Volume 111
Issue 4 *Dickinson Law Review - Volume 111, 2006-2007*

3-1-2007

Establishing Retaliation for Purposes of Title VII

Megan E. Mowrey

Establishing Retaliation for Purposes of Title VII

Megan E. Mowrey*

ABSTRACT

An employer is prohibited from retaliating against an employee who engages in a protected activity as defined by Title VII, including opposing discriminatory employment practices or filing charges alleging discrimination by the employer. The Supreme Court took up the issue of what constitutes retaliation for purposes of Title VII in an effort to resolve a split in the circuit courts. This Article examines the different standards used by the circuits and looks at the Sixth Circuit case that was appealed to the Supreme Court, as well as the resolution of that case by the Court. This Article also analyzes the nature of retaliation and the consequences for the law governing employment discrimination.

I. Introduction

Title VII of the Civil Rights Act of 1964 prohibits substantive discrimination by an employer against an employee (§ 703(a) of Title VII).[1] Title VII also prohibits retaliation by an employer against an employee who exercises his or her rights under the Act (§ 704(a) of Title VII).[2] The Supreme Court has clarified the elements of substantive discrimination in several cases,[3] but the circuit courts applied a variety of standards in analyzing retaliation.[4] The different standards partly reflected a disagreement regarding whether a successful plaintiff must

* Assistant Professor, School of Accountancy and Legal Studies, Clemson University College of Business and Behavioral Science.

1. Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1998).

2. Section 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) (2000).

3. *See, e.g.*, Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986); Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993); Oncale v. Sundowner Offshore Services, 523 U.S. 75 (1998).

4. *See* discussion *infra* Parts II and III.

establish the same elements in a case sounding in substantive discrimination or a case claiming retaliation. The Supreme Court reconciled the split in the circuits in *Burlington Northern & Santa Fe Ry. Co. v. White*.[5] This Article discusses the split prior to *Burlington Northern* and examines the Supreme Court's decision and its implications for claims of retaliation.

II. The Standards Applied by the Circuits

The circuit courts used four different standards[6] for establishing actionable retaliation at the time White argued her case in *Burlington Northern & Santa Fe Ry. Co. v. White*.[7] Before proceeding to the Supreme Court decision, this Article begins with a discussion of the circuits' various standards, presenting the alternatives that were available to the Court. The standard used by the Third and the Fourth Circuits[8] is examined first. This was the standard adopted by the Sixth Circuit,[9] where White's case originated.

A. The Retaliation Must Be Material and Employment Related

1. The Third Circuit

The Third Circuit required that prohibited retaliatory acts by an employer must be both material and job related.[10] In *Robinson v. City of Pittsburgh*,[11] employee Carmen Robinson began working for the Pittsburgh Police Department in 1990.[12] Robinson alleged that, beginning in 1992, she was sexually harassed for two years by her commander.[13] The harassment included inappropriate language and touching.[14] She filed both an internal complaint and a complaint with the Equal Employment Opportunity Commission ("EEOC") and eventually

5. *See* Burlington Northern & Santa Fe Ry. Co. v. White (*White II*), 126 S.Ct. 2405 (2006).

6. *See* discussion *infra* Parts II and III.

7. *Id. Burlington* 126 S.Ct. 2405.

8. Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997); Von Gunten v. Maryland, 243 F.3d 858, 866 (4th Cir. 2001).

9. White v. Burlington N. & Santa Fe Ry. Co. (*White I*), 364 F.3d 789, 802 (6th Cir. 2004), *cert. granted*, 126 S.Ct. 797 (U.S. Dec. 5, 2005) (No. 05-259). Burlington Northern & Santa Fe Ry. Co. v. White (*White II*), 126 S.Ct. 2405 (2006). *See infra* Parts II and III.

10. Robinson v. City of Pittsburgh, 120 F.3d 1286 (3d Cir. 2004).

11. *Id.*

12. *Id.* at 1291.

13. *Id.*

14. *Id.*

filed suit in the district court claiming a hostile work environment, sexual harassment and retaliation.[15] The district court largely dismissed the suit in a summary judgment action, and the jury held against Robinson on the remaining charges.[16] Robinson appealed both the summary judgment and the trial court's instructions to the jury on her remaining causes of action.[17] As part of her appeal, Robinson claimed that the city retaliated against her for reporting the harassing conduct, which included, "restricted job duties, reassignment and subsequent failure to transfer her out of an assignment in which she was under the direct command of the alleged harasser, and the issuance of several unsubstantiated oral reprimands against her," as well as additional questionable and derogatory comments and breaches of decorum.[18]

The Third Circuit held that such treatment failed to constitute adverse employment action as required by Title VII's anti-retaliation section; the conduct must affect the terms and conditions of employment.[19] The court cited its prior ruling in *Nelson v. Upsala College*[20] in which it held that § 704(a) "interdicts an unlawful employment practice rather than conduct in general which the former employee finds objectionable."[21] The difficulties Robinson encountered were not materially adverse to her employment, and, therefore, failed to constitute retaliation.[22] The circuit court affirmed the lower court's rulings against Robinson.[23]

2. The Fourth Circuit

As noted, the Sixth Circuit used a standard that required both materiality and job relatedness.[24] The standard was also used in the

15. *Id.* at 1292.
16. *Robinson*, 120 F.3d at 1291.
17. *Id.* at 1293.
18. *Id.* at 1300.
19. *Id.*
20. 51 F.3d 383 (3d Cir. 1995).
21. *Robinson*, 120 F.3d at 1300 (quoting *Nelson*, 51 F.3d at 388).
22. *Id.* at 1299-1300. The *Robinson* court also specifically addressed the notion of timing in claims of retaliation. *Id.* at 1301-03. The court admitted that its prior cases failed to provide a hard and fast rule regarding whether timing alone could establish causation in claims of retaliation. *Id.* at 1302 The court resolved the issue by stating that timing alone is not generally dispositive of causation when the facts do not evidence a clear connection between the employee's complaints and the employer's allegedly retaliatory acts. *Id.* Such a connection was present in the Third Circuit case of *Jalil v. Avdel*, in which the employee was fired two days after filing an EEOC claim. Jalil v. Avdel Corp., 873 F.2d 701, 708 (3d Cir. 1989).
23. *Robinson*, 120 F.3d at 1307.
24. White v. Burlington N. & Santa Fe Ry. Co. (*White I*), 364 F.3d 789, 792 (6th Cir. 2004), *cert. granted*, 126 S.Ct. 797 (U.S. Dec. 5, 2005) (No. 05-259). The Sixth Circuit case is discussed *infra* Part III.

Fourth Circuit case of *Von Gunten v. Maryland*.[25] Barbara von Gunten worked for the Maryland Department of the Environment ("MDE").[26] Her position required her to perform sanitary surveys on the Maryland shore for three months, and for the balance of the year work on a two-person boat collecting water samples in the Chesapeake Bay.[27] After initially serving on shore, von Gunten began working with her field supervisor, Vernon Burch.[28] Two months later, von Gunten reported to the head of her section, William Beatty, that Burch was sexually harassing her by using questionable language, touching her inappropriately and urinating off the side of the boat.[29] Beatty reported von Gunten's complaints to his supervisor, John Steinfort.[30] At a meeting attended by von Gunten, Burch, Beatty and Steinfort, von Gunten's complaints were discussed and the Maryland anti-harassment policy was distributed.[31] In response, Burch denied the harassment, and, when the pair returned to the boat, von Gunten alleged that Burch's activities worsened.[32]

In December 1996, Burch allegedly struck von Gunten with an oar, and von Gunten then asked Steinfort for a transfer off the boat.[33] Steinfort initially resisted the transfer, but eventually agreed.[34] Von Gunten then immediately reported Burch's harassment to Maryland's internal fair employment office.[35] Von Gunten's report was followed by a call from Steinfort to the fair employment office, in which he stated that there was insufficient evidence of harassment.[36] These conversations were followed by a written report by von Gunten and Maryland's investigation of the harassment, in which Maryland concluded that the harassment was not so "severe as to create an abusive working environment."[37] After reporting her difficulties to the fair employment office, von Gunten alleged that Maryland had retaliated against her by, among other things, removing her state-supplied car, downgrading her performance evaluations, reassigning her to shore duty, and generally subjecting her to a hostile work environment.[38]

---

25. Von Gunten v. Maryland, 243 F.3d 858, 866 (4th Cir. 2001).
26. *Id.* at 861.
27. *Id.* at 861-62.
28. *Id.* at 862.
29. *Id.*
30. *See id.*
31. *See* Von Gunten v. Maryland, 243 F.3d 858, 862 (4th Cir. 2001).
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *See* Von Gunten v. Maryland, 243 F.3d 858, 862 (4th Cir. 2001).
37. *Id.*
38. *Id.* at 862-63.

Von Gunten filed charges with the EEOC in 1997, and was subsequently offered a change in assignment.[39] She rejected the change, in part because it primarily consisted of shore work, and also because she would have had to work with Beatty and Steinfort, who had not, in von Gunten's opinion, adequately dealt with her claims of alleged sexual harassment.[40] After discussions with the fair employment office, which failed to address her ongoing difficulties, von Gunten resigned.[41]

The EEOC granted von Gunten a right to sue, and she filed in the district court.[42] The court granted summary judgment to Maryland regarding von Gunten's claims of retaliation and constructive discharge, but allowed the sexual harassment claim.[43] The jury that heard the case, however, found against her.[44]

When the case was appealed, the Fourth Circuit held that § 704(a) retaliation claims "require proof of an 'adverse employment action.'"[45] The court reiterated the holding announced in *Ross v. Communications Satellite Corp.*,[46] which applied the same standard to claims sounding in either §§ 703(a) or 704(a).[47] The court rejected the ultimate employment decision standard used in the Fifth and Eighth Circuit Courts.[48] In rejecting the ultimate employment decision standard, the court noted that while such actions as hiring or firing may constitute retaliation, additional actions such as "'retaliatory harassment' can also comprise adverse employment actions."[49]

The Fourth Circuit standard was of no help to von Gunten, since the court held that von Gunten's treatment failed to meet the necessary condition of an adverse impact.[50] Specifically regarding the allegedly retaliatory acts, the loss of von Gunten's state car was temporary, the changes to her performance evaluation were minor, and the ratings she received actually resulted in a pay increase.[51] Regarding von Gunten's

39. *Id.* at 863.
40. *Id.*
41. *See* Von Gunten v. Maryland, 243 F.3d 858, 863 (4th Cir. 2001).
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* (quoting Ross v. Commc'n Satellite Corp., 759 F.2d 355, 365 (4th Cir. 1985)).
46. *Ross,* 759 F.2d at 366.
47. *See* Von Gunten v. Maryland, 243 F.3d 858, 863 n.1 (4th Cir. 2001).
48. *Id.* at 864-65 (rejecting the approach taken by the Fifth Circuit in *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997) and the Eighth Circuit in *Manning v. Metropolitan Life Ins. Co.*, 127 F.3d 686, 692 (8th Cir. 1997) and Kim v. Nash Finch Co., 123 F.3d 1046, 1060 (8th Cir. 1997)). *See infra* Part II.B of this review for a discussion of the ultimate employment decision standard.
49. *Id.* at 865 (quoting *Ross,* 759 F.2d at 363).
50. *Id.* at 867-69.
51. *Id.* at 867-68.

assertion that the reassignment to shore duty also constituted retaliation, the court stated that von Gunten's reassignment was made at von Gunten's request and in an effort by Maryland to temporarily accommodate von Gunten while other work was found.[52] The court further analyzed the reassignment when it stated that, "If the change in von Gunten's job assignment truly had been significant, if, for example, it exposed her to more dangerous conditions or stifled advancement . . . then her contention would have merit."[53] These adverse aspects were not present in von Gunten's case.[54] Von Gunten also had alleged that Maryland mishandled administrative issues, including inappropriately suspending her with pay, and subjecting her to hyper-scrutiny.[55] But, in the court's words "terms, conditions, or benefits of a person's employment do not typically, if ever, include general immunity from the application of basic employment policies or exemption from a state agency's disciplinary procedures."[56]

Lastly, concerning the issue of retaliatory harassment allegedly created by Maryland when it created a hostile work environment, the court cited *Ross*[57] and *Harris v. Forklift Systems, Inc.*[58] for the proposition that while the hostile work environment claim might be successful, it must demonstrate a relationship with the worker's employment, and the employer's actions must be "'severe or pervasive enough' to create 'an environment that a reasonable person would find hostile or abusive.'"[59] The Fourth Circuit agreed with the lower court ruling that, since the employer's actions took place sporadically over the course of a year and a half, the actions may not have produced an abusive environment to a reasonable person.[60]

---

52. *See id* at 868-69.
53. *Von Gunten*, 243 F.3d at 868.
54. *Id.*
55. *Id.* at 869.
56. *Id.*
57. Ross v. Commc'n Satellite Corp., 759 F.2d 355, 363 (4th Cir. 1985).
58. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993). *Harris* concerns substantive discrimination. *Id.* at 20. As discussed *infra* Part IV.B, Justice Alito revisited the arguments in *Harris* in his concurrence in *White II,* 126 S.Ct. 2405, 2418-22 (2006). Justice Alito raised his concern that the Court's interpretation of materiality would require a particularized analysis dependent on the circumstances of the retaliation; what is material for one may not be material to another. *Id.* at 2421.
59. Von Gunten v. Maryland, 243 F.3d 858, 870 (4th Cir. 2001) (quoting *Harris*, 510 U.S. at 21).
60. *Id.* As discussed *infra* Part IV.A, the reasonable person standard was similarly important to the Supreme Court in Burlington N. & Santa Fe Ry. Co. v. White (*White II*), 126 S.Ct. 2405, 2415 (2006).

B. The Retaliation Must Pose an Ultimate Employment Decision

The Fifth and the Eighth Circuits applied the strictest standard to cases alleging retaliation, which was least amenable to an employee's assertion of retaliation.[61]

1. The Fifth Circuit

In *Mattern v. Eastman Kodak Co.*,[62] the plaintiff was subjected to an allegedly hostile work environment and sexual harassment by two co-workers while participating in an on-the-job training program at Eastman Kodak ("Eastman").[63] Mattern filed an EEOC charge and claimed that her supervisors knew about the harassment, condoned it and took no action.[64] An internal investigation of her claims resulted in one of the alleged abusers taking early retirement, and no action being taken against the second.[65] Mattern filed a claim with the district court and alleged, among other things, that Eastman retaliated against her.[66]

The court's analysis of § 704(a), and its application to the facts, took into consideration five acts of allegedly retaliatory conduct occuring after Mattern complained of discrimination.[67] First, supervisors were sent to her home when she complained of a work-related illness and took a day of vacation.[68] Such a visit was unusual for the employer.[69] Second, Mattern was discussing her discriminatory treatment at Eastman's human resource department when she was reprimanded for not being at her workstation.[70] Third, Mattern experienced hostility in the form of her fellow workers being uncivil toward her.[71] In addition, her locker was broken into and some of her tools stolen.[72] Fourth, Mattern became ill, and in her doctor's opinion the illness was attributable to her treatment at Eastman.[73] Eastman failed to respond when informed of her doctor's diagnosis.[74] Fifth, Mattern, who had previously received good work evaluations, was given negative

61. *See* Mattern v. Eastman Kodak Co., 104 F.3d 702 (5th Cir. 1997); *see* Manning v. Metro. Life Ins. Co., 127 F.3d 686, 691 (8th Cir. 1997).
62. 104 F.3d 702 (5th Cir. 1997).
63. *Id.* at 703.
64. *Id.* at 704.
65. *Id.*
66. *Id.*
67. *Id.* at 705-06.
68. *Mattern*, 104 F.3d at 705.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 706.
74. *Mattern*, 104 F.3d at 706.

performance reviews.[75] Consequently, she was told that she could be terminated, and then did not receive a pay increase.[76]

The court stated that in order to prove retaliation, Mattern must establish that Eastman's actions were "ultimate employment decisions," "such as hiring, granting leave, discharging, promoting, and compensating."[77] None of the actions rose to the level of ultimate employment decisions in the court's view.[78] "Doubtless, some of these actions may have had a tangential effect on conditions of employment; but . . . an ultimate employment decision had not occurred."[79] The court pointed to its ruling in *Dollis v. Rubin*,[80] as replicating its present standard.[81] The court furthermore explained, regarding Mattern's poor work evaluations, that "an employee may not complain that not obtaining a position was retaliation if she was not qualified for that position in the first place."[82]

2. The Eighth Circuit

The plaintiffs in *Manning v. Metropolitan Life Insurance Co.*[83] complained of retaliation and sexual harassment, including "daily descriptions of [a co-worker's] body parts, explicit updates on his sexual activity, and crude propositions made under the threat of adverse consequences or the promise of special favors."[84] The employees' complaints to supervisors went unanswered.[85] When a lawsuit was filed, the allegations led a jury to hold that the actions constituted a breach of Arkansas law for the tort of outrage.[86] These same actions failed to prove retaliation, according to the district court, and in an appeal of the district court decision to the Eighth Circuit, the court stated "not

75. *Id.*

76. *Id.* The evidence at trial suggested that the poor evaluations resulted from Mattern's inability to perform certain tasks properly. *Id.*

77. *Id.* at 707 (quoting Page v. Bolger, 645 F.2d 227, 233 (4th Cir. 1981)).

78. *Id.*

79. *Id.* at 708 (citing to Hill v. Miss. State Employment Serv., 918 F.2d 1233 (5th Cir. 1990)).

80. 77 F.3d 777 (5th Cir. 1995).

81. *See Mattern*, 104 F.3d at 707 (citing *Dollis*, 77 F.3d at 781-82). Note that the Supreme Court would doubtless agree with the Fifth Circuit's conclusion about the retaliatory nature of the work evaluations, but for reasons relating to materiality, rather than a sense of the employee's immunity when the worker is not qualified. If in fact Mattern could not do the work, Eastman did not retaliate when it rated her poorly, and Mattern suffered no materially adverse harm when she was so evaluated. *See id.* at 708.

82. *Id.* at 709 (citing Gonzales v. Carlin, 907 F.2d 573 (5th Cir. 1990)).

83. 127 F.3d 686 (8th Cir. 1997).

84. *Id.* at 691.

85. *Id.* at 689-90.

86. *Id.* at 692.

everything that makes an employee unhappy is an actionable adverse action."[87] Only actions that constitute ultimate employment decisions were a violation of Title VII under the Eighth Circuit's reasoning.[88]

C. *The Ninth Circuit and its Application of the EEOC Guidelines*

The EEOC standard, announced in the agency's 1998 Guidelines concerning retaliation,[89] differs from the standard as argued by the Government when White appealed.[90] The Government insisted that § 704(a) applies only to tangible employment actions.[91] The EEOC Guidelines impose no such requirement.[92] The differing perspectives were most pronounced in the Ninth Circuit's ruling in *Ray v. Henderson*.[93] *Ray* is unique, not only for the standard it applied, but also because it involved a worker whose claim focused on retaliation, not substantive retaliation.[94]

William Ray worked for the post office in rural California for twenty-eight years.[95] When women in his office alleged gender bias and harassment, Ray echoed their concerns at two meetings held in part to address the issue.[96] The postmaster denied the abuse, and no action was taken.[97] Ray then joined in a letter with two co-workers that complained about the office's treatment of women, and the letter was sent to the postmaster's supervisor.[98] At a meeting held to confront the ongoing concerns, the postmaster threatened that he "might have to change [his] whole approach to management . . . [he] left [Ray] alone . . . [he] may have to change that."[99] The postmaster berated Ray and changed his

87. *Id.* (quoting Montandon v. Farmland Indus., Inc., 116 F.3d 355, 359 (8th Cir. 1997)).

88. *Id.* The holding in *Manning* repeated the standard imposed by the Eighth Circuit in *Ledergerber v. Stangler*, 122 F.3d 1142 (8th Cir. 1997), which discussed claims for both substantive and retaliatory discrimination. *See id.* at 1143. The court held that the standard in either case required that the employee establish an adverse employment action; the employer's actions must materially affect the worker's terms and conditions of employment. *Id.* at 1145. The court utilized the "ultimate employment action" language and stated that lateral transfers, absent a materially adverse affect, do not violate Title VII. *Id.* at 1144.

89. EEOC Compliance Manual § 8, "Retaliation," ¶ 8008 at 6512 (July 31, 1998).

90. Brief for the United States as Amicus Curiae Supporting Respondent, Burlington N. & Sante Fe Ry. Co., v. White, 126 S. Ct. 797 (2006) (No. 05-259), 2006 WL 622123.

91. White II, 126 S. Ct. at 2411.

92. EEOC Compliance Manual § 8, "Retaliation," ¶ 8008 at 6512 (July 31, 1998).

93. Ray v. Henderson, 217 F.3d 1234 (9th Cir. 2000).

94. *Id.* at 1239.

95. *Id.* at 1237.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Ray*, 217 F.3d at 1237-38.

work schedule, making Ray's work more difficult to complete, and cancelled employment meetings at which the allegations of gender bias would likely be considered.[100]

Ray filed complaints with the EEOC alleging, among other charges, retaliation.[101] After notification of the complaint, the postmaster escalated his ill treatment of Ray.[102] In a district court ruling, the court held for the post office on the charge of retaliation and Ray appealed.[103]

No dispute existed as to whether Ray engaged in activities encouraged by Title VII; Ray offered his support to co-workers who believed that gender bias was poisoning the atmosphere of the post office.[104] Rather, the issue in *Ray* concerned whether the post office's actions were in fact *retaliatory* and, therefore, constituted violations of Title VII.[105]

The court held, in its interpretation of § 704(a) that "an action is cognizable as an adverse employment action if it is reasonably likely to deter employees from engaging in protected activity."[106] The court adopted the standard contained in the EEOC Guidelines, which states that an adverse employment action is "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."[107] Neither materiality nor job relatedness were required.[108] Application of the standard meant that "lateral transfers, unfavorable job references, and changes in work schedules"[109] could all constitute retaliation, as did Ray's treatment at the hands of the postmaster.[110] The court specifically rejected the ultimate employment decision standard of the Eighth Circuit and remanded the case for consideration consistent with the EEOC standard.[111]

100. *Id.* at 1238.
101. *Id.* at 1239.
102. *Id.*
103. *Id.*
104. *Id.* at 1237.
105. *Ray*, 217 F.3d at 1240.
106. *Id.* at 1243.
107. *Id.* at 1242-43; EEOC Compliance Manual § 8, "Retaliation," ¶ 8008 at 6512 (July 31, 1998).
108. *Ray*, 217 F.3d at 1240-41.
109. *Id.* at 1243.
110. *Id.* at 1244.
111. *Id.* at 1246.

D. A Material Retaliation Need Not Be Employment Related

The Seventh and the District of Columbia Circuit Courts[112] applied a standard that the Supreme Court ultimately applied.[113] The reasoning of the circuits comes primarily from two cases.

1. The Seventh Circuit

Chrissie Washington claimed that her employer reassigned her to a work schedule that did not allow her to care for her child (who had Down syndrome) after Washington complained of race discrimination at the state agency where she worked.[114] After a magistrate court ruled against Washington on her complaint of retaliation, Washington appealed to the Seventh Circuit.[115] The court stated, consistent with its opinion in *Herrnreiter v. Chicago Housing Authority*,[116] that retaliation need not entail an "adverse employment action."[117] The court stated that not "every unwelcome response is forbidden retaliation."[118] Indeed, the court stated "Congress *could* make any identifiable trifle actionable, but the undefined word 'discrimination' does not itself command judges to supervise the minutiae of personnel management. Even the definition of 'tangible employment action' in *Burlington Industries, Inc. v. Ellerth*[119] uses 'significant' three times, reminding us that life's little reverses are not causes of litigation."[120]

The court held that the standards for liability under §§ 703(a) and 704(a) were different.[121] Substantive discrimination concerns discrimination "with respect to [the worker's] compensation, terms, conditions, or privileges of employment."[122] Retaliation is a *form* of discrimination prohibited by Title VII, and, as such, it may occur in many ways, none of which is necessarily limited to employment-related conduct:[123]

---

112. Washington v. Illinois Department of Revenue, 420 F.3d 658, 659 (7th Cir. 2005); Rochon v. Gonzales, 438 F.3d 1211, 1218-19 (D.C. Cir. 2006).

113. Northern & Santa Fe Ry. Co. v. White (*White II*), 126 S.Ct. 2405, 2416 (2006).

114. *Washington*, 420 F.3d at 659.

115. *Id.*

116. 315 F.3d 742 (7th Cir. 2002).

117. *Washington*, 420 F.3d 658, 660; *Herrnreiter*, 315 F.3d at 745-46.

118. *Washington*, 420 F.3d at 660.

119. Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998) (examining the definition of a tangible employment action, which is also discussed *supra* in Part V of this Article).

120. *Washington*, 420 F.3d at 661.

121. *Id.* at 660-61.

122. *Id.* at 660 (quoting § 703(a) (42 U.S.C. § 2000e-2(a))).

123. *See id.* at 659-60.

> The state's Department of Revenue might have audited Washington's tax returns in response to her complaint to the EEOC, or hired a private detective to search for a disreputable tidbit that could be used to intimidate her into withdrawing the complaint. When the employer's response does not affect a complainant's terms and conditions of employment, it is vain to look for an adverse "employment" decision.[124]

Nevertheless, while conduct that constitutes retaliation need not be employment related, the court held that it still must be material.[125] Furthermore, the Seventh Circuit explained that the context of the employer's actions was important in deciding whether the acts were material.[126] "[A]n act that would be immaterial in some situations is material in others."[127] In concert with the requirement for materiality, the court's standard included a judgment as to whether the employer's actions would dissuade a reasonable worker from making or suggesting a charge of discrimination.[128]

Applying the standard to the facts in *Washington*, the change in schedule was specifically designed to significantly inconvenience Washington's ability to care for her son.[129] Such a change may have mattered little to other employees, encompassing only, for example, a switch in the supervisor who monitored the employee under one scheduling assignment, and not the other, but it was a material burden to Washington.[130] The employer's actions may have constituted retaliation, and the court remanded the case for a judgment consistent with its standard.[131]

2. The District of Columbia Circuit

The employee in *Rochon v. Gonzales*,[132] Donald Rochon, worked in the Omaha, Nebraska office of the FBI.[133] Rochon had formally protested discrimination in that office as far back as 1984.[134] Internal

124. *Id.* at 660.
125. *Id.* at 661.
126. *See Washington*, 420 F.3d at 661-62.
127. *Id.* at 661; *see also* Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993) (examining context in determining materiality; *see* discussion *infra* Part IV.B).
128. *See Washington*, 420 F.3d at 662.
129. *Id.*
130. *Id.*
131. *Id.* at 663.
132. *See* Rochon v. Gonzales, 438 F.3d 1211 (D.C. Cir. 2006).
133. *See id.* at 1213; *see infra* Part IV.B (discussing the analysis of *Rochon* in Justice Alito's concurring opinion in White II); Burlington N. & Santa Fe Ry. Co. v. White (*White II*), 126 S.Ct. 2405, 2418 (2006).
134. *See Rochon*, 438 F.3d at 1213.

investigations found that the FBI subjected Rochon to racial discrimination and retaliation.[135] As part of the settlement of the matter, the FBI agreed not to repeat its retaliatory acts against Rochon.[136] Nonetheless, the FBI did take retaliatory action against Rochon, which led to Rochon suing, and a second settlement agreement being reached.[137] Rochon then claimed that the FBI took relation against him yet again when it failed to respond to threats made by a federal prisoner against Rochon and his wife.[138] Rochon filed suit in the district court claiming that the FBI's actions constituted retaliation.[139]

The FBI's failure to respond to the threats made against Rochon and his family occurred outside the workplace, and, therefore, failed to constitute either a change in the terms of Rochon's employment or in his work conditions.[140] The lack of response was, however, an arguably improper act.[141] Insisting that the actions taken by the employer need not be employment related, Rochon referred to the Supreme Court case of *Robinson v. Shell Oil Co.*[142] In *Robinson*, an employee of Shell Oil, Charles Robinson, was fired by Shell Oil.[143] Robinson filed charges claiming that the firing was discriminatory.[144] In response to a request for information from one of Robinson's subsequent, potential employers, Shell provided negative references regarding Robinson, and he alleged that the negative references constituted retaliation.[145] The Supreme Court granted review of the case to settle a split in the circuits concerning whether a former employee could claim a § 704(a) retaliation.[146] The Court held that § 704(a) applied to former

135. *See id.*
136. *See id.*
137. *See id.*
138. *See id.* at 1213-14.
139. *See id.*
140. *See Rochon*, 438 F.3d at 1216-17.
141. *See, e.g., id.* at 1218 (discussing the court's analysis and belief that an unjust result would occur if actions such as those by the employer in this case were held not to be retaliatory).
142. *See* Robinson v. Shell Oil Co., 519 U.S. 337 (1997).
143. *See id.* at 339.
144. *See id.*
145. *See id.*
146. *See id.* at 340. The Fourth Circuit had held that former employees could not sue under section 704(a) in *Robinson v. Shell Oil Co.*, 70 F.3d 325 (1996). This decision was reversed on appeal by the Supreme Court, 519 U.S. 337 (1997). All the other circuits that had considered the issue generally held that former employees could maintain the action: the Second Circuit, Pantchenko v. C.B. Dolge Co., 581 F.2d 1052, 1055 (2nd 1978); the Third Circuit, Charlton v. Paramus Bd. Of Ed., 23 F.3d 194, 198-200 (3d Cir. 1994), *cert. denied*, 513 U.S. 1022 (1994); the Ninth Circuit, O'Brien v. Sky Chiefs, Inc., 670 F.2d 864, 869 (9th Cir. 1982); the Tenth Circuit, Rutherford v. American Bank of Commerce, 565 F.2d 1162, 1165 (10th Cir. 1977); and the Eleventh Circuit, Bailey v. USX Corp., 850 F.2d 1506, 1509 (11th Cir. 1988). The Seventh Circuit had held in Reed v. Shepard,

employees.[147]

First, the *Robinson* Court noted that, "[i]nsofar as § 704(a) expressly protects employees from retaliation for filing a 'charge' under title VII, and a charge under § 703(a) alleging unlawful discharge would necessarily be brought by a former employee, it is far more consistent to include former employees within the scope of 'employees' protected by § 704(a)."[148] Second, to the extent an employer could retaliate, as long as its actions were taken only against former employees, the employer might silence its current workers, who feared retaliation for asserting or cooperating in support of Title VII protections.[149] The *Robinson* Court stated that, "[I]t would be destructive of this purpose of the antiretaliation provision for an employer to be able to retaliate with impunity against an entire class of acts under Title VII—for example, complaints regarding discriminatory termination."[150]

The D.C. Circuit agreed with the employee, Rochon, and the Supreme Court's reasoning in *Robinson*.[151] The D.C. Circuit understood the *Robinson* holding to similarly require that violations of § 704(a) include not only employment-related actions, but also actions outside the workplace.[152] The following example demonstrates the logic of the *Rochon* court's result and the problems created if it had held otherwise. An employer fires a worker in violation of the substantive discrimination protection of § 703(a), and the worker files a complaint with the EEOC. In response, the employer takes actions against the former employee (e.g., by supplying incorrect and deleterious job references), hoping that the former worker will drop the charges or that other workers will recognize that they may suffer similarly dire consequences for claiming discrimination or assisting in an investigation of discrimination. If the employer was statutorily harmless under § 704(a), the former worker would have no recourse, other than § 703(a). All similarly situated workers would suffer the same fate under this reasoning. The *Rochon* court recognized the unfairness of maintaining that only employment related actions constituted a violation of the anti-retaliation provisions of Title VII, which "'would be destructive of [the] purpose of the antiretaliation provision,' namely, '[m]aintaining unfettered access to

939 F.2d 484, 492-93 (4th Cir. 1991), that former employees could not sue under these circumstances, but the circuit reconsidered this position in Veprinsky v. Fluor Daniel, Inc., 87 F.3d 881, 886 (4th Cir. 1996).

147. Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997).

148. *Id.* at 345.

149. *See id.* at 345-46.

150. *Id.* at 346.

151. *See* Rochon v. Gonzales, 438 F.3d 1211, 1218 (D.C. Cir. 2006).

152. *See id.*

statutory remedial mechanisms.'"[153] If the need to show employment relatedness is eliminated, the result changes, and the former employee in the example may sue under § 704(a). And, logically, an action taken by the employer against a *former* employee is, by definition, an action outside the workplace.[154]

The Government argued, as it would in the Supreme Court appeal of *White v. Burlington Northern & Santa Fe Railway Co.*,[155] that the actions must be employment related, contrary to the EEOC Guidelines, which do not require job relatedness, instead stating that retaliation includes actions "that [are] based on a retaliatory motive and [are] reasonably likely to deter the charging party or others from engaging in protected activity."[156] The *Rochon* court agreed, however, with the Seventh Circuit's ruling in *Aviles v. Cornell Forge Co.*;[157] actions "not ostensibly employment related" still may be retaliatory.[158]

As it had in prior cases dealing with retaliation,[159] the *Rochon* court required the employer's actions to be material.[160] The court repeated the statement of the First Circuit, which said, "'there is room for a *de minimus* threshold' in claims of retaliatory conduct."[161] The *Rochon* court stated,

> The retaliatory conduct Rochon alleges, to wit, the FBI's refusal to investigate, as it would ordinarily do for any member of the public, a death threat made against him by a federal prison inmate, meets this threshold of significance. In other words, a reasonable FBI agent well might be dissuaded from engaging in protected activity protected by Title VII if he knew that doing so would leave him unprotected by the FBI in the face of threats against him or his

153. *Id.* at 1218 (quoting *Robinson*, 519 U.S. at 346).

154. The *Rochon* court dealt with the anti-retaliation provision under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(d). 438 F.3d at 1217. The court noted that a prior D.C. Circuit case dealing with the provision, *Passer v. American Chemical Supply*, 935 F.2d 322 (D.C. Cir. 1991), concerned a retaliation that took the form of a cancelled symposium, which had been planned in honor of the employee. The court held that the cancellation was made in response to the worker's allegations that his employer violated the ADEA, and, since "the statute does not limit its reach only to acts of retaliation that take the form of cognizable employment actions such as discharge, transfer or demotion," the cancellation was retaliatory and in breach of the ADEA. *Id.* at 331.

155. 364 F.3d 789 (6th Cir. 2004), *aff'd*, 126 S.Ct. 2405 (2006).

156. 364 F.3d at 798 (quoting the EEOC Compliance Manual § 8, "Retaliation," ¶ 8008 (1998)).

157. 183 F.3d 598 (7th Cir. 1999).

158. *Rochon*, 438 F.3d at 1218 (quoting Aviles v. Cornell Forge Co., 183 F.3d 598, 606 (7th Cir. 1999)).

159. *See, e.g.*, Brown v. Brody, 199 F.3d 446, 457 (D.C. Cir. 1999).

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

161. *Id.* (quoting Randlett v. Shalala, 118 F.3d 857, 862 (1st Cir. 1997)).

family.[162]

The court then remanded the case for a judgment in accordance with its standard.[163]

III. The Sixth Circuit: *White v. Burlington Northern & Santa Fe Ry. Co.*

The Supreme Court granted certiorari in December 2005 regarding the appeal of *White v. Burlington Northern & Santa Fe Railway Co.*[164] The Court heard oral arguments four months later and issued its decision in June 2006.[165] The Sixth Circuit case, reviewed by the Court, concerned whether the employee, Sheila White, established that her employer, Burlington Northern & Santa Fe Railway Co. ("Burlington Northern") violated Title VII's prohibitions against retaliatory discharge in the context of alleged employment discrimination.[166]

A. Background

Sheila White worked as a forklift operator at the Burlington Northern Tennessee Yard in Memphis.[167] On September 16, 1997, approximately three months after her hire, White complained to the roadmaster of the yard as well as to other company officials about alleged sexual harassment committed by her immediate supervisor.[168] Shortly thereafter, the company investigated White's complaint, suspended the supervisor and ordered him to attend anti-discrimination training sessions regarding sexual harassment.[169] On September 26, 1997, the yardmaster told White about Burlington Northern's investigation and suspension of the supervisor.[170] The yardmaster also told White that her fellow workers had complained about White holding the job of forklift operator, which the workers argued was less arduous and "cleaner" than other track laborer positions, within which the forklift

162. *Id.* at 1219-20.
163. *Id.* at 1220.
164. White v. Burlington N. & Santa Fe Ry. Co. (*White I*), 364 F.3d 789 (6th Cir. 2004), *cert. granted*, 126 S.Ct. 797 (U.S. Dec. 5, 2005) (No. 05-259).
165. Burlington N. & Santa Fe Ry. Co. v. White (*White II*), 126 S.Ct. 2405 (2006).
166. *White I*, 364 F.3d at 794. Even if a claim of retaliation is not made together with a claim of substantive discrimination, the Supreme Court's holding in *White II* may provide protection against the retaliation, i.e., even if no substantive discrimination occurred, retaliation in violation of Title VII may be actionable.
167. *Id.* at 792.
168. *Id.*
169. *Id.*
170. *Id.*

operator position was classified.[171] The workers had not disparaged White's performance, but did question whether a less senior woman should hold the job, rather than a man.[172] At the same meeting, the yardmaster informed White that because of her fellow workers' complaints, he was reassigning White to a standard track laborer position, which did not require the qualifications needed for the job of forklift operator.[173]

White filed charges of sex discrimination and retaliation with the EEOC in October 1997.[174] She subsequently filed additional charges with the EEOC in December, again complaining of retaliation.[175] In her second charge, White alleged that the yardmaster "had placed her under surveillance and was checking on her daily activities."[176]

After White filed her second charge with the EEOC, an incident occurred in which White was alleged to have been insubordinate, and, as a result, the yardmaster suspended her without pay.[177] A foreman of the group with which White worked told White that the railroad was "trying to get rid of her"[178] and that Burlington Northern considered her a "troublemaker."[179] White's suspension occurred seven days after she filed her second round of charges with the EEOC, and the yardmaster knew at the time of her suspension that such charges had been filed.[180] Consistent with company policy, the suspension would automatically become a termination unless White grieved the discipline with her union, which she did.[181] White then filed a third set of charges with the EEOC alleging retaliation.[182] A Burlington Northern manager investigated White's alleged insubordination (which had prompted her suspension).[183] Thirty-seven days into the suspension, the manager found the suspension to be unwarranted and ordered White's reinstatement with backpay.[184] After exhausting her relief with the EEOC, White filed suit in the federal

171. *Id.*
172. White v. Burlington N. & Santa Fe Ry. Co. (*White I*), 364 F.3d 789, 792 (6th Cir. 2004), *cert. granted*, 126 S.Ct. 797 (U.S. Dec. 5, 2005) (No. 05-259).
173. *Id.* at 792-93.
174. *Id.* at 793.
175. *Id.*
176. *Id.*
177. *Id.* at 794.
178. *White I*, 364 F.3d at 794.
179. *Id.*. It is unclear whether the foreman's statements were made to White simply to provide information, whether the foreman gave the statements to White to help White with her EEOC case, or whether the foreman was harassing White.
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. *White I*, 364 F.3d at 794.

district court alleging sex discrimination and retaliation in violation of Title VII.[185]

The jury that heard White's case found against White on the charge of sex discrimination, but returned a verdict for White on the charge of retaliation and awarded her $43,500.[186] Burlington Northern appealed the district court's decision to the Sixth Circuit Court of Appeals.[187]

The first appeal of the case, heard by a three-member panel of the Sixth Circuit, reversed the jury's verdict regarding retaliation, and found that the employer had not retaliated through its suspension or transfer of White.[188] White appealed, again to the Sixth Circuit, and the decision of that court,[189] sitting *en banc*, is discussed in the next section.[190] While the *en banc* decision was ultimately appealed and heard by the Supreme Court, the Sixth Circuit's decision is informative to an understanding of the arguments brought to bear in retaliation cases and the Supreme Court's resolution of the case.

B. The Decision of the Sixth Circuit

1. The Suspension

The circuit court examined the retaliation provision of Title VII, § 704(a) of Title VII (42 U.S.C. § 2000e-3(a)),[191] which states:

> (a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings
>
> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an

185. *Id.*

186. *Id.* In an additional motion, White asked the district court for attorney fees, and the court awarded her $54,285, or 80% of those fees. *Id.*

187. *Id.*

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

189. *White I*, 364 F.3d 789.

190. *See also* Michael Clarkson & Ann Thomas, *Recent Developments in Employer-employee Relations*, 40 TORT TRIAL & INS. PRAC. L.J. 369, 378-79 (2005). 364 F.3d at 794.

191. See Part IV.A for a discussion of the Supreme Court's analysis of the retaliation provision of Title VII.

investigation, proceeding, or hearing under this subchapter. [192]

The Sixth Circuit cited *Burlington Industries v. Ellerth*,[193] ("*Ellerth*") noting that "not just any discriminatory act by an employer constitutes discrimination under Title VII. . . . Employment actions that are *de minimus* are not actionable. . . ."[194] According to the Sixth Circuit, the *Ellerth*[195] Court required that successful Title VII claims involve a "tangible employment action," or, in the Sixth Circuit's restatement of this term, an "adverse employment action."[196] The Sixth Circuit quoted its previous ruling in *Primes v. Reno*, where it stated that "[i]f every low evaluation or other action by an employer that makes an employee unhappy or resentful were considered an adverse action, Title VII would be triggered by supervisor criticism or even facial expressions indicating displeasure."[197] The Sixth Circuit, thereby, equated the standards under §§ 703(a) and 704(a), requiring materiality and job relatedness for actionable violations under either section.

The court proceeded to recount the *Geisler v. Folsom*[198] case, which was the first instance in which the Sixth Circuit was asked to decide whether the plaintiff had proved an adverse employment action.[199] *Geisler* held that general tension arising after an employee filed EEOC charges failed to constitute retaliation for purposes of Title VII.[200] Shortly after *Geisler*, the Sixth Circuit addressed the termination of an employee in *Jackson v. RKO Bottlers of Toledo, Inc.*[201] The Sixth Circuit in *White v. Burlington Northern Santa Fe Railway Co.* also cited holdings cited by *Jackson* from the Fifth Circuit,[202] the Tenth Circuit,[203] and Eleventh Circuit,[204] stating that a "plaintiff must establish: (1) that he engaged in activity protected by Title VII; (2) that he was the subject of adverse employment action; and (3) that there exists a casual [sic] link

192. Section 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) (2000).

193. 524 U.S. 742, 761 (1998).

194. *White I*, 364 F.3d at 795.

195. *Ellerth*, 524 U.S. at 761.

196. *White I*, 364 F.3d at 795. The court states that, while the Supreme Court uses the phrase "tangible employment action," and the Sixth Circuit uses "adverse employment action," the phrases capture "the same concept." *Id.* at 796 n.1.

197. *Id.* at 795 (quoting Primes v. Reno, 190 F.3d 765, 767 (6th Cir. 1999)).

198. 735 F.2d 991 (6th Cir. 1984).

199. *White I*, 364 F.3d 796.

200. *Id.* at 796; *Geisler*, 735 F.2d at 994.

201. 743 F.2d 370 (6th Cir. 1984).

202. Whatley v. Metro. Atlanta Rapid Transit Auth., 632 F.2d 1325, 1328 (5th Cir. 1980).

203. Burrus v. United Tel. Co. of Kansas, Inc., 683 F.2d 339, 343 (10th Cir. 1982).

204. Jones v. Lumberjack Meats, Inc., 680 F.2d 98, 101 (11th Cir. 1982).

between his protected activity and the adverse action of his employer."[205] All of these cases addressed a termination, but none dealt with employment actions that fell "short" of an actual discharge, which is in contrast to the employee in *White* who was not terminated.[206]

Continuing its recitation of the Sixth Circuit's prior cases that dealt with the concept of an adverse employment action, the court looked at a reassignment in the context of a retaliation claim in *Yates v. Avco Corp.*[207] *Yates* held that a temporary reassignment without a reduction in pay or in benefits failed to constitute retaliation.[208] The Sixth Circuit later held, in *Kocsis v. Multi-Care Management, Inc.*,[209] that proof of employment discrimination "must show that [the plaintiff] suffered a 'materially adverse change in the terms of [his or] her employment. . . . A mere inconvenience or an alteration of job responsibilities' or a 'bruised ego' is not enough to constitute an adverse employment action."[210] In 1999, the Sixth Circuit repeated the standard announced in *Kocsis*, and defined an adverse employment action in *Hollins v. Atlantic*[211] as a "materially adverse change in the terms and conditions of [plaintiff's] employment."[212] In combination with *Hollins*, the Sixth Circuit noted that *Kocsis* stood for the proposition that a reassignment alone, without an accompanying adverse employment action, will not itself constitute an adverse employment action, but to the extent the action is accompanied by, for example, a reduction in salary, the employment action may be adverse.[213]

Stating that *Kocsis* was the seminal case in analyzing what constitutes an adverse employment action,[214] the Sixth Circuit declared

205. *White I*, 364 F.3d at 796 (quoting 743 F.2d at 375).

206. *White I*, 364 F.3d at 796; *Burlington Supreme Court*, 126 S.Ct. 2405 (2006); *see* discussion *supra* Part IV.

207. 819 F.2d 630, 638 (6th Cir. 1987).

208. *Id.*

209. Kocsis v. Multi-Care Mgmt., Inc., 97 F.3d 876 (6th Cir. 1996).

210. *White I*, 364 F.3d at 797 (quoting Kocsis v. Multi-Care Mgmt. Inc., 97 F.3d 876, 885-86 (6th Cir. 1996)).

211. 188 F.3d 652 (6th Cir. 1999).

212. *White I*, 364 F.3d at 796 (quoting Hollins v. Atlantic Co. 188 F.3d 652, 662 (6th Cir. 1999)).

213. *Id.* at 797. This ruling is similar to the Supreme Court's decision in Pennsylvania State Police v. Suders, 542 U.S. 129 (2004), discussed *supra* Part V, which held that in the context of a constructive discharge, the employer's actions were not a tangible employment action absent a precipitating factor that itself could be considered a tangible employment action. *Id.* at 149. In *Suders*, the employee's discharge was voluntary and the employer's alleged discrimination that prompted the termination was not addressed by the employee through the employer's anti-discrimination policy. *Id.* at 129-130. To the extent the employer's actions were adverse, the employee failed to try to rectify them, as advised by the Supreme Court in Burlington Indus. v. Ellerth (524 U.S. 742, 765 (1998)) and then in *Suders*. *Id.* at 152.

214. *Kocsis* concerned a violation of the Americans with Disabilities Act, 42 U.S.C.

that the Supreme Court in *Ellerth*[215] relied on the language in *Kocsis* (as well as decisions from several other circuits[216]) in defining tangible employment actions.[217] "'A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'"[218] The Sixth Circuit also noted that tangible employment actions, as pointed out by *Ellerth*, generally inflict "direct economic harm."[219]

Both the plaintiff and the EEOC had urged the Sixth Circuit to adopt the EEOC's definition of an adverse employment action: "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter a charging party or others from engaging in protected activity."[220] The EEOC argued that both the Sixth Circuit's prior rulings, and its requirement that the action pose a materially adverse change in the terms of employment, failed to complement Title VII's mission to prevent retaliation.[221] The standard, as endorsed by the EEOC, was applied by the Ninth Circuit in *Ray v. Henderson*,[222] which did not identify a restriction on the nature of a retaliatory act, or "a minimum level of severity for actionable discrimination."[223] Under the EEOC's interpretation, any intentionally discriminatory act, therefore, qualifies as

---

§ 12112(a) (1995). Kocsis, 97 F.3d at,882. The *Kocsis* court stated that the employee suffered no materially adverse employment action when she could show no relationship between the employer's actions and her employment. *Id.* at 886-87.

215. 524 U.S. 742 (1998).

216. Spring v. Sheboygan Area Sch. Dist., 865 F.2d 883 (7th Cir. 1989); Crady v. Liberty Nat'l Bank and Trust Co., 993 F.2d 132, 136 (7th Cir. 1993); Flaherty v. Gas Research Inst., 31 F.3d 451, 456 (7th Cir. 1994).

217. *White II*, 364 F.3d at 797.

218. *Id.* (quoting Burlington Indus. v. Ellerth, 524 U.S. 742, 761 (1998)).

219. *Id.* at 798 (quoting *Ellerth*, 524 U.S. at 762). In a footnote, the court described two cases that also considered the notion of how adverse the employer's action must be. *Id.* at 798 n.3. An adverse employment action did not exist in *Hollins v. Atlantic Co.*, 188 F.3d 652 (6th Cir. 1999), since the employee in that case merely suffered a lower performance rating and nothing more. *Id.* (citing *Hollins*,188 F.3d at 662). Similarly, the plaintiff in *Bowman v. Shawnee State University,* 220 F.3d 456 (6th Cir. 2000), failed to describe an adverse employment action when he was temporarily removed from a university committee for ten days, and his pay was never docked, nor was his position as an instructor ever suspended. *Id.* (*Bowman*.220 F.3d at 461-62).

220. EEOC Compliance Manual § 8, "Retaliation," ¶ 8008 at 6512 (July 31, 1998); White v. Burlington N. & Santa Fe Ry. Co. (*White I*), 364 F.3d 789, 798 (6th Cir. 2004), *cert. granted*, 126 S.Ct. 797 (U.S. Dec. 5, 2005) (No. 05-259).

221. *White I*, 364 F.3d at 798.

222. 217 F.3d 1234, 1243 (9th Cir. 2000); *see also* discussion of Ray v. Henderson, 217 F.3d 1234 (9th Cir. 2000) *supra* Part II. C.

223. *White I*, 364 F.3d at 798 (quoting Ray, 217 F.3d at 1243). The court also notes that Knox v. Indiana, 93 F.3d 1327 (7th Cir. 1996) states that "[t]here is nothing in the law of retaliation that restricts the type of retaliatory acts that might be visited upon an employee who seeks to invoke her rights by filing a complaint." *Knox*, 93 F.3d at 1334.

an illegal retaliation in violation of § 704(a) of Title VII, regardless of materiality; the standard eliminates the need to find that the act was material. The court stated that EEOC Guidelines were not binding, but were important, in that "they 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'"[224] The court then proceeded to ignore the EEOC guidelines.[225]

The Sixth Circuit interpreted Title VII's retaliation provisions as prohibiting not "any form of discrimination,"[226] but only those acts that "deter employees from engaging in protected activity."[227] In the court's understanding, its materiality standard implies that all actionable claims, either substantive or retaliatory discrimination, arise from genuinely adverse employment actions, and suits involving mere "trivialities" would be summarily dismissed.[228] Rather than creating a list of all possible adverse employment actions, the court stated that it must consider "indices that might be unique to a particular situation"[229] in deciding whether an employment action was adverse.[230]

The Sixth Circuit's reticence to adopt a purportedly comprehensive list of adverse employment actions echoed the Supreme Court's sentiments in *Pennsylvania State Police v. Suders*.[231] *Suders* required the Court to determine whether or not a constructive discharge constituted a tangible employment action (i.e., an adverse employment action) for purposes of allowing an employer to raise an affirmative defense to charges of employment discrimination.[232] Citing its earlier decision in *Burlington Industries v. Ellerth*,[233] the *Suders* Court reiterated that tangible employment actions include "such [actions] as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[234] Justice Ginsburg, writing for the eight-to-one majority in *Suders*, stated that tangible employment actions have in common the official actions of

224. *White I*, 364 F.3d at 798 (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986)).

225. *Id.* at 799.

226. *Id.*

227. *Id.* The EEOC acknowledged that "petty slights and trivial annoyances" would not trigger a Title VII violation. *Id.*

228. *Id.*

229. *Id.* (quoting Kocsis v. Multi-Care Mgmt., Inc., 97 F.3d 876, 886 (6th Cir. 1996)).

230. *White I*, 364 F.3d at 799.

231. Pennsylvania State Police v. Suders, 542 U.S. 129 (2004); *see infra* Part V for a discussion of *Suders*.

232. *Suders*, 542 U.S. at 139. *See infra* Part V for the discussion of tangible employment actions.

233. Burlington Indus. v. Ellerth, 524 U.S. 742, 761 (1998).

234. *Suders*, 542 U.S. at 139 (citing *Ellerth*, 524 U.S. at 761).

the employer.[235] In the case below, the Third Circuit had noted that the *Ellerth*[236] list of tangible employment actions was non-exhaustive.[237] The Supreme Court in its review of *Suders* essentially agreed, but held that the significant factor distinguishing each action on the list, from other actions that should not be included, was the official nature of the action.[238] In either interpretation, the list is non-exhaustive, but it is under what circumstances a court should add to the list, making an employer's action tangibly adverse, that differentiates the Third Circuit ruling in *Easton* from that of the Supreme Court's review and decision in *Suders*.[239] The Sixth Circuit reinforced this sentiment when stating that "it is impossible to list every possible employment action that falls into the definition of adverse employment action."[240]

In furtherance of its analysis, the Sixth Circuit touted the practicality of using a standard that rested on the necessity of finding an adverse employment action in any Title VII case, whether it rests on violations under § 703(a) or § 704(a).[241] The court's reasoning departed from the arguments raised by the plaintiff and the EEOC, as well as the defense raised by the employer.[242] "Having a different standard for the different provisions of Title VII would be burdensome and unjustified by the text of the statute, which uses the same phrase 'discriminate against' in each of its anti-discrimination provisions."[243] The court attempted, therefore, to achieve a pragmatic solution to two problems: (1) the difficulty of divining an exhaustive list of all possible adverse employment actions, which even the Supreme Court believed was

235. *Id.* at 131.
236. *Ellerth*, 524 U.S. at 761.
237. Suders v. Easton, 325 F.3d 432, 456 (citing *Ellerth,* 524 U.S. at 761).
238. *See Suders*, 542 U.S. at 148-50.
239. Prior to *Suders*, several federal courts, including those sitting in the Second and Eighth Circuits, held that the *Ellerth* list of tangible employment actions constituted non-exhaustive examples of adverse actions. *See, e.g.*, Vasquez v. Atrium Door & Window Co., 218 F. Supp. 2d 1139 (D. Ariz. 2002); Cherry v. Menard, Inc., 101 F. Supp. 2d 1160 (N.D. Iowa 2000). Regarding an attempt to list all actionable offenses in the context of a retaliation, the Seventh Circuit in *Knox v. State of Indiana,* 93 F.3d 1327 (7th Cir. 1996) also stated that, "The law deliberately does not take a 'laundry list' approach to retaliation, because unfortunately its forms are as varied as the human imagination will permit." *Knox* , 93 F.3d at 1334. The Supreme Court in *Suders*, discussed in *infra* Part V, held that a constructive discharge was not a tangible employment action. *Suders*, 542 U.S. at 148. In White's case, the Sixth Circuit held, however, that the employer's treatment did constitute a tangible, *i.e.* an adverse, employment action. White v. Burlington N. & Santa Fe Ry. Co. (*White I*), 364 F.3d 789, 800-03 (6th Cir. 2004), *cert. granted*, 126 S.Ct. 797 (U.S. Dec. 5, 2005) (No. 05-259).
240. *White I*, 364 F.3d at 799.
241. *Id.*
242. *Id.; see supra* notes 181-86 and accompanying text.
243. *White I*, 364 F.3d at 799.

unnecessary,[244] and (2) the issue of what standard to use when adding adverse employment actions to the list.[245] The court solved both problems, in its estimation, by announcing a uniform standard, applicable to all Title VII claims.[246]

The court turned to an explanation of its standard, which required a plaintiff to establish that the employer undertook a materially adverse employment action, i.e., in the court's words, "*any* kind of adverse action"[247] that was material and job related. Materiality is the significant component of the standard that distinguishes it from the standard argued by the employee, White, and on which standard White nevertheless won in the Sixth Circuit.[248] As later noted by the Government in its Amicus Brief to the Supreme Court when White appealed:

> The materially adverse employment action test not only follows the path marked by *Ellerth*, but provides a workable, objective, and uniform standard for adjudicating both direct discrimination and retaliation claims under Title VII. Under the materially adverse actions standard, an employer's conduct must cause "objectively tangible harm" to be actionable, and thus "[p]urely subjective injuries, such as dissatisfaction with a reassignment, . . . public humiliation or loss of reputation" would not qualify as a matter of law.[249]

The court specifically rejected the standard raised by Burlington Northern, which would have made only "ultimate employment decisions" subject to a Title VII violation under § 704(a).[250] Burlington Northern argued that since White's suspension without pay was later rectified by her reinstatement with past due wages, White ultimately suffered no adverse employment action; she got her job and her money

244. *See Suders*, 542 U.S. at 149 (discussing the need of an official company act in order to establish a tangible employment action).

245. *Id.* at 149-50.

246. *Id.* at 152.

247. *White I*, 364 F.3d at 802 (quoting Mattei v. Mattei, 126 F.3d 794, 805 (6th Cir. 1997)) (emphasis added)). The *Mattei* court discussed retaliation provisions in the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001, 1140 (1974), and the National Labor Relations Act of 1974, 29 U.S.C. §158 (1974). *See Mattei,* 126 F.3d at 800 (interpreting the concept of an "employment relationship").

248. White v. Burlington N. & Santa Fe Ry. Co. (*White I*), 364 F.3d 789, 789 (6th Cir. 2004), Burlington Northern & Santa Fe Ry. Co. v. White (*White II*), 126 S.Ct. 2405 (2006). The Government endorsed the materiality standard in its amicus brief to the Supreme Court (Brief for the United States as Amicus Curiae Supporting the Respondent, 2006 WL 622123 (U.S)).

249. Brief for the United States, *supra* note 248, as Amicus Curiae Supporting the Respondent, 2006 WL 622123 (U.S), at 23, quoting Forkkio v. Powell, 306 F.3d 1127, 1130-1131 (D.C. Cir. 2002).

250. *White I*, 364 F.3d at 800; *see supra* Part II.B for discussion of the ultimate employment decision.

back.[251] Burlington Northern's argument primarily relied on the Sixth Circuit case of *Dobbs-Weinstein v. Vanderbilt University*,[252] in which a university that had denied tenure to a professor later reversed its decision.[253] The *Dobbs-Weinstein* court held that the denial, followed by the grant of tenure failed to constitute an adverse employment decision since any adverse effect was rectified.[254] It was the "reversal [that] was the ultimate employment decision."[255] The Sixth Circuit distinguished the current action from *Dobbs-Weinstein* and stated that *Dobbs-Weinstein* did not control, explaining that its holding in the latter case rested on the peculiar nature of tenured university positions.[256]

In clarification of its decision in *White*, the Sixth Circuit announced that it would join the majority of the circuits in refusing to impose an "ultimate employment decision" standard, as Burlington Northern would require.[257] In support of its argument, the court cited *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*,[258] in which the Second Circuit held that an employee's suspension, which was later reversed, constituted an adverse employment action, despite the employer's payment of backwages.[259] *Lovejoy-Wilson* addressed discrimination in the context of an Americans with Disabilities Act ("ADA")[260] claim, and held that the employee (who suffered from epilepsy) established a *prima facie* case of retaliation by showing that, among other actions, the employer suspended the employee without pay for seven days after she filed ADA charges.[261] Similar in language to Title VII, the ADA prohibits employers "from discriminating against any individual because such individual has opposed any act or practices made unlawful by this chapter or because such individual made a charge, assisted or participated in any manner in an investigation, proceeding, or hearing under this chapter."[262] The court

251. *White I*, 364 F.3d at 800.
252. Dobbs-Weinstein v. Vanderbilt Univ., 185 F.3d 542 (6th Cir. 1999).
253. *Id.* at 543-44.
254. *Id.*
255. *White I*, 364 F.3d at 801 (quoting *Dobbs-Weinstein*, 185 F.3d at 545).
256. *Id.* at 802 n.7. Whether the court's distinction signaled a genuine change in the court's analysis of adverse employment actions, or whether it was merely, as the court stated, a distinction between the two fact patterns, is questionable. A concurring opinion stated that the decision in *White* certainly overturned *Dobbs-Weinstein*. *Id.* at 808 (Clay, J., concurring).
257. *White I*, 364 F.3d at 802; *see supra* Part II.B for discussion.
258. Lovejoy-Wilson v. NOCO Motor Fuel, Inc., 263 F.3d 208 (2d Cir. 2001).
259. *Lovejoy-Wilson*, 263 F.3d at 223.
260. 42 U.S.C. § 12101-213 (1990).
261. *Love-Joy Wilson*, 263 F.3d at 223.
262. 42 U.S.C. § 12101-213. Title VII of the Civil Rights Act of 1964 states: "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge,

stated that, in the present case, even if the backpay was reinstated, the employee suffered the loss of the wages during the suspension,[263] and the damage had already been done.[264] By way of contrast, the Sixth Circuit mentioned that in its prior decision, *Jackson v. City of Columbus*,[265] a suspension with pay and benefits did not constitute an adverse employment action.[266]

The Sixth Circuit's treatment of the issue rested on five points. First, the statute's plain language did not require an ultimate employment decision before an action is considered to violate Title VII.[267] Second, the suspension in White's case was not trivial, even if it did not result in a termination, i.e., an ultimate employment decision; the suspension did not fall into the category of "mere inconvenience(s)" that fail to warrant Title VII protection.[268] The suspension would have resulted in a termination if White did not challenge it, and during the time of the suspension she received no pay.[269] Third, if the employer's actions were not a violation of Title VII, then White would be unable to pursue her claim under Title VII, which provides not only compensatory relief (such as backpay), but also includes the recovery of attorney's fees and additional awards such as damages for emotional suffering.[270] The court discussed a fourth reason for its departure from the ultimate employment decision standard: White complained about the allegedly discriminatory conduct both through internal procedures as well as through the courts.[271] The fact that she pursued her complaint through both avenues of redress should not foreclose her options and render the issue moot before the courts until the employer reached its ultimate decision.[272]

---

testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a) (2000).

263. *Love-Joy Wilson*, 263 F.3d at 224.

264. The *Lovejoy-Wilson* court also stated, "that lesser actions may be considered adverse employment actions . . . [such as] 'negative evaluation letters, [and] express accusations of lying. . . .'" *Id.* at 223 (quoting *Morris v. Lindau*, 196 F.3d 102, 110 (2d Cir. 1999)).

265. Jackson v. City of Columbus, 194 F.3d 737 (6th Cir. 1999).

266. *Id.* at 752.

267. *White I*, 364 F.3d at 802. Title VII does not include the "ultimate employment decision" language and does not, on its face, require such a finding. 42 U.S.C. § 2000e-3(a) (2000).

268. *White I*, 364 F.3d at 802.

269. *Id.* at 793.

270. *Id.; see also* 42 U.S.C. 1981a(b); 2000e-5 (g), (k) (1991); Albermarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (the purposes of Title VII include making the plaintiff whole for injuries caused by employment discrimination).

271. *White I*, 364 F.3d at 793.

272. *Id.*

Lastly, the court pointed to the two circuits whose decisions arguably endorsed the ultimate employment decision standard:[273] the Fifth Circuit[274] and the Eighth Circuit.[275] Neither of these circuits appeared to hold to that standard in all events. The Sixth Circuit noted that the Fifth Circuit recognized the need to perhaps revisit the issue in light of the Supreme Court's ruling in *Ellerth*.[276] Furthermore, according to the Sixth Circuit, the Eighth Circuit had regularly taken a more expansive approach to the issue, citing, e.g., *Manning v. Metro Life Ins. Co.*,[277] which held that an ultimate employment decision includes "tangible changes in duties or work conditions that constituted a material employment disadvantage."[278] The court also cited the Eighth Circuit case of *Kim v. Nash Finch Co.*,[279] in which an employee who was not "discharged, demoted, or suspended,"[280] may be subject to an ultimate employment decision when he or she endures a "reduction in duties, actions that disadvantage or interfere with the employee's ability to do his or her job, [or] 'papering' of an employee's file with negative reports and reprimands."[281] Regardless of the Eighth Circuit's labeling of its list

273. *Id* at 801.

274. *See, e.g.*, Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997).

275. *See, e.g.*, Ledergerber v. Strangler, 122 F.3d 1142, 1144 (8th Cir. 1997).

276. *White I*, 364 F.3d at 801; Fierros v. Tex. Dep't of Health, 274 F.3d 187, 192-93, 192 n.2, (5th Cir. 2001).

277. Manning v. Metro Life Ins. Co., 127 F3d 686 (8th Cir. 1997).

278. *Id.* at 692.

279. Kim v. Nash Finch Co., 127 F.3d 1046, 1060 (8th Cir. 1997).

280. *White I*, 364 F.3d at 801.

281. *Id.* In reference to this analysis, the court also mentioned two prior cases in a footnote. *Id.* at 799, n.5 (discussing Passer v. Am. Chem. Soc'y, 935 F.2d 322 (D.C. Cir. 1991) and EEOC v. Outback Steakhouse of Florida, Inc., 75 F. Supp. 2d 756 (N.D. Ohio 1999)). In *Passer*, the employer canceled a symposium in honor of a former employee after that employee's allegation of employment discrimination. *Passer*, 935 F.2d at 330-31. The District of Columbia Circuit Court held that the cancellation might be considered retaliatory for purposes of Title VII, despite the fact that the employee had ceased to work for the employer. *Id.* As noted by the D.C. Circuit in *Passer*, the Supreme Court had previously dealt with whether a former employee may bring an action for discrimination under § 704(a) in Robinson v. Shell Oil Co. 519 U.S. 337, 339 (1999). If former employees were excluded, this "would undermine the effectiveness of Title VII by allowing the threat of postemployment retaliation to deter victims of discrimination from complaining to the EEOC." *Id.* at 346.

The second case, *Outback Steakhouse*, concerned an employee whose employer counterclaimed in reaction to a lawsuit alleging discrimination. *Outback Steakhouse*, 75 F. Supp. 2d at 757. The counterclaim, held the Ohio district court, was sufficient to constitute retaliation, regardless of its direct effect on employment. *Id. at* 758-60. The Ohio court said that, "The impetus behind Title VII's anti-retaliation provision is the need to prevent employers from deterring victims of discrimination from complaining to the EEOC." *Id.* at 758. The Sixth Circuit noted "that Title VII's anti-retaliation provision is not limited to discrimination affecting employment." *White I*, 364 F.3d at 799 (citing *Outback Steakhouse*, 75 F. Supp. 2d at 758-60). In dicta, the Sixth Circuit stated that it was unnecessary in White's case to distill the fine distinctions between, on the one hand,

as examples of ultimate employment decisions, arguably some of the actions, such as papering, would not qualify as ultimate employment decisions.

2. The Reassignment

In a scant, single paragraph, the Sixth Circuit dealt with whether the plaintiff's job transfer was an adverse employment action.[282] Given White's fellow workers' opinion that the new job was harder, the fact that the new position required fewer qualifications, such qualifications being "an indication of prestige,"[283] and Burlington Northern's admission that the forklift operator position was not only better, but the male workers resented a female for having it, the court held that the reassignment was a demotion "evidenced by 'indices . . . unique to [the] particular situation,'"[284] and was an adverse employment action.[285] Since the court defined any materially adverse employment action to sound in breach of both § 703(a) and § 704(a),[286] it was unnecessary for the court to distinguish two theories of liability under the respective sections.[287]

---

actions that materially affect employment and, on the other, actions that are retaliatory and materially adverse, but that nonetheless do not affect employment; in White's case, both the suspension and job transfer clearly did affect employment. *Id.* at 799. From the court's language, it appears, however, that the court would have been willing to consider claims such as those made in *Passer* and *Outback Steakhouse* as constituting adverse employment actions. "The D.C. Circuit and the United States District Court for the Northern District of Ohio have written well-reasoned opinions that conclude that . . . an employer is prohibited from retaliating in materially adverse ways, regardless of whether the retaliatory acts affect employment." *Id.* at 799 n.5.

282. *White I*, 364 F.3d at 803.

283. *Id.* "[T]he plaintiff had failed to show an adverse employment action, because, among other things, her job reassignment did not entail any loss of prestige." *Id.* (citing Kocsis v. Multi-Care Mgmt., Inc., 97 F.3d 876, 886-87 (6th Cir. 1996)).

284. *Id.* (citing *Kocsis*, 97 F.3d at 886).

285. *White I*, 364 F.3d at 803.

286. It bears repeating that the Sixth Circuit limited its decision on appeal to whether the employee suffered a retaliation, not whether the employer was guilty of substantive discrimination. *Id.* at 791.

287. The Sixth Circuit established that the suspension and the transfer were both acts of retaliation. *Id.* at 803. In reference to the court's decision regarding pretext, attorney's fees and punitive damages, the court first addressed Burlington Northern's reasons for the actions which Burlington Northern argued in the alternative should the court hold that the actions were adverse employment actions. *Id.* at 804. The Sixth Circuit held that the reasons were pretextual. *Id.* at 804. The court's decision rested, first, on Burlington Northern's inconsistent testimony regarding its justification and, second, the jury's ability to believe White's, rather than Burlington Northern's, recitation of the events. *Id.*

The Sixth Circuit then concluded its opinion by holding that White was entitled to attorney fees, *id.* at 805, and that she may also be entitled to punitive damages. *Id.* at 808. On remand, the court noted, only the issue of punitive damages should be addressed. *Id.*

C. *The Next Step*

White successfully argued that Burlington Northern retaliated against her when it transferred and suspended her in response to complaints she made concerning employment discrimination.[288] Burlington Northern petitioned the Supreme Court for an appeal of the case, and the Court granted *cert.*[289] The Court could have refused to grant the appeal, in which case the circuit split would have continued. Or, the Court could have granted *cert.* and merely adopted the standard employed by the Sixth Circuit, which would have resolved the lower courts' disarray. The Court, however, chose a third way, creating a standard that differed from the Sixth Circuit's interpretation of Title VII.

IV. The Supreme Court Decision

A. *The Opinion of the Court*

The Supreme Court unanimously held, with one concurrence by Justice Alito,[290] that Burlington Northern engaged in retaliation both when it reassigned White and when it suspended her.[291] In reaching its decision, the Court rejected the EEOC standard (contained in the EEOC Guidelines),[292] the standard proffered by the Government,[293] the standard offered by the petitioner (Burlington Northern),[294] as well as the standard argued by the respondent (White).[295] Instead, the Court adopted the standard used by the Seventh Circuit[296] and District of Columbia Circuit[297] Courts, which provides that "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it might well have dissuaded a reasonable worker from making or supporting a charge of discrimination.'"[298] The Court recognized that employment relatedness

---

288. *Id.*

289. *White I,* 364 F.3d 789 (6th Cir. 2004), *cert. granted,* Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 797 (2005) (No. 05-259).

290. Burlington N. & Santa Fe Ry. Co. v. White (*White II*), 126 S.Ct. 2405, 2418 (2006); *see also* discussion *infra* Part IV.B (discussing Justice Alito's concurrence).

291. *Id.* at 2416.

292. *Id.* at 2413; EEOC Compliance Manual § 8, "Retaliation," ¶ 8008 at 6512 (July 31, 1998).

293. *White II,* 126 S. Ct. at 2414.

294. *Id.*

295. *Id.* at 2410.

296. Washington v. Illinois Dep't of Revenue, 420 F.3d 658, 662 (7th Cir. 2005).

297. Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006).

298. *White II,* 126 S. Ct. at 2410-11 (quoting Rochon v. Gonzales, 438 F.3d 1211, 1219 (citing *Washington*, 420 F.3d at 662 (quotations omitted))).

and materiality were the paramount issues dividing the circuit courts.[299] The Court's resolution of the split "requires us to decide whether Title VII's anti-retaliation provision forbids only those employer actions and resulting harms that are related to employment and the workplace. And we must characterize how harmful an act of retaliatory discrimination must be in order to fall within the provision's scope."[300]

The Court repeated the substantive discrimination and anti-retaliation provisions of §§ 703(a) and 704(a) of Title VII, and stated that while the statute forbids retaliation, the split in the circuit courts concerned whether or not the same standard applied for discriminatory acts under both sections, particularly whether or not the employer's conduct must be employment related and how harmful the employer's actions must be.[301] The Court then parsed the four different standards used by the circuits.[302]

First, courts in the Third, Fourth, and Sixth Circuits had used a uniform standard for discriminatory acts that violate either the substantive provision of § 703(a), or the retaliation provision of § 704(a).[303] These circuits hold all discriminatory acts, whether sounding in § 703(a) or § 704(a), as imposing the same standard, i.e., that the employer's actions must "resul[t] in an adverse effect on the 'terms, conditions, or benefits' of employment."[304] For purposes of an application of § 704(a), these circuits required not only that the retaliatory acts be employment related, but also that the acts be materially adverse.[305]

Second, the Court noted that a stricter standard had been adopted by the Fifth and Eighth Circuits by requiring that only those actions that constitute an ultimate employment decision violate the retaliatory provision of Title VII.[306] Third, the Court noted that the Ninth Circuit followed the EEOC standard, announced in its 1998 Guidelines,[307] which requires treatment "that is based on a retaliatory motive and is reasonably

299. *Id.*
300. *Id.* at 2411.
301. *Id.*
302. *Id.* at 2410-11.
303. 126 S. Ct. at 2410; Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997) (discussed *supra* Part II.); Von Gunten v. Maryland, 243 F.3d 858, 866 (4th Cir. 2001) (discussed *supra* Part II.A.2); White v. Burlington N. & Santa Fe Ry. Co., 364 F.3d 789, 799 (6th Cir. 2004) (discussed *supra* Part.III).
304. *White II*, 126 S.Ct. at 2410 (quoting *Von Gunten*, 243 F.3d at 866).
305. *Id.*
306. *Id.*; Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997) (discussed *supra* Part II.B.1); Manning v. Metro. Life Ins. Co., 127 F.3d 686, 692 (8th Cir. 1997) (discussed *supra* Part II.B.2).
307. *White II*, 126 S.Ct. at 2411; EEOC Compliance Manual § 8, "Retaliation," ¶ 8008 at 6512 (July 31, 1998).

likely to deter the charging party or others from engaging in protected activity."[308] The standard does not require employment relatedness, nor does the standard explicitly deal with the notion of material adversity.

In their own ways, the approach of the Fifth and Eighth Circuits, on the one hand, and the approach of the Ninth Circuit on the other, both require different standards to establish a violation of § 703(a) or § 704(a), although each falls on opposite ends of the spectrum of actionable conduct. For the Fifth and Eighth Circuits, employment relatedness was required for a successful plaintiff to establish retaliation, and employment relatedness under § 704(a) was not merely a term, condition or privilege of employment, as specified under § 703(a), but instead, for the Fifth[309] and Eighth[310] Circuits, was an ultimate employment decision, such as a termination.[311] The Ninth[312] Circuit would not require job relatedness at all to establish retaliation under § 704(a)[313] (and the statute, on its face, does not impose such a requirement[314]), nor would it require materiality, even if § 703(a)[315] does specify that a violation must concern a term, condition or privilege of employment.[316]

The Court chose the fourth way, using the interpretation of the standard used by the Seventh and the D.C. Circuits[317] in cases of retaliation.[318] The Supreme Court's standard does not require employment relatedness, but it does to some degree parallel the case as it was analyzed by the Sixth Circuit, especially the Sixth Circuit's treatment of materiality.[319] "The employer's challenged action would have been material to a reasonable employee . . . [and] dissuaded a reasonable worker from making or supporting a charge of

308. *White II*, 126 S. Ct. at 2411 (quoting Ray v. Henderson, 217 F.3d 1234, 1242-43 (9th Cir. 2000)) (discussed *supra* Part II.C).

309. *Mattern*, 104 F.3d at 707.

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

311. *White II*, 126 S. Ct. at 2410.

312. *Henderson*, 217 F.3d at 1242-43.

313. Title VII of the Civil Rights Act of 1964 § 704(a), 42 U.S.C. § 2000e-3(a) (2000).

314. *Id.*

315. Title VII of the Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2(a) (1998).

316. *White II*, 126 S. Ct. at 2411.

317. Wash. v. Ill. Dep't of Revenue, 420 F.3d 658, 661-62 (7th Cir. 2005) (discussed *supra* Part II.D.1); Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006) (discussed *supra* Part II.D.2).

318. *White II*, 126 S. Ct. at 2414-15.

319. *See, e.g.*, White v. Burlington N. & Santa Fe Ry. Co. (*White I*), 364 F.3d 789, 795 (6th Cir. 2004), *cert. granted*, 126 S.Ct. 797 (U.S. Dec. 5, 2005) (No. 05-259) (discussing the Sixth Circuit's analysis of adverse employment actions).

discrimination."[320] The Court eliminated job relatedness, as the Sixth Circuit would require, but maintained the need to establish materiality, which was in accordance with the Sixth Circuit ruling.[321]

The Court compared the language used in sections 703(a) and 704(a):

> § 703(a) of Title VII (42 U.S.C. § 2000e-2(a)):
>
> It shall be an unlawful employment practice for the 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, sex, or national origin.[322]
>
> ***
>
> § 704(a) of Title VII (42 U.S.C. § 2000e-3(a)):
>
> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.[323]

Noting that the wording differed in the two sections, the court stated that § 703(a) focuses on who the employee is, that is, the employee's protected status,[324] while § 704(a) concerns what the employee does, that

320. *White II*, 126 S. Ct. at 2411 (quoting *Ill. Dep't of Revenue*, 420 F.3d at 662) (discussed *supra* Part II.D.1).

321. *Id.* at 2416.

322. Title VII of the Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2(a) (1998).

323. Title VII of the Civil Rights Act of 1964 § 704(a), 42 U.S.C. § 2000e-3(a) (2000). Burlington N. & Santa Fe Ry. Co. v. White (*White II*), 126 S.Ct. 2405, 2411 (2006).

324. 42 U.S.C.. § 2000e-2(a).

is, asserting his or her rights;[325] the different statutory goals addressed in each section confront different evils.[326] In order to achieve the goals of Title VII, both sections prohibit discrimination, but each section attempts to curtail different employer actions and necessitate different standards of actionable discriminatory conduct. Section 703(a) attacks substantive employment discrimination, whereas § 704(a) attacks acts that may not be employment related, but would, if not prohibited, constitute discrimination by interfering with employees' Title VII protections.[327] "Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses. 'Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances.'"[328]

In support of its argument, the Supreme Court in *White* [329] cited *Mitchell v. Robert DeMario Jewelry, Inc.*[330] *Mitchell* addressed retaliation under a different statute, 29 U.S.C § 158 of the National Labor Relations Act ("NLRA").[331] The Court recognized that imposing different standards under §§ 703(a) and 704(a) had parallels in the NLRA.[332] Section 158(a)(3) of title 29 of the U.S.C. prohibits substantive discrimination against workers for their membership activity related to labor organizations,[333] and 29 U.S.C. § 158(a)(4) prohibits the employer from retaliating against a worker who asserts his or her rights under the NLRA.[334] Precedent for the unique nature of retaliation was established, therefore, by the Court's rulings involving other statutory schemes, including the NLRA.[335]

---

325. *Id.* § 2000e-3(a).

326. Burlington N. & Santa Fe Ry. Co. v. White (*White II*), 126 S.Ct. 2405, 2411-13 (2006).

327. *Id.* at 2412; *see also*, Robinson v. Shell Oil Co., 519 U.S. 337, 341-346 (1997) (discussing the meaning of an employee under section 704(a)). *Robinson* holds that a former employee may bring actions for retaliation, despite the fact that he or she no longer works for the employer. *Robinson*, 519 U.S. at 346. Actions taken against former employees, by definition, cannot be employment related. For a review of retaliatory conduct, *see* Scott Rosenberg & Jeffrey Lipman, *Developing a Consistent Standard for Evaluating a Retaliation Case under Federal & State Civil Rights Statutes & State Common Law Claims: An Iowa Model for the Nation*, 53 DRAKE L. REV. 359, 362 (2005).

328. *White II*, 126 S. Ct. at 2414 (quoting Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960)).

329. *Id.*

330. *Mitchell*, 361 U.S. 288 (1960).

331. *Id*; National Labor Relations Act § 8, 29 U.S.C. § 158 (1974).

332. *White II*, 126 S. Ct. at 2414.

333. 29 U.S.C. § 158.

334. *Id.*

335. The Supreme Court also stated that the NLRA anti-retaliation provision attacked "a wide variety of employer conduct." *See White II*, 126 S.Ct. at 2414 (quoting Bill Johnson's Restaurants, Inc. v. Nat'l Labor Relations Bd., 461 U.S. 731, 740 (1983)).

Regarding *Ellerth* and its subsequent clarifications, in which tangible *employment* actions were addressed, the Supreme Court stated that such cases only dealt with whether or not an employer could assert an affirmative defense to charges of employment discrimination.[336] *Ellerth* and its progeny did not address Title VII's anti-retaliation provision.[337] The Government's and Burlington Northern's understanding of *Ellerth* mischaracterized § 704(a) as mandating a tangible employment action, and the Court rejected this interpretation.[338] The Court also rejected the EEOC's standard, which required neither job relatedness nor materiality.[339]

The Court explained its adopted standard, particularly the requirement that the action be materially adverse:[340] "We speak of *material* adversity because we believe it is important to separate significant from trivial harm . . . petty slights, minor annoyances and simple lack of good manners . . . [are unlikely] 'to deter victims of discrimination from complaining to the EEOC'']."[341] Furthermore, the Court chose to announce a standard in which the context of the employer's actions was important to determining whether one could assert that the actions were material.[342] "Context matters. 'The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.'"[343] The Sixth Circuit similarly had acknowledged the importance of context in determinations of materiality when it stated that courts must consider "'indices that might be unique to a particular situation.'"[344] The materiality standard preserves the twin notions of, first, weeding out those claims that concern employment actions that are merely irritating, annoying or downright rude (but are not statutorily prohibited), and, second, encouraging truly harmed employees to be

336. *Id.* at 2413.

337. *Id.*; *see also* Pennsylvania State Police v. Suders, 542 U.S. 129 (2004) (discussing *Ellerth* but failing to address the anti-retaliation provision of Title VII).

338. *White II*, 126 S.Ct. at 2413.

339. *Id.*; *see also* Howard Zimmerle, Note, *Common Sense v. The EEOC: Co-worker Ostracism and Shunning as Retaliation Under Title VII*, 30 IOWA J. CORP. L. 627, 634 (2005) (discussing the broad view the EEOC has taken in regards to the anti-retaliation provision).

340. *White II*, 126 S.Ct. at 2415.

341. *Id.* (quoting Oncale v. Sundowner, Offshore Services, Inc., 523 U.S 75, 80 (1998)) (emphasis in original).

342. *Id.*

343. *Id.* (quoting Oncale, 523 U.S. at 81-82.

344. White v. Burlington N. & Santa Fe Ry. Co. (*White I*), 364 F.3d 789, 797 (6th Cir. 2004), *cert. granted*, 126 S.Ct. 797 (U.S. Dec. 5, 2005) (No. 05-259) (quoting Kocsis v. Multi-Care Mgmt., Inc., 97 F.3d 876, 886 (6th Cir. 1996)).

protected.[345]

The potential impreciseness of the term "material" was made clear during oral arguments before the Supreme Court, when Justice Alito asked Respondent's counsel, Donald Donati, representing White, "[W]hat does material mean?"[346] Donati replied, "That's a great question . . ." in reaction to which the courtroom erupted in laughter.[347] Justice Souter asked, "[D]o you think [it] does anything more than just eliminate clearly de minimus behavior on the part of the employer?"[348] Donati answered, "I don't think it does anything other than that."[349] Respondent's counsel went on to say (referring specifically to White's reassignment), that the injury to White, caused by the actions of her employer, was material and clearly a "substantial injury."[350]

Stating that whether an employer's actions are considered material requires a case by case analysis, the Court applied this standard to the retaliatory actions alleged by White, holding that Burlington Northern violated § 704(a) in the case of the transfer and of the suspension.[351] Regarding White's transfer, the Court agreed with White that even if the reassignment to the new position fell within White's job classification, Burlington Northern's actions were nonetheless retaliatory.[352] The Court acknowledged that while the reassignment was technically consistent with the scheme of job descriptions used by Burlington Northern, the new position was "'more arduous and dirtier,'" than her former position as forklift operator, which required more qualifications and was objectively considered a better job by the male employees who resented White for having such a "prestigious" position.[353] The differences between the two work positions led the Court to conclude that Burlington Northern was trying to avoid liability under Title VII by attempting to technically comply with the law while violating the statute's clear

345. *White II,* 126 S.Ct. at 2416.

346. Transcript of Oral Argument at 49. *White II,* 126 S.Ct. 2405 (2006) (No. 05-259), 2006 WL 1063292.

347. *Id.*

348. *Id.*

349. *Id.* at 49-50.

350. *Id.* at 50. As the Sixth Circuit stated in the case below, "[t]aking away an employee's paycheck for over a month is not trivial, and if motivated by discriminatory intent, it violates Title VII." White v. Burlington N. & Santa Fe Ry. Co. (*White I*), 364 F.3d 789, 802 (6th Cir. 2004), *cert. granted*, 126 S.Ct. 797 (U.S. Dec. 5, 2005) (No. 05-259).

351. Burlington N. & Santa Fe Ry. Co. v. White (*White II*), 126 S.Ct. 2405, 2416 (2006).

352. *Id.* at 2416-17.

353. *Id.* at 2417; *see also* Christine Bradshaw, Note, *A Revised Tangible Employment Action Analysis: Just What Is an Undesirable Reassignment?*, 14 AM. U.J. GENDER SOC. POL'Y & L. 385 (2006) (criticizing courts' present interpretation of "undesirable reassignment," and describing it as a departure from U.S. Supreme Court precedent).

intention to prevent retaliation.[354]

> Almost every job category involves some responsibilities and duties that are less desirable than others. Common sense suggests that one good way to discourage an employee such as White from bringing discrimination charges would be to insist that she spend more time performing the more arduous duties and less time performing those that are easier or more agreeable. That is presumably why the EEOC has consistently found "[r]etaliatory work assignments" to be a classic and "widely recognized" example of "forbidden retaliation."[355]

Burlington Northern argued in its brief to the Supreme Court that, since both positions fell within the same job classification, the transfer could be neither adverse nor a demotion.[356] The Respondent, White, noted in her brief that if job classification was the sole criteria for deciding whether a reassignment was adverse, the employer would have an incentive to classify jobs as broadly as possible, ensuring that a transfer remained within a job classification so the employer could not be held to having acted adversely to the extent the reassignment was merely within the classification.[357] Alternatively, the employer could create job classifications that included both better and less desirable positions, in which case the employer would be invulnerable if a transfer to the poorer position was claimed to be adverse. The Court agreed with White that the reassignment was material and, therefore, retaliatory.[358]

The Court also found White's thirty-seven-day suspension to be retaliatory, despite Burlington Northern's insistence that it had rectified the suspension by giving White backpay.[359] First, the Court's ruling on the suspension encompassed that Title VII allowed a successful plaintiff to potentially receive punitive as well as compensatory damages.[360] Since Congress had amended Title VII in 1991 to allow recovery of these damages, holding otherwise would prevent White from obtaining the benefit of Congress's clear intent.[361] In support of this conclusion, the Court also pointed to the availability of injunctive relief in Title VII cases, which would be unavailable to the extent Burlington Northern's

354. *White II*, 126 S.Ct. at 2416-17.
355. *Id.* at 2416 (quoting 2 EEOC 1991 Manual § 614.7, pp. 614-31 to 614-32).
356. Brief for Petitioner at 27-29, *White II*, 126 S.Ct. 2405, No. 05-259 (U.S. Jan. 26, 2006), 2006 WL 704480.
357. Brief for Respondent at 32, *White II*, 126 S.Ct. 2405, No. 05-259 (U.S. March 9, 2006), 2006 WL 622126.
358. *See id.*; *see also White II*, 126 S.Ct. at 2417.
359. *White II*, 126 S.Ct. at 2417-18.
360. *Id.* at 2417.
361. *Id.*

actions failed to pose a violation of Title VII.[362]

Second, the Court noted that White suffered from the lack of pay at the time of the suspension, regardless of whether she ultimately was recompensed.[363] A reasonable employee observing White's treatment by Burlington Northern could have been dissuaded from asserting his or her statutory rights. As the Court stated, the suspension would have led to White's termination, if not challenged by White, and "an indefinite suspension without pay could well act as a deterrent, even if the suspended employee eventually received backpay. . . . Thus, the jury's conclusion that the 37-day suspension without pay was materially adverse was a reasonable one."[364]

The Supreme Court and the Sixth Circuit reached the same conclusion in favor of White, but for different, albeit somewhat similar, reasons. The Court pointed out that while the Sixth Circuit correctly required that the employer's actions must be material, there was no need to show that the actions were employment-related.[365] In White's case, the employer's actions were clearly employment-related, posing a change in the conditions of her employment through a transfer and suspension without pay.[366] The Court clarified retaliation, however, by noting that employers may take actions that, while retaliatory, occur either outside the workplace or are not tangible employment actions, and still threaten Title VII, inflicting harms on employees who would otherwise have no redress.[367]

B. Justice Alito's Concurrence

Justice Alito agreed with the result but questioned the standard used by the Court.[368] Justice Alito would require that the employer's actions were both material and employment-related in order for a § 704(a) claim to be actionable, thus offering a uniform standard for violations of either

362. *Id.*

363. *Id.* The Court included White's testimony at trial in which she stated, "That was the worst Christmas I had out of my life. No income, no money, and that made us all feel bad. . . . I got very depressed." *White II*, 126 S.Ct. at 2417.

364. *WhiteII*, 126 S.Ct. at 2417-18.

365. *Id. at* 2414-15.

366. *Id. at* 2416.

367. The unfairness of this result, if applied in Rochon v. Gonzales, 438 F.3d 1211 (D.C. Cir. 2006), (discussed *supra* Part II.D.2), in which the plaintiff's family was threatened, not by the employer, but by persons outside the workplace, may have been on the minds of the justices in reaching their result; the inaction of the employer in *Rochon* was material, even if it was not employment related. *Id.* at 1218. *See also* Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3rd Cir. 2004) discussed *supra* Part II.D.2 (actions taken by an employer against a former employee may still constitute retaliation).

368. *White II*, 126 S.Ct. at 2418-22..

§ 703(a) or § 704(a).[369] Since the suspension and reassignment were material and employment-related, Justice Alito would hold that Burlington Northern violated § 704(a), and he concurred in the Court's finding for White.[370]

Justice Alito specifically discussed the *Rochon* decision, and stated that under his uniform standard, even if the worker was precluded from filing a § 704(a) claim, a § 703(a) claim would still have been available.[371] Justice Alito's conclusions in this regard failed to address the possibility that an employee may not have a substantive discrimination claim, but could arguably maintain a claim for retaliation despite a lack of employment-relatedness.[372]

Justice Alito's difficulty with the Court's standards for §§ 703(a) and 704(a) extended to the Court's holding that actionable retaliation pertains to conduct that could dissuade a reasonable employee from asserting his or her rights under Title VII.[373] A court's perception of the reasonable employee may be obscured, in Justice Alito's view, if

369. *Id.* at 2420. *See also* the standards in the Third Circuit, discussed *infra* Part II.A.1, the Fourth Circuit, discussed *infra* Part II.A.2, and the Sixth Circuit, discussed *infra* Part III.

370. *White II*, 126 S.Ct. at 2421-22.

371. *Id.* at 2420.

372. Two Supreme Court cases examine the notion that §§ 703(a) and 704(a) claims are distinct, depending on the party who files the claim and the actions of the employer. The Supreme Court held in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) that, even if a claim of retaliation fails, the claim of discrimination may be successful. *McDonnell Douglas Corp.*, 411 U.S. at 799. The Court, in Jackson v. Birmingham Bd. of Educ., 125 S.Ct. 1497 (2005) held that a retaliation claim may succeed even when a discrimination claim is unsuccessful. Jackson, 125 S.Ct. at 1510. Losing on the claim of discrimination, but winning on the claim of retaliation, as occurred in *White II,* highlights the two Title VII protections provided under §§ 703(a) and 704(a). An employee who alleges discrimination may not be able to establish a case as required under § 703(a). The employee may prove retaliation was taken, however, when the employee pursues his or her right to a discrimination-free workplace, if the employer took action against the employee for asserting such rights. The two theories of liability are severable, and an employee who never claims discrimination in violation of § 703(a) may sue under § 704(a).

For example, Ken supervises three workers, Keisha, Paolo and Chris. Paolo overhears Ken's threat to fire Keisha if Keisha does not agree to date him. Paolo complains to his employer about Ken's conduct, and, as a result of his complaints, Paolo is fired. Paolo may claim retaliation in violation of Title VII, even though he was not the object of the original discriminatory conduct. In proving retaliation, Paolo may point not only to the act of dismissal, but he may also show that his fellow worker, Chris, or any other employee, could be dissuaded from complaining about the discrimination, since the result of Paolo's complaint was termination. It is, therefore, compatible with the protections established by Title VII that the complaints of discrimination and retaliation may be resolved differently, or not argued in tandem, depending on which party files suit and his or her respective theory of employer liability. *See* Ray v. Henderson, 217 F.3d 1234 (9th Cir. 2000) (discussed *supra* Part II.C).

373. *White II*, 126 S.Ct. at 2421.

materiality can only be determined in the context of the employer's conduct.[374] "[T]he majority's test is not whether an act of retaliation well might dissuade the average reasonable worker, putting aside all individual characteristics, but, rather, whether the act well might dissuade the reasonable worker who shares at least some individual characteristics with the actual victim."[375] Justice Alito's reservations raised an issue that is similar to concerns in the Court's prior decision in *Harris v. Forklift Systems, Inc.*[376]

Harris dealt with a hostile work environment claim under Title VII.[377] The worker, Teresa Harris, alleged that her employer created an abusive environment in which the company president used offensive language, made sexual innuendos and generally engaged in improper conduct and gender bias.[378] Harris quit her job and sued.[379] Harris was unsuccessful at trial and in the Sixth Circuit.[380] On appeal to the Supreme Court, the Court held that the lower courts had applied an incorrect standard for discriminatory conduct.[381]

Harris resolved a split in the circuits regarding the standard to be applied to employer conduct in cases alleging a violation of § 703(a) for purposes of a hostile work environment.[382] The Court stated that its prior cases established that prohibited conduct,

> is not limited to "economic" or "tangible" discrimination. The phrase "terms, conditions or privileges of employment" evinces a Congressional intent to "strike at the entire spectrum of disparate treatment of men and women" in employment. . . . [W]hen the workplace is permeated with "discriminatory intimidation, ridicule, and insult" that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive environment, Title VII is violated (some internal quotation marks omitted)."[383]

The question of how abusive, i.e., how material the conduct must be, weighed on the Court's mind in reaching its decision in *Harris*. *Harris* quoted *Meritor Savings Bank v. Vinson*, saying that while "'mere utterance of an epithet which engenders offensive feelings in an

374. *Id.*
375. *Id.*
376. 510 U.S. 17 (1993).
377. *Id.* at 19.
378. *Id.*
379. *Id.*
380. *Id.* at 19-20.
381. *Id.* at 21.
382. *Harris*, 510 U.S. at 21.
383. *Id.* (quoting Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978) and Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986)).

employee' . . . does not sufficiently affront the conditions of employment to implicate Title VII . . . [a]n environment that a reasonable person would find hostile or abusive" would still violate Title VII.[384] The *Harris* Court also recognized that the employee's perception is important in determining whether the conduct was harmful. "[I]f the victim does not specifically perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation."[385] While the *Harris* Court noted that the standard requires a case-by-case analysis of the conduct, rather than a bright-line test, to determine if the employer's actions were sufficiently material, "we can say that whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. . . . No single factor is required."[386]

If *Harris* and *Burlington Northern* each force the courts to analyze materiality, and thereby, reasonableness, on a case-by-case basis, Justice Alito would consider this particularized analysis unnecessarily burdensome.[387] In Justice Alito's view, requiring that the employer's

384. *Id.* at 21.

385. *Id.* at 21-22.

386. *Id.* at 22.

387. *Harris* does not reference the phrase "the reasonable woman" in its holding, using instead "the reasonable person." *Id.* at 21. However, the need to determine materiality in reference to the reasonableness of the victim raised the issue of what is considered reasonable to a particular worker. The Ninth Circuit previously employed the phrase in Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991), which held "that a female plaintiff states a prima facie case of hostile-environment sexual harassment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." Ellison, 924 F.2d at 879 (footnote omitted). The Court's ruling in *Harris*, when read, for example, in connection with its ruling in Oncale v. Sundowner Offshore Services, Inc.,523 U.S. 75 (1998), stands for the proposition that women and men may bring cases claiming violations of Title VII, and the view of the reasonable person in this regard will be used by the court. *Harris*, 510 U.S. at 21; *Oncale*, 523 U.S. at 81. *See*, for example, the following reviews for a discussion of the reasonable woman standard: David I. Gedrose, *Workplace Sexual Harassment: The Ninth Circuit's Reasonable Woman Standard and Employer Remedial Actions in Hostile Environment Claims Following* Ellison v. Brady, 28 WILLAMETTE L. REV. 151 (1991); Angela Baker, *The "Reasonable Woman" Standard Under* Ellison v. Brady*: Implications for Assessing the Severity of Sexual Harassment and the Adequacy of Employer Response*, 17 J. CORP. L. 691 (1992); Kathleen Nordin, Ellison v. Brady*: Is the Reasonable Woman Test the Solution to the Problem of How Best to Evaluate Hostile Environment Sexual Harassment Claims?*, 19 W. ST. U. L. REV. 607 (1992); Robert S. Adler & Ellen R. Peirce, *The Legal, Ethical, and Social Implications of the "Reasonable Woman" Standard in Sexual Harassment Cases*, 61 FORDHAM L. REV. 773 (1993); Melanie A. Meads, *Applying the Reasonable Woman Standard in Evaluating Sexual Harassment Claims: Is It Justified?*, 17 LAW & PSYCHOL. REV. 209, 221 (1993); Liesa L. Bernardin, Note, *Does the Reasonable Woman Exist and Does She Have Any Place in Hostile Environment Sexual Harassment Claims Under Title VII After* Harris, 46 FLA. L. REV. 291 (1994); Richard L. Wiener et al., *Social Analytic Investigation of Hostile Work*

actions be employment-related under either § 703(a) or § 704(a) eliminates the need for a court to decide whether a retaliatory action was material to a particular employee; actions are, or are not, employment-related, and, if they are employment-related, the actions are necessarily material.[388] Justice Alito's evaluation of the issue and his preferred standard may be more clear-cut relative to the Court's decision, but it is not necessarily more fair. In any case, the Supreme Court in *Burlington Northern* held that to ensure Title VII's protections, employment relatedness is not required under § 704(a).

V. The Supreme Court's Analysis of Tangible Employment Actions: *Ellerth* and Its Progeny

The Supreme Court established that §§ 703(a) and 704(a) are distinct, addressing different discriminatory conduct.[389] While employment relatedness is required for purposes of successfully arguing the claim of substantive discrimination, retaliatory acts must be material, but are not necessarily related to employment.[390] The Court had identified employment relatedness as a requirement in a series of discrimination cases that did not deal with retaliation, but did discuss the notion of a tangible employment action.[391]

The Supreme Court last dealt with the issue of tangible employment actions in *Pennsylvania State Police v. Suders*.[392] The classification was important for purposes of determining whether the employer's action would trigger the employer's opportunity for an affirmative defense against charges of substantive employment discrimination. *Suders*

Environments: A Test of the Reasonable Woman Standard, 19 LAW & HUM. BEHAV. 263 (1995); Barry S. Roberts & Richard A. Mann, *Sexual Harassment in the Workplace: A Primer*, 29 AKRON L. REV. 269 (1996); Jeremy A. Blumenthal, *The Reasonable Woman Standard: A Meta-Analytic Review of Gender Differences in Perceptions of Sexual Harassment*, 22 LAW & HUM. BEHAV. 33 (1998); Leslie M. Kerns, *A Feminist Perspective: Why Feminists Should Give the Reasonable Woman Standard Another Chance*, 10 COLUM. J. GENDER & L. 195 (2001); Elizabeth L. Shoenfelt, Allison E. Maue, & JoAnn Nelson, *Reasonable Person Versus Reasonable Woman: Does It Matter?* 10 AM. U.J. GENDER SOC. POL'Y & L. 633 (2002); Vicki Lens, *Supreme Court Narratives on Equality and Gender Discrimination in Employment: 1971-2002*, 10 CARDOZO WOMEN'S L. J. 501 (2004); Laura D. Francis, *What Part of "Hostile Environment" Don't You Understand? The Need for an Entire-Environment Approach in Sexual Harassment Cases*, 72 GEO. WASH. L. REV. 815 (2004).

388. *See also* the Sixth Circuit's analysis of this issue, which is discussed *supra* Part III.

389. *See* Burlington N. & Santa Fe Ry. Co. v. White (*White II*), 126 S.Ct. 2405, 2411-13 (2006).

390. *See id.*

391. *See id.* at 2413-15.

392. *See generally* Pa. State Police v. Suders, 542 U.S. 129 (2004).

clarified the Supreme Court's standard announced in *Ellerth*[393] and *Faragher*.[394] The Court held in the latter cases that Title VII prohibited discriminatory employment actions by the employer's supervisor, which may be classified as tangible employment actions or actions that do not rise to the level of a tangible employment action.[395] While both tangible and intangible employment actions may be illegal under Title VII, employers (through their supervisors) who committed actions that were not tangible employment actions could raise an affirmative defense to discrimination charges.[396] The affirmative defense allows an employer to successfully challenge charges of discrimination to the extent the employer proves that it maintained an effective anti-discrimination policy and that the employee unreasonably failed to use it.[397] When allowed to raise the defense, the employer is virtually assured of a win, if the elements of the affirmative defense are successfully proven.[398] In the presence of a tangible employment action, however, the employer cannot raise the affirmative defense, and must, for example, rely on an attack of the plaintiff's *prima facie* case or, alternatively, establish a nondiscriminatory reason for the action.[399]

In reaching its decision in *Burlington Northern*, two issues were critical for the Supreme Court's resolution of the case, and both issues were arguably related to the concept of a tangible employment action. The first involved examining whether a particular act is a tangible employment action and whether this determination is necessary in cases

393. *See* Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998).

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

395. *See Ellerth*, 524 U.S. at 754-55; *Faragher*, 524 U.S. at 787-88. The Sixth Circuit stated that tangible employment actions and adverse employment actions were essentially referring to the same concept. *See* Clarkson & Thomas, *supra* note 190, at 378-79. White v. Burlington N. & Santa Fe Ry. Co. (*White I*), 364 F.3d 789, 796 n.1 (6th Cir. 2004), *cert. granted*, 126 S.Ct. 797 (U.S. Dec. 5, 2005) (No. 05-259).

396. *See Suders*, 542 U.S. at 137-38 (citing *Ellerth*, 524 U.S. at 765 and *Faragher*, 524 U.S. at 807).

397. *See id.* at 134 (citing *Ellerth*, 524 U.S. 742 and *Faragher* 524 U.S. 775). For a discussion of why employees may not report discrimination, *see* Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 25-42 (2005).

398. For a discussion of *Suders* and the affirmative defense, *see* Megan E. Mowrey & Virginia Ward Vaughn, *Employer Liability for Sexual Harassment Culminating in Constructive Discharge: Resolving the Tangible Employment Action Question*, 14 REVIEW OF LAW AND WOMEN'S STUDIES 101 (2004). For a related discussion, *see* Heather S. Murr, *The Continuing Expansive Pressure to Hold Employers Strictly Liable for Supervisory Extortion: An Alternative Approach Based on Reasonableness*, 39 U.C. DAVIS L. REV. 529 (2006).

399. *Ellerth*, 524 U.S. at 765; *see also*, Rosalie Berger Levinson, *Parsing the Meaning of Adverse Employment Action in Title VII Disparate Treatment, Sexual Harassment, and Retaliation Claims: What Should Be Actionable Wrongdoing?*, 56 OKLA. L. REV. 623 (2003) (including a review of noneconomic or indirect injuries as a basis for harm at 625-30).

alleging retaliation.[400] Burlington Northern argued in the Sixth Circuit[401] and before the Supreme Court[402] that the acts it took against White failed to constitute adverse employment actions, and, therefore, it was not guilty of retaliation. The second, companion issue concerned whether the standard for discrimination is the same in cases alleging substantive employment discrimination under § 703(a) and in cases alleging retaliation in violation of § 704(a). Burlington Northern argued to the Supreme Court that the standards were the same under both sections of Title VII, and, therefore, it was not guilty of discrimination, again citing the tangible employment action standard.[403]

Burlington Northern did not dispute the timing of its actions, because timing was not at issue since Burlington Northern acted against White after she reported her employer's substantive discrimination.[404] Rather, Burlington Northern argued that the acts themselves were not adverse, i.e., tangible employment actions.[405] If Burlington Northern's actions were adverse, as the Sixth Circuit concluded,[406] the timing made them retaliatory, which Title VII prohibits.[407] Whether the acts themselves subjected Burlington Northern to charges of illegal discrimination under § 703(a) was decided in the trial court, where the jury held that the acts did not violate § 703(a); this decision was affirmed on appeal.[408] Left unanswered, however, was the notion of what constitutes retaliation under § 704(a).

At oral argument, petitioner Burlington Northern focused on the concept that Title VII encouraged preemptive action by the employer that both deters discrimination and prevents questionable conduct from rising to the level of a lawsuit when such conduct is amenable to a solution fashioned by the parties.[409] In this respect, Burlington Northern attempted to draw a parallel between its actions and the notion of the responsibility both of the employer and of the employee in rectifying

400. Burlington N. & Santa Fe Ry. Co. v. White (*White II*), 126 S.Ct. 2405, 2413 (2006).

401. White v. Burlington N. & Santa Fe Ry. Co. (*White I*), 364 F.3d 789, 800 (6th Cir. 2004), *cert. granted*, 126 S.Ct. 797 (U.S. Dec. 5, 2005) (No. 05-259) (discussing the suspension of White); *id.* at 803 (discussing the transfer of White).

402. *See White II*, 126 S.Ct at 2411-14.

403. *Id.* at 2411.

404. *Id.* at 2416.

405. *Id.* at 2417.

406. *See White I*, 364 F.3d at 800-04.

407. Section 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) (2000).

408. *See White I*, 364 F.3d at 794, 798.

409. The solution should be consistent with the employer's anti-discrimination policy and process.

employment discrimination as spelled out in *Ellerth*.[410] Justice Scalia questioned counsel for the Petitioner, Carter Philips, whether the suspension was an official company act, which would make the suspension, therefore, includable in the acts described as tangible employment actions under the court's reasoning in *Suders*[411] and in *Ellerth*.[412] Philips acknowledged that the suspension was the act of the company, "but the question still remains, Justice Scalia, for it to be a tangible employment action . . . is it available to the employer to cure, when the purpose of this entire statutory scheme is to avoid litigation and to provide informal mechanisms for protecting the rights of the employee?"[413] The Petitioner's argument ran that if Burlington Northern had acted consistently with a valid anti-discrimination policy, rectifying the suspension and paying White her backwages, then the employer cured.[414]

Immediately after this exchange, Justice Ginsburg established one of the key factors that decided the case. In tandem with questions from Justice Souter, Justice Ginsburg stated,

> [But, the employer] didn't cure. I mean, it was 37 days, right, that she went without pay? . . . And she understandably experienced much stress in that time. She worried about how she would be able to feed her children, could she get them Christmas presents. That was—there was nothing that she got, when it was determined that she hadn't been insubordinate, that compensated her for that stress.[415]

Materiality, as the Court later announced, would be determined as of the time of the suspension, rather than based on the employer's attempt to retroactively cure.

Additionally, the claims made by the employees in *Ellerth* and in *Burlington Northern* are distinct. *Ellerth* countenances cases in which an employee who, despite access to a valid anti-discrimination policy, fails to take advantage of that policy.[416] The employee in *Ellerth* abdicated her responsibility in the formula, while the employer, who attempted to prevent discrimination through its policies, met its obligation.[417] *Burlington Northern* involves something different, because it addresses

410. *See* Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 765 (1998).
411. *See* Pa. State Police v. Suders, 542 U.S. 129, 152 (2004).
412. Transcript of Oral Argument at 24-25, *White II*, 126 S.Ct. 2405 (2006) (No. 05-259), 2006 WL 1063292.
413. *Id.*
414. *See White II*, 126 S.Ct. at 2417.
415. Transcript of Oral Arguments at 25, *White II*, 126 S.Ct 2405 (2006) (No. 05-259), 2006 WL 1063292.
416. *Ellerth*, 524 U.S. at 765.
417. *Id.*

whether an employer can take actions specifically directed at punishing the employee for availing himself or herself of Title VII's protections; this is violation occurring through retaliation, and *Ellerth* and its progeny do not address retaliation.[418] In *Burlington Northern*, the employee did not abdicate responsibility for addressing employment discrimination.[419] Indeed, White reported the discrimination internally and was subsequently disciplined, which was followed by EEOC charges and a lawsuit.[420] The employee in *Burlington Northern* was targeted for retaliation because she used the policy and asserted her statutory rights.[421]

The Third Circuit court that heard the first appeal of *Suders*[422] expressed the following concern in reference to the facts in *Suders*. The Third Circuit worried that an employer could make the worker's employment so bad that the worker would be forced to quit, resulting in a constructive discharge, and, if constructive discharge was not a tangible employment action, the employer would be held harmless to the extent it successfully raised the affirmative defense.[423] Alternatively, according to the Third Circuit, if constructive discharge was classified as a tangible employment action, the employer would be prevented from raising the affirmative defense, thereby ameliorating the court's concern.[424] Nevertheless, the *Suders* Court held that constructive discharge would not be classified as a tangible employment action, where, as in *Suders*, the discharge involved the employee's voluntary action, and the employer took no official action against the employee.[425] *Ellerth*,[426] *Faragher*[427] and *Suders*[428] all require mutual responsibility for maintaining a discrimination-free workplace, which may begin with an anti-discrimination policy and conclude with an employee who either does or does not access that policy when claiming discrimination.[429]

Burlington Northern, however, involved actions in which a policy was in place, as evidenced by the employee reporting allegedly discriminatory incidents and the employer's subsequent investigations.[430]

---

418. *See* discussion *supra* note 338; *White II*, 126 S.Ct. at 2413.
419. *White II*, 126 S.Ct. at 2409-10.
420. *Id.*
421. *Id.*
422. Suders v. Easton, 325 F.3d 432 (3d Cir. 2003), *vacated,* 542 U.S. 129 (2004).
423. *Suders*, 325 F.3d at 461.
424. *Id.*
425. *Pa. State Police v. Suders*, 542 U.S. 129, 148 (2004).
426. 524 U.S. 742 (1998).
427. 524 U.S. 775 (1998).
428. 542 U.S. 129, 148 (2004).
429. *See* discussion *supra*, notes 417-22.
430. Burlington N. & Santa Fe Ry. Co. v. White (*White II*), 126 S.Ct. 2405, 2409-10 (2006).

The policy was, however, irrelevant to the ruling. Burlington Northern's actions were taken *because* the employee took advantage of the policy, not absent such a policy, and not despite the employee's failure to take responsibility.[431]

The goal of a discrimination-free workplace would be defeated to the extent the employer is excused for conduct that it hopes will discourage employees from obtaining the protections afforded by Title VII.[432] Retaliation assumes that the employer is taking action because of the employee's attempt to address discrimination, and whether the employment actions are classified as tangible or not, the affirmative defense is not available. What could have been true in White's case, if the Court had ruled otherwise, is that an employee in White's position might be without recourse to Title VII as long as the employer's actions occurred outside of the worker's employment[433] or, alternatively, as long as an anti-discrimination policy was in place. Returning to the suspension, Burlington Northern argued that the presence of its policy, coupled with the employee's access of it, and the employer's subsequent remedy of the suspension through backpay, rendered the employment action nonmaterial, excusing liability.[434] But, to the contrary, the Supreme Court held that retaliatory acts may include those acts that are not work-related.[435] If the Court ruled that employment relatedness was required, the fear of the Third Circuit in *Suders* would have come to pass: namely, that the employer could make conditions very bad for the employee who alleges discrimination (whether his or her own discrimination, or discrimination against a co-worker), and yet fear no legal reprisal as long as the actions were not tangible employment actions.

A ruling in favor of the employer, permitting the employer's actions against the employee, would compromise Title VII and raise the possibility that an employer's action that is not an *ultimate* employer action might never violate § 704(a). The Court did not endorse this

431. *Id.*

432. Savage raised this argument when she stated that to maintain access to Title VII's prohibitions and remediation of discrimination, any act that deters employees from filing a charge or opposing discrimination in the workplace should constitute retaliation. Joan M. Savage, *Adopting the EEOC Deterrence Approach to the Adverse Employment Action Prong in a Prima Facie Case for Title VII Retaliation*, 46.B.C. L. REV 215 (2004).

433. *See supra* Part II.B.2 for a discussion of Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997), in which a worker could claim retaliation even though the employer's retaliatory actions occurred after the worker was fired.

434. *White II*, 126 S.Ct. at 2417-18. In regard to the reassignment, Burlington Northern similarly claimed that the reassignment was not a tangible employment action, since it involved a shift within a job classification rather than a tangible action such as, its argument went, a demotion. *See* discussion *supra* Part IV.A.

435. *White II*, 126 S.Ct. at 2411.

result,[436] but such was the case in *Mattern v. Eastman Kodak Co.*,[437] in which the Fifth Circuit required an ultimate employment action, including, e.g., "hiring, granting leave, discharging, promoting, and compensating."[438] The Fifth Circuit's standard essentially repeated the list of tangible employment actions contained in *Ellerth*, *Faragher*, and *Suders*.[439] Nevertheless, employer actions that are discriminatory, but do not constitute a firing, demotion, or other actions on the list of tangible employment actions, may still violate Title VII and § 704(a);[440] retaliatory acts need not be tangible employment actions. Title VII applies to more than economic or tangible discriminatory acts,[441] as previously discussed[442] and stated by the court in *Meritor Savings Bank v. Vinson*,[443] which held that "the language of Title VII is not limited to 'economic' or 'tangible' discrimination. The phrase 'terms, conditions or privileges of employment' evidences a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment."[444] Furthermore,

> in the context of retaliation claims, employees might be deterred from exercising their statutory rights if they knew that going forward could result in temporary suspensions or demotions. The knowledge that one's rights may eventually be vindicated and a position restored or a

436. *Id.* at 2414.

437. 104 F.3d 702 (5th Cir. 1997). The Fifth Circuit approach is discussed *supra* Part II.B.1. *See also supra*, Part II.B.2 for a discussion of the Eighth Circuit which also used the ultimate employment decision standard in Manning v. Metro. Life Ins. Co., 127 F.3d 686 (8th Cir. 1997).

438. *Mattern*, 104 F.3d at 707 (quoting Page v. Bolger, 645 F.2d 227, 233 (4th Cir.1981)).

439. *Id.*

440. *See, e.g.*, Joan M. Savage, *Adopting the EEOC Deterrence Approach to the Adverse Employment Action Prong in a Prima Facie Case for Title VII Retaliation*, 46.B.C. L. REV 215, 219 (2004)., (citing Pryor v. Seyforth, Shaw, Fairweather & Geraldson, 212 F.3d 976, 980 (7th Cir. 2000); Passtino v. Johnson & Johnson Consumer Prod., Inc., 712 F.3d 493, 506 (9th Cir. 2000); and Payne v. McLemore's Wholesale & Retail Stores, 654 F.2d 1130, 1140 (1981)). Each of these cases involved an unsuccessful substantive discrimination claim and a successful claim of retaliation. Savage noted that Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) held that, while § 703(a) of the Civil Rights Act does not explicitly cover hostile work environments, a successful plaintiff may nonetheless establish a violation of Title VII, despite the lack of an ultimate employment decision. Savage, *supra* note 432; *see also*, Robert A. Kearney, *The Unintended Hostile Environment: Mapping the Limits of Sexual Harassment Law*, 25 BERKELEY J. EMP. & LAB. L. 87 (2004).

441. Rosalie Berger Levinson, *Parsing the Meaning of Adverse Employment Action in Title VII Disparate Treatment, Sexual Harassment, and Retaliation Claims: What Should Be Actionable Wrongdoing?*, 56 OKLA. L. REV. 623, 641-42 (2003).

442. *See* discussion *supra* Part IV.B.

443. 477 U.S. 57 (1986).

444. *Id.* at 64 (quoting Los Angeles Dep't of Water & Power v. Manhart, 455 U.S. 702, 707 n.13 (1978)).

> name cleared provides little solace to the employee who wishes to avoid the stress and turmoil such temporary adverse action can cause.[445]

VI. Recently Remanded Cases

Several cases, including the following two,[446] have been remanded to the circuit courts on the heels of *Burlington Northern*;[447] both concerned a variety of claims, including retaliation in violation of Title VII.

In *James v. Metropolitan Government of Nashville*,[448] the plaintiff, James, worked for the local government as a librarian in the Nashville Public Library system.[449] While James had received positive work evaluations for several years, these positive evaluations were then followed by negative reviews for several years.[450] The employer told James that she would be fired if her evaluations continued to be negative.[451] Efforts were made by her employer to accommodate what James and her doctor stated were health difficulties that interfered with her ability to comport with the employer's performance standards.[452] These efforts were allegedly insufficient, and James voluntarily left her job. James sued for violations of the Americans with Disability Act ("ADA"),[453] the Age Discrimination in Employment Act ("ADEA"),[454] and Title VII.[455] James's suits under the ADA and ADEA were dismissed by the district court.[456] She then proceeded under Title VII,

---

445. Levinson, *supra* 399, at 665. The notion that a discriminatory climate left unaddressed by the employer constituted a violation of Title VII was the chief issue in Oncale v. Sundowner Offshore Services,Inc., 523 U.S. 75 (1998), where the employer tolerated discriminatory conduct by its employees even after a worker complained about the abuse. *Oncale*, 523 U.S. at 77. A customer's discriminatory conduct has also been attributed to the employer to the extent the employer failed to take action against the behavior. *See, e.g.*, Lockard v. Pizza Hut, 162 F.3d 1062, 1072 (10th Cir. 1998).

446. James v. Metro. Gov't of Nashville, 159 Fed. Appx. 686 (6th Cir. 2005); Bussell v. Motorola, Inc., 141 Fed.Appx. 819 (11th Cir. 2005), *vacated,* 127 S.Ct. 38 (2006). For the implications for state law in, for example, Kentucky, *see* Stephen Richey & Faith C. Isenhath, *How Recent Kentucky Courts are Applying the Retaliation Claim in Employment Cases*, 33 N. Ky. L. Rev. 283 (2006).

447. *White II*, 126 S.Ct. 2405 (2006).

448. 159 Fed.Appx. 686 (6th Cir. 2005).

449. *Id.* at 687

450. *Id.* at 687-88.

451. *Id.*

452. *Id.*

453. *Id.*; 42 U.S.C. § 12112(a) (1995).

454. 29 U.S.C. § 621 (2006).

455. Section 703(a), Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) (1998).

456. James v. Metro. Gov't of Nashville, 159 Fed.Appx. 686, 688 (6th Cir. 2005).

claiming a hostile work environment and retaliation.[457] The jury found for James under her retaliation claim, but her employer disputed the holding, arguing that James failed to suffer any adverse employment action and, therefore, the verdict should be set aside and the issue decided in favor of the defendant as a matter of law.[458] The district court denied the employer's motion, and James's appealed, seeking to reverse the district court's other rulings.[459]

The appellate court stated that a retaliation "must be 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'"[460] This standard for retaliation required proof not only that the conduct was objectively hostile and abusive, but also that the individual targeted for the treatment perceived the actions as hostile and abusive.[461] In evaluating whether or not James met her burden of establishing an objectively hostile environment, the court acknowledged that "indices unique to a particular situation"[462] might signal a hostile work environment, but the challenged conduct "must be more disruptive than a mere inconvenience or an alteration of job responsibilities."[463] The court did note that while an adverse employment action must be materially adverse, retaliation may occur even after the employee has left his or her job.[464]

Applying the test it had announced, the *James* court held that the employer's actions failed to constitute retaliation for purposes of violating Title VII.[465] The court in this regard partially relied on its prior Sixth Circuit opinion in *Morris v. Oldham County Fiscal Court.*[466] In *Morris*, the harassment included the actions of a supervisor who was accused of "calling [the plaintiff] . . . visiting her workplace to harass her . . . [driving] to her office building on several occasions . . . sitting in his truck looking in her office window, making faces at her . . . following her home from work . . . and throwing roofing nails on her home driveway several times."[467] In contrast, James offered, in support of her claimed retaliation, the allegation that her employer opposed James's

457. *Id.*
458. *Id.* at 688-89.
459. *Id.*
460. *Id.* at 691 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)).
461. *Id.*
462. *James*, 159 Fed.Appx. at 689.
463. *Id.* at 690 (quoting Kocsis v. Multi-Care Mgmt., Inc., 97 F.3d 876, 886 (6th Cir. 1996)).
464. *James*, 159 Fed.Appx. at 690 (citing Robinson v. Shell Oil Co., 519 U.S. 337, 339 (1997)).
465. *Id.*
466. 201 F.3d 784 (6th Cir. 2000).
467. *James*, 159 Fed. Appx. at 689 (quoting Morris v. Oldham County Fiscal Court, 201 F.3d 784, 793 (6th Cir. 2000)).

filing of a disability benefit application and nothing more.[468] The *James* court stated that the employer's actions were not comparable in magnitude and did not constitute retaliation of the sort encountered in *Morris*.[469] The court remanded the case consistent with its ruling that the plaintiff presented insufficient evidence in favor of retaliation and granted the defendant's motion for a judgment as a matter of law.[470]

The Supreme Court subsequently remanded *James* to the Sixth Circuit[471] after providing its definition of retaliation in *Burlington Northern*,[472] namely that "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse. . . ."[473] Job-relatedness was not required under the Supreme Court rule.[474]

Bussell v. Motorola, Inc.[475] similarly involved a claim of retaliation, which the Supreme Court remanded to the Eleventh Circuit after its decision in *Burlington Northern*.[476] The district court in *Bussell* had granted summary judgment to the defendant employer.[477] In the facts on appeal, the plaintiff, Bussell, claimed that she endured an allegedly hostile work environment.[478] Her employer took actions regarding the harassment, including holding meetings that addressed the actions of the plaintiff's co-worker, who was the center of the harassment.[479] Bussell's supervisor then allegedly retaliated against Bussell by yelling at her and increasing her workload.[480] While the harassing supervisor was subsequently disciplined, Bussell claimed that she was the victim of continuing retaliation and eventually quit.[481]

The Eleventh Circuit held that the district court appropriately dismissed charges of a hostile work environment and sexual harassment, stating that the harassment was not so "severe or pervasive to alter the

468. *Id.* at 691. The court also noted that, while a clerical error informed James that she had lost family medical benefits, she did not, in fact, lose the benefits. *Id.* at 690.

469. *Id.* at 691.

470. *Id.*

471. James v. Metro. Gov't of Nashville, 127 S. Ct. 336 (2006) (remanded to the Sixth Circuit).

472. Burlington N. & Santa Fe Ry. Co. v. White (*White II*), 126 S. Ct. 2405, 2416 (2006).

473. *Id.* at 2415.

474. *Id.* at 2409. This aspect of the standard was referenced by the court in *James* when the *James* court stated that charges of retaliation may be brought against a former employer. *James*, 159 Fed. App'x. at 690 n.1.

475. 141 Fed App'x. 819 (*Bussel I*) (11th Cir. 2005).

476. *Bussell v. Motorola, Inc.*,(*Bussel II*) 127 S. Ct. 38 (2006).

477. *Busse l*, 141 Fed App'x. at 820.

478. *Id.* at 820-22.

479. *Id.* at 821-22.

480. *Id.* at 822.

481. *Id.*

conditions of the employment. . . ."[482] The court seemed to place nearly all of its attention on whether or not Bussell provided sufficient proof that she suffered an adverse employment action.[483] The conduct examined by the court included an incident in which the plaintiff's shirt was pulled up and her pants were pulled down.[484] The incident was characterized by the court as a "single incident and not sufficiently severe or pervasive to alter the work environment."[485] In addition, the plaintiff was subjected to ten to fifteen instances in which the same co-worker inappropriately rubbed against her.[486] The court stated that,

> Unlike other cases in this Court, such as *Hulsey v. Pride Res.*, [sic] *LLC*,[487] where alleged sexual activities of a *supervisor* occurred over a concentrated time period, these activities occurred over a two-month period. Bussell neither identifies, nor have we found, an analogous holding that such alleged behavior is sufficiently severe or pervasive to constitute a hostile workplace sexual harassment claim.[488]

The court summarily rejected Bussell's argument of retaliation for lack of evidence supporting an adverse employment action.[489] In the court's understanding of the suit, since the plaintiff failed to suffer an adverse employment action, and her ultimate termination was neither involuntary nor based on cognizable harassment,[490] the court let the prior judgment against the plaintiff stand.[491]

The court's focus on the adverse employment action claim, and its characterization of the plaintiff's battery by her co-worker as insufficiently severe or pervasive, allowed the court to conclude that there could not be any retaliation.[492] Such a result not only ignores the gravity of the incidents, but also fails to address the nature of retaliation. The Supreme Court likely sent the case back to the Eleventh Circuit for further review consistent with these problems in the Eleventh Circuit's analysis, not the least of which was the circuit's failure to apply the recently announced standards for determining retaliation in violation of Title VII under *Burlington Northern*.

---

482. *Id.* at 822-23.
483. *Bussell*, 141 Fed. App'x. at 823.
484. *Id.*
485. *Id.*
486. *Id.*
487. 367 F.3d 1238 (11th Cir. 2004).
488. *Bussell*, 141 Fed App'x. at 823.
489. *Id.*
490. There was, in the court's opinion, no constructive discharge based on a precipitating violation of Title VII. *Id. at* 823.
491. *Id.*
492. *Id.*

VII. Conclusion

The Supreme Court gave important guidance in *Burlington Northern*, analyzing and explaining what is meant by retaliation under Title VII.[493] The justices unanimously held that Burlington Northern could not subject Shelia White to reassignment or suspension without harming White and violating employment discrimination law.[494] The Court established that §§ 703(a) and 704(a) are unique, and a standard that uniformly encompassed violations of both sections would ignore the distinguishable, illegal conduct intended to be addressed by each section of the statute.[495] The Court's conclusions are encouraging to employees and endorse employers' commitment to a discrimination-free workplace.

493. *See supra* Part IV.A.
494. *See supra* Part IV.A.
495. *See supra* Part IV.A.