual harassment victims mitigate harm and report egregious conduct sooner rather than later.[208] This certainly is a commendable goal; however, there may be several other contributing factors as to why women do not report sexual harassment.[209]

One commentator has explained that it is "atypical" for victims of sexual harassment to file an internal complaint, even when the harassment was so egregious that they may later feel compelled to file a lawsuit.[210] For example, in a survey of federal workers only twelve percent of harassed female employees actually reported the harassment.[211] The fear that women face is "debilitating" because sexual harassment is often judged by a societal double standard stacked against women.[212] Additionally, women are more often victims of sexual assault and rape than men, and as a result their sensitivity to sexual misconduct and fear of reporting it are more than some groundless form of hysteria.[213]

It seems that the "Catch-22" harassment victims find themselves in as a result of *Ellerth*[214] requiring that harassment be reported and *Breeden*[215] which allows an employer to retaliate with impunity if a victim is incorrect in her assessment of a legal threshold may also contribute to the failure to report. In spite of the discord between the actual behavior of victims and the expectations imposed upon them by the law, offering employees more protection against retaliation and some compensation for the higher standards imposed for hostile environment and constructive discharge is laudable.

VI. CONCLUSION

The Supreme Court has gotten on the right track in *White* by adopting an expansive approach to protecting employees from retaliation by employers, thus furthering the purpose of the anti-retaliation provision, as well as the ultimate purpose of Title VII. Importing the *Ellerth/Faragher* framework into the retaliatory context would only place another obstacle in the path of an employee who has availed herself of Title VII's protections, thus directly contravening the purpose of Section 704.

208. *See, e.g, Suders*, 542 U.S. at 144.

209. Chamallas, *supra* note 196, at 337; Johnson, *supra* note 172, at 140.

210. Chamallas, *supra* note 196, at 337.

211. *Id.* (citing United States Merit Sys. Prot. Bd., Sexual Harassment in the Federal Workplace: Trends, Progress, Continuing Challenges 30 (1994)).

212. Johnson, *supra* note 172, at 140.

213. *Id.*

214. *Ellerth*, 524 U.S. at 765.

215. *Breeden*, 532 U.S. at 271.