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NOTE

A BRIDGE TOO FAR: THE SUPREME COURT OVEREXTENDS THE ANTI-RETALIATION PROVISION OF TITLE VII

Nicholas Villani†

Cynthia Richardson filed racial discrimination charges with the Equal Employment Opportunity Commission (EEOC) in response to racial discrimination she experienced at work, but it was only the beginning of her troubles. Richardson subsequently found horse manure in her parking spot, was hit with a rubber band while riding the bus with co-workers, found her car scratched in the employee parking lot, and found hair in her food on four separate occasions.

Title VII of the landmark Civil Rights Act prohibits employment

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2. Id. at 435 (“Richardson contends that . . . she was again harassed because of her race, and furthermore was retaliated against for having complained about the discrimination she [previously] encountered . . . .”).

3. Id.

4. According to Professor Mack A. Player, “[t]he legislative history of Title VII is perhaps the most unusual of any modern statute.” MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW § 5.03, at 201 (abr. student ed. 1988). An early draft of the bill stipulated only a weak enforcement body with little power past employment conciliation. Id. Additionally, there was no protection for employment discrimination based on sex. Id. Interestingly, the House Rules Committee chairman offered an amendment to add sex as a protected class “in a spirit of satire.” Id. (citation omitted). Despite the chairman’s satirical intent, the amendment was adopted “with little debate.” Id. The Equal Employment Opportunity Act amended Title VII in 1972, and provided more liberal procedural measures and greater enforcement powers for the EEOC. See id. § 5.03, at 202.

As a practical matter, one should be aware of the nomenclature of Title VII statutory provisions. Id. § 5.01, at 199 n.1. Due to the cumbersome numbering conventions of the United States Code, many courts, enforcement agencies, and practitioners refer to the section of the Act as opposed to the formal United States Code section. Id. Thus, 42 U.S.C. § 2000e is referred to as section 701, 42 U.S.C. § 2000e-1 is referred to as section 702, and so on. Id. Thus, the anti-retaliation provision of Title VII (42 U.S.C. § 2000e-3(a)) is commonly referred to as section 704. Id.
discrimination based on race, color, national origin, sex, or religion.\textsuperscript{5} Additionally, Title VII outlaws retaliation against employees who contest these prohibited forms of discrimination.\textsuperscript{6} Clear cases of retaliation exist when the employer terminates the employee or reduces the employee’s salary in response to the employee taking protected actions under Title VII.\textsuperscript{7} Beyond these so-called “ultimate employment decisio[ns],”\textsuperscript{8} the law is less clear in determining what constitutes a retaliatory adverse employer action.\textsuperscript{9} The Supreme Court attempted to clear up any misconceptions when it granted certiorari to \textit{Burlington Northern & Santa Fe Railroad v. White}.\textsuperscript{10}

The harm Richardson suffered following her EEOC complaint was objectionable,\textsuperscript{11} but should it give rise to an action against her employer? In Richardson’s case, the Second Circuit determined that although the harms suffered were personal and came from co-workers, the “unchecked retaliatory co-worker harassment” was sufficient to constitute retaliatory adverse actions by the employer under Title VII.\textsuperscript{12}

The Title VII provision in question prohibits an employer from discriminating against employees or applicants for their opposition to, or

\begin{itemize}
\item \textsuperscript{5} 42 U.S.C. § 2000e-2(a) (2000). Title VII of the Civil Rights Act addresses discrimination in employment settings. \textit{See} \textit{PLAYER}, supra note 4, § 5.01, at 199. Title VII regulates relationships between employers and their employees as well as job applicants. \textit{Id.} Additionally, Title VII covers unions and employment agencies. \textit{Id.} Individuals covered under the Act and subjected to such discrimination may file complaints with the EEOC and seek a remedy. \textit{See} 42 U.S.C. § 2000e-2.

\item § 2000e-3(a). Since employees who report employment discrimination face the prospect of retaliation from their employer, the purpose of Title VII shows a general emphasis on protecting employees from discriminatory workplace conditions, while the retaliation provision of Title VII serves to specifically retain uninhibited access to the protections provided in Title VII through the proscription of employer retaliation. \textit{See id.} Title VII provides secondary protection to employees who take advantage of discrimination protections by outlawing additional discrimination against employees for “making charges, testifying, assisting, or participating in [Title VII] proceedings.” \textit{Id.}

\item § 2000e-2 (“It shall be an unlawful employment practice for an employer . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation . . . ”); \textit{see also} Noviello v. City of Boston, 398 F.3d 76, 88 (1st Cir. 2005) (“Typically, an adverse employment action involves a discrete change in the terms and conditions of employment.”).

\item Burlington N. & Santa Fe Ry. v. White (Burlington III), 126 S. Ct. 2405, 2410 (2006) (quoting Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997)).

\item \textit{See} Charles Lane, \textit{High Court Weighs Retaliation at Work; Harassment-Case Standard Unclear}, \textit{WASH. POST}, Apr. 18, 2006, at A4 (attributing the following statement to an attorney for Burlington Northern, “unless the court clarifies the legal standard, ‘any act of retaliation, no matter how trivial’ . . . could trigger a lawsuit”).

\item \textit{Burlington III}, 126 S. Ct. at 2410-11.

\item \textit{See} Richardson v. N.Y. State Dep’t of Corr. Serv., 180 F.3d 426, 435 (2d Cir. 1999).

\item \textit{Id.} at 446-47.
\end{itemize}
complaint of, an unlawful employment practice. Thus, Title VII protects two forms of employee action: participation and opposition.

Title VII protects against both retaliation based on the invocation of Title VII protections and participation in Title VII proceedings, and retaliation based on an individual's opposition to illegal practices under Title VII. First and foremost, employees who participate in Title VII actions receive very broad protections. According to Professor Mack A. Player, "[a]ctions classified as 'participation' in Title VII proceedings receive complete protection against workplace retaliation regardless of the merits of the charge or accuracy of any statements or allegations made by the individual as part of the proceedings." Additionally, employees who oppose illicit employment discrimination also receive protection.

The retaliation provisions of Title VII extend to individuals opposing what they perceive to be illegal employment discrimination. This


It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, 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.

Id.

Retaliation claims under Title VII "have doubled in the last 10 years, now accounting for some 30 percent of the [EEOC's] docket." Linda Greenhouse, Justices Weigh Whether Railroad Retaliated Against Worker, N.Y. TIMES, Apr. 18, 2006, at A24 (recounting claim made by Burlington Northern's attorney during oral arguments before the Supreme Court); see also Lane, supra note 9 ("Charges of unlawful retaliation under Title VII nearly doubled between 1992 and 2005, from 10,499 to 19,429. They account for a quarter of the Equal Employment Opportunity Commission's caseload.").

14. See PLAYER, supra note 4, § 5.27, at 269-70.

15. Id.

16. Id. § 5.27, at 272. Under participation, the parties charging employment discrimination receive protection, as well as anyone who testifies or provides information in a Title VII proceeding. Id. This extends to:

[A]ll aspects of the official proceedings under Title VII: filing the initial charge, giving solicited or unsolicited information to EEOC agents, filing judicial complaints, giving statements to attorneys, providing information in pre-trial discovery, and trial testimony. Virtually all communications with enforcement agencies will be considered "participation" if the communication relays information or requests advice.

Id.

17. Id. § 5.27, at 271.

18. Id. § 5.27, at 273. According to Professor Player, "[i]n this way, [the employment retaliation provision of the statute] extends Title VII beyond protecting classes, such as race, sex, national origin, and religion, to the protection of activity." Id.

19. Id. § 5.27, at 275. Although the protection for opposition is qualified, Professor Player still sees rather broad protections:
protection, however, only extends to those who oppose "practices which reasonably appear . . . to violate Title VII." 20

Prior to Burlington, the federal appellate courts were split on the issue of what constitutes a retaliatory adverse employment action. 21 The split resulted from judicial struggles in deciphering what constitutes "an employment decision or action disadvantaging the plaintiff." 22 Regarding retaliation, the statute refers only to retaliatory "discrimination" without defining what activities meet this standard. 23

Some circuits took a strict approach, interpreting Title VII retaliation protections to apply only to "ultimate employment decisions." 24 Other circuits used an intermediate approach to apply retaliation protections when the "terms, conditions, or benefits" of employment had been affected. 25 The majority of circuits, however, applied a broad approach in determining what is considered retaliation. 26

This Note will first explore the merits of the various approaches to retaliatory adverse employment actions. Then, this Note will analyze the efficacy of the various models used in interpreting claims of retaliatory adverse employment action. Next, this Note will examine the Supreme
Court’s decision in *Burlington*. Ultimately, this Note will argue that courts should exercise restraint in applying *Burlington* to Title VII retaliation cases in order to avoid opening the floodgates and encouraging frivolous Title VII retaliation claims for trivial harms and slights. This Note argues that such an approach serves the interests of employees as well as employers, while maintaining the spirit of Title VII retaliation protections.

I. INTERPRETATION OF ANTI-RETALIATION PROVISION VARIED AMONG THE CIRCUITS: CASE LAW DEVELOPMENT PRIOR TO *BURLINGTON*

A. Preliminary Matters: Burden-Shifting Analysis Applicable to Title VII Claims

In any Title VII action, courts apply a burden-shifting standard.  

27. First, “[t]he complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of . . . discrimination.”  

28. This burden involves a three-step process, which requires the complainant to show “(1) participation in a protected activity that is known to the defendant, (2) an employment decision or action disadvantaging the plaintiff, and (3) a causal connection between the protected activity and the adverse decision.”

29. After a plaintiff has established a prima facie case, “[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason” for the adverse action.  

30. If the employer makes a sufficient showing, the burden again shifts, and “the plaintiff must demonstrate that there is sufficient potential proof for a reasonable jury to find the proffered legitimate reason merely a pretext for impermissible retaliation.”

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28. Id.
29. See Richardson v. N.Y. State Dep’t of Corr. Serv., 180 F.3d 426, 443 (2d Cir. 1999) (outlining the three-part test). For a critique of judicial approaches to this process under Title VII, as well as other similar acts, see Melissa A. Essary & Terence D. Friedman, *Retaliation Claims Under Title VII, the ADEA, and the ADA: Untouchable Employees, Uncertain Employers, Unresolved Courts*, 63 Mo. L. REV. 115, 151 (1998) (“As they are wont to do, courts have taken what began as a straightforward, three-element test for actionable retaliation and turned it into a labyrinth of conflicting decisions and poorly defined required showings.”).
32. Richardson, 180 F.3d at 443.
B. Strict Interpretation of Title VII Only Protected Employees Against “Ultimate Employment Decisions”

The Fifth and Eighth Circuits adopted a stringent standard for determining what action constitutes retaliatory adverse employer conduct. This strict approach limited actionable conduct to “ultimate employment decisions.” Ultimate employment decisions were defined “as hiring, granting leave, discharging, promoting, and compensating.”

The Fifth Circuit adopted a strict approach for retaliatory adverse employer actions in *Mattern v. Eastman Kodak Co.*, where an employee filed a Title VII sexual harassment charge with the EEOC. Following the complaint, the employee began to experience hostility from co-workers, lost property at work, and received negative employment evaluations.

The court decided that “Title VII was designed to address ultimate employment decisions, not . . . every decision made by employers that . . . might have some tangential effect upon those ultimate decisions.” Ultimate employment decisions are actions “such as hiring, granting leave, discharging, promoting, and compensating.” The court found that the

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33. See *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997); *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997).

34. *Mattern*, 104 F.3d at 707 (citing *Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir. 1995)). According to the Fifth Circuit, Congress intended Title VII to deal with ultimate employment decisions, as opposed to employer actions only tangentially related to those ultimate employment decisions. *Id.* (citing *Dollis*, 77 F.3d at 781-82). The Eighth Circuit also believed Title VII remedies should be limited to ultimate employment decisions, and actions with only a tangential effect on employment do not qualify. *Ledergerber*, 122 F.3d at 1144 (citing *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994)).

35. *Mattern*, 104 F.3d at 707 (quoting *Dollis*, 77 F.3d at 781-82).

36. See *id.* at 704.

37. See *id.* at 705-06. The alleged retaliation involved co-workers ignoring the employee and making snide remarks; tools stolen from the employee’s work locker without recourse from management; and increasingly negative employment reviews, which caused the employee to miss a raise in pay. *Id.*

38. *Id.* at 707 (quoting *Dollis*, 77 F.3d at 781-82). The court recognized that “the anti-retaliation provision [of Title VII] states that employers shall not ‘discriminate’ against employees for taking action protected by Title VII.” *Id.* at 708 (quoting 42 U.S.C. § 2000e-3(a) (2000)). To discern what Congress meant when using the term “discriminate” in the anti-retaliation section, the court looked to the preceding section of Title VII. *Id.* at 708. The court observed broad protections under § 2000e-2(a)(2), which makes it unlawful “to limit, segregate, or classify . . . employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect . . . status.” § 2000e-2(a)(2); *Mattern*, 104 F.3d at 709. The anti-retaliation provision of Title VII makes no similar declaration. See generally § 2000e-3(a). Thus, according to the Fifth Circuit, the anti-retaliation provision could “only be read to exclude such vague harms [(like those accounted for in 42 U.S.C. § 2000e-2(a)(2))] and to include only ultimate employment decisions.” *Mattern*, 104 F.3d at 709.

39. *Id.* at 707 (quoting *Dollis*, 77 F.3d at 782); see also *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981) (setting out the criteria for an ultimate employment decision). Ironically, while the Fourth Circuit opinion in *Page* spawned these categories of ultimate employment decisions, the Fourth Circuit emphatically denounced the ultimate employment
employee's problems did not constitute retaliation. Though the employee might suffer retaliation in the future, the mere possibility of such an action did not equate to an ultimate employment decision.

The Eighth Circuit adopted a strict approach for showing adverse employment actions in *Ledergerber v. Stangler*, where a supervisor alleged retaliation by her employer in response to her opposition of a purported policy giving preference to African American employees. The alleged retaliation involved completely replacing the supervisor's staff.

The court found that "[w]hile the action complained of may have had a tangential effect on her employment, it did not rise to the level of an ultimate employment decision intended to be actionable under Title VII." The court reasoned that employment actions that do not materially alter the terms or conditions of employment are insufficient to show retaliation. The supervisor failed to present evidence showing that the change in staff makeup constituted retaliation, especially considering the supervisor's pay, benefits, duties, job title, and office (essentially the terms and conditions of employment) were not materially altered.

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40. *Mattern*, 104 F.3d at 708.
41. *Id.* Here, "[t]he employee could only prove examples of the 'many interlocutory or mediate decisions having no immediate effect upon employment conditions' which therefore were 'not intended to fall within the direct proscriptions of . . . Title VII.'" *Id.* (quoting *Page*, 645 F.2d at 233).
42. *Ledergerber v. Stangler*, 122 F.3d 1142, 1143 (8th Cir. 1997). The employee was a director who investigated charges of racial discrimination. *Id.* Upon finding flawed hiring practices and inconsistent equality policies, the director recommended changes in employment practices to address the racial tension in the office. *Id.*
43. *Id.* While the employee's entire four-person staff was replaced, the employee's position, responsibilities, and staff size remained the same. *Id.*
44. *Id.* at 1144. The approach utilized by the Eighth Circuit should be deemed strict because the court noted that Title VII intends "ultimate employment decisions" to be actionable. *Id.* Nonetheless, it is significant that Eighth Circuit explored the terms and conditions of employment when analyzing the merits of a retaliatory adverse employment action. *Id.* at 1144-45. Exploration of the terms and conditions of employment (but without the "ultimate employment decision" language) becomes vital under the intermediate approach to Title VII retaliation complaints. *Von Gunten*, 243 F.3d at 865.
46. *Ledergerber*, 122 F.3d at 1144-45.
C. Intermediate Approach to Title VII Required a Change in the Terms, Conditions, or Benefits of Employment

The Second, Third, and Fourth Circuits utilized an intermediate approach for determining claims of prohibited retaliation under Title VII. The intermediate standard generally required a showing that the terms, conditions, or benefits of employment had changed in order to establish retaliation under Title VII. The intermediate approach avoided pigeonholing the issue under the "ultimate employment decision" label, but still required some proof that the alleged retaliation adversely affected the scope of employment.

The Second Circuit adopted the intermediate approach to Title VII retaliation actions in Richardson v. New York Department of Correctional Service, where an employee filed charges with the EEOC based on racial discrimination and a hostile work environment. The employee alleged retaliation when the employer took no action after a reported series of harassing acts from co-workers and supervisors. The incidents had such an adverse effect on the employee the she eventually required extensive sick leave, which became so extreme that it caused a de facto resignation under the terms of employment.

The court recognized that retaliatory harassment from co-workers, when severe enough and ignored by the employer, may lead to a finding of retaliatory adverse employment action by that employer. The court explained "that Title VII does not 'define adverse employment action solely in terms of job termination or reduced wages and benefits.'" Instead, the court examined whether the action adversely affected "the terms and conditions of employment." In making this determination,
the court recognized the lack of a bright line rule and the need to approach each case independently to determine whether the facts rise to the level of adverse employment action. Ultimately, the court decided that "[a]n employee could suffer a materially adverse change in the terms and conditions of her employment if her employer knew about but failed to take action to abate retaliatory harassment inflicted by co-workers."

The Third Circuit similarly adopted an intermediate approach to the issue in Robinson v. City of Pittsburgh, where a police officer filed sexual harassment complaints with her employer as well as the EEOC. Robinson claimed that she was subjected to a hostile work environment, sexual harassment, quid pro quo sexual harassment, and retaliation. Her retaliation claim involved a problematic working environment, which included decreased work duties, reassignment, and refusal of her request to transfer away from her harasser. Additionally, the alleged retaliation consisted of unsubstantiated verbal criticisms and negative comments in response to the actions Robinson took under Title VII.

The court found that for the actions to constitute retaliation, the "retaliatory conduct must be serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment."
The court held that the alleged derogatory comments and oral reprimands did not significantly affect the terms, conditions, or benefits of employment, and thus the claims failed to "rise to the level of . . . [what the court would consider] 'adverse employment action." The court likened the derogatory comments and oral reprimands similar to other trivial, unsuccessful retaliation claims. The similarities were an important factor in the court's decision to dismiss Robinson's claim for failure to satisfy the "terms and conditions" test.

The Fourth Circuit's use of the intermediate approach appeared in Von Gunten v. Maryland. In Von Gunten, an employee of the Maryland Department of the Environment (MDE) complained of sexual harassment in the workplace. Von Gunten alleged that following her formal Title VII complaint, she suffered retaliation from her supervisor and from her co-workers. Specifically, the alleged retaliation involved poor employment evaluations, downgraded benefits, and an unhealthy working environment. She also claimed that she suffered retaliation because her employer-issued vehicle was withdrawn, forcing her to use a personal vehicle for work (for which she was reimbursed). She further alleged makes it unlawful for an employer to discriminate for taking action under Title VII, § 2000e-2(a) makes it unlawful for an employer:

[T]o fail or refuse to hire or . . . otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment . . . or . . . to . . . deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, color, religion, sex, or national origin.


Accordingly, the court concluded that "conduct other than discharge or refusal to rehire is thus proscribed by Title VII only if it alters the employee's 'compensation, terms, conditions, or privileges of employment,' deprives him or her of 'employment opportunities,' or 'adversely affect[s] his [or her] status as an employee.'" Robinson, 120 F.3d at 1300 (alterations in original) (quoting 42 U.S.C. § 2000e-2(a)).

The court went on to discourage trivial and extraneous claims of employer retaliation: "'[N]ot everything that makes an employee unhappy' qualifies as retaliation, for '[o]therwise, minor and even trivial employment actions that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit." Id. (second alteration in original) (quoting Smart v. Ball State Univ., 89 F.3d 437, 441 (7th Cir. 1996)).

63. Robinson, 120 F.3d at 1301. Additionally, the court noted that much of the alleged retaliation actually occurred prior to the filing of the EEOC complaint, thus barring a finding of retaliation for most of the allegations. Id. at 1301-02.

64. See id. at 1301. The court supported its holding by analogizing to retaliation claims that were found "too intangible" or "involv[ed a] small indirect effect on employee's earnings." Id.

65. Id.
66. 243 F.3d 858, 865 (4th Cir. 2001).
67. Id. at 862.
68. Id. at 862-63.
69. See id. at 862.
70. Id.
that she received a downgraded employment evaluation at the end of the year, was given an unacceptable reassignment, and experienced a hostile work environment filled with retaliatory treatment from co-workers.\footnote{Id. at 862-63.}

The court specifically recognized that actions falling short of "ultimate employment decisions" may be considered retaliation under Title VII.\footnote{Id. at 865.} The court found that retaliation cases require evidence showing that the alleged retaliation "adversely effected [sic] 'the terms, conditions, or benefits' of the plaintiff's employment."\footnote{Von Gunten, 243 F.3d at 864 (citing Mattern, 104 F.3d at 709).} In the end, the court concluded that Von Gunten did not show that the employer's actions adversely affected the terms, conditions, or benefits of her employment.\footnote{Id. at 869-70.} The court found that her claims of retaliation were ultimately unpersuasive and had little to no negative impact on the employee in the scope of her employment.\footnote{Id. at 867-70.} In deciding that the retaliation claim lacked merit, the court noted that the employer reimbursed Von Gunten for her personal vehicle use, and soon gave her another state car and gasoline card.\footnote{Id. at 867.} The court also noted that she received a pay raise despite the downgraded evalua-
tion and obtained the only assignment available at the time of her reassign- 
ment request. Therefore, her hostile work environment claims were not significant enough to materially affect the terms, conditions, or ben-

D. The Broad Interpretation of Title VII Allowed a Case-by-Case Approach

The majority of courts hearing Title VII retaliation cases utilized a broad standard. This approach generally validated retaliation claims where the alleged retaliation would deter employees from taking actions protected under Title VII. The goal of this approach was to further the purposes of Title VII and encourage employees to utilize the protections available under Title VII. While the broad approach was the majority view among the federal circuit courts, it came in two varieties: some courts applied a threshold test and found retaliation where the adverse actions were severe or pervasive, while other courts applied a deterrence test and found retaliatory treatment in behavior that would deter employees from taking action protected under Title VII.

1. A Threshold Test: Adverse Actions Amount to Retaliatory Action Under Title VII If Sufficiently Severe or Pervasive

The First Circuit in Noviello v. City of Boston decided what constitutes retaliatory adverse employment actions. A parking enforcement officer reported a case of sexual harassment to her supervisors. Following the report, Noviello’s co-workers ostracized her and subjected her to verbal

77. Id. at 867-68.
78. Id. at 869-70.
79. See Noviello v. City of Boston, 398 F.3d 76, 89-90 (1st Cir. 2005); Ray v. Henderson, 217 F.3d 1234, 1243 (9th Cir. 2000); Morris v. Oldham County Fiscal Court, 201 F.3d 784, 792 (6th Cir. 2000); Gunnell v. Utah Valley State Coll., 152 F.3d 1253, 1264 (10th Cir. 1998); Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1456 (11th Cir. 1998); Knox v. Indiana, 93 F.3d 1327, 1334 (7th Cir. 1996).
80. See, e.g., Noviello, 398 F.3d at 90.
81. See Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997) (relying on the anti-retaliation provision’s primary goal of maintaining unfettered access to Title VII).
82. See Noviello, 398 F.3d at 89; Morris, 201 F.3d at 792; Gunnell, 152 F.3d at 1264; Knox, 93 F.3d at 1334.
83. See Ray, 217 F.3d at 1243; Wideman, 141 F.3d at 1456.
84. Noviello, 398 F.3d at 89.
85. Id. at 82. The initial alleged harassment consisted of the officer’s superior forcibly removing the officer’s brassiere during work, and hanging the undergarment outside the work vehicle. Id.
assails. She filed a complaint with the EEOC, but the harassment continued.

The court held that when an employer allows the perpetuation of a hostile work environment, it may be considered a retaliatory adverse employment action under the anti-retaliation protections of Title VII. The court clarified "that workplace harassment, if sufficiently severe or pervasive, may in and of itself constitute an adverse employment action sufficient . . . for Title VII retaliation cases." The court also observed that the EEOC takes a similar stance. Although the court justified the

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86. Id. at 82-83.
87. Id. at 83. Examples of the continued retaliatory harassment included a co-worker threatening that Noviello's "pay-day" was drawing near, and a co-worker violating department policy in order to abandon the employee while on her parking enforcement route. Id.
88. Id. at 89. The court built upon a "totem pole" of previous decisions that suggested co-worker harassment might constitute adverse employment action. Id.; see Wyatt v. City of Boston, 35 F.3d 13, 15-16 (1st Cir. 1994) (per curiam) (discussing in dicta the possibility of employee harassment constituting adverse employment action); see also Che v. Mass. Bay Trans. Auth., 342 F.3d 31, 40 (1st Cir. 2003) (approving the co-worker harassment discussion from Wyatt); Marrero v. Goya of P.R., Inc., 304 F.3d 7, 26 (1st Cir. 2002) (approving the co-worker harassment discussion); White v. N.H. Dep't of Corr., 221 F.3d 254, 262 (1st Cir. 2000) (approving the use of the Wyatt dicta); Hernandez-Torres v. Intercontinental Trading, Inc., 158 F.3d 43, 47 (1st Cir. 1998) (paraphrasing dictum in Wyatt).

In discussing the so-called "totem pole" that the court in Noviello used to reach its conclusion regarding hostile working environments as retaliation, it should be noted that the Wyatt dicta relied on an employment discrimination treatise. See Wyatt, 35 F.3d at 15-16. The court stated that "[i]n addition to discharges, other adverse actions are covered by § 2000e-3(a)." Id. at 15. Citing a treatise, the court noted in a parenthetical that "employer actions such as demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations and toleration of harassment by other employees" are covered. See id. at 15-16; 2 ARTHUR LARSON & LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 34.04(3) (2d ed. 2006).
89. Noviello, 398 F.3d at 89. In reaching this conclusion, the court also noted "Congress's intention 'to strike at the entire spectrum of disparate treatment of men and women in employment, which includes requiring people to work in a discriminatorily hostile or abusive environment.'" Id. at 89-90 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)). Based on this intent of Congress, the court opted to construe 42 U.S.C. § 2000e-2(a)(1) broadly to include hostile working environment in the definition of discrimination. Id.

Then the court addressed the retaliation provision of Title VII, which guards against employer discrimination "because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. § 2000e-3(a) (2000). The court observed that the term "discriminate" is not preceded by any qualifier. Noviello, 398 F.3d at 90. Thus, the court interpreted the term "discriminate" similar to its meaning in the previous section of Title VII. Id. (citing Ratzlaf v. United States, 510 U.S. 135, 143 (1994) (discussing the canon of construction for applying the same construction to terms that appear in numerous places in a statute)). Therefore, the court found that "the verb 'discriminate' in the anti-retaliation clause includes subjecting a person to a hostile work environment." Id.
90. Noviello, 398 F.3d at 90. The EEOC contends that a lack of a qualifier for the term "discriminate" in the anti-retaliation provision nonetheless shows an intent to "pro-
holding on “severe or pervasive” grounds, the First Circuit further recognized the importance of guaranteeing access to remedies available under Title VII, noting that co-worker hostility toward an employee for reporting discrimination is a paradigm of retaliatory adverse employment action and may deter similarly situated employees from utilizing protections afforded under Title VII protections.

The Sixth Circuit adopted a broad approach in *Morris v. Oldham County Fiscal Court*, where an employee reported quid pro quo and hostile environment sexual harassment from her supervisor. After making the allegations, Morris continued to experience harassment including several unwanted visits and over thirty telephone calls, allegedly for the sole purpose of harassment. The harassment eventually caused the employee to suffer from anxiety attacks and feel the need to use extensive sick leave, rendering her unable to return to work full time.

The court held that the supervisor’s retaliatory harassment was actionable under Title VII. The court examined the Supreme Court’s holding on a separate Title VII matter finding that “severe or pervasive harassment by a supervisor . . . can constitute ‘discrimination.’” Accordingly,
the Sixth Circuit applied this finding to retaliation cases, holding that "severe or pervasive supervisor harassment that is engaged in because an individual 'has opposed any practice made an unlawful employment practice by' Title VII also can constitute 'discrimination.'"\textsuperscript{98} In \textit{Morris}, the court determined the harassment went beyond "simple teasing, offhand comments, and isolated incidents,"\textsuperscript{99} and was severe and pervasive enough to constitute retaliation.\textsuperscript{100}

The Seventh Circuit also applied a broad standard in determining what constitutes retaliatory adverse employment actions.\textsuperscript{101} In \textit{Knox v. Indiana}, a correctional officer complained of sexual harassment by her supervisor.\textsuperscript{102} The supervisor was allegedly angry about the harassment charge and reported the occurrence to co-workers.\textsuperscript{103} Knox's co-workers, friends of the supervisor, began insulting and demeaning Knox in the presence of prison inmates.\textsuperscript{104} In fact, her co-workers "made it known that they intended to make Knox's life 'hell.'"\textsuperscript{105} Knox subsequently brought suit

\begin{quote}
States, 510 U.S. 135, 143 (1994)). Therefore, since severe or pervasive harassment from one's supervisor can constitute discrimination under 42 U.S.C. § 2000e-2(a)(1), that "severe or pervasive" standard should also apply to the subsequent anti-retaliation provision found in § 2000e-3(a). \textit{Id.} at 791-92 (extending the Supreme Court decision in \textit{Ellerth} to the anti-retaliation provision of Title VII).

For further discussion of the \textit{Ellerth} case and its impact on Title VII retaliation cases, see generally Ann M. Henry, Comment, \textit{Employer and Employee Reasonableness Regarding Retaliation under the Ellerth/Faragher Affirmative Defense}, 1999 U. CHI. LEGAL F. 553, 580 (1999) (discussing a two-prong affirmative defense for employers facing a claim of Title VII retaliation).

\textsuperscript{98} Morris, 201 F.3d at 792 (quoting from the statutory language of Title VII).

Based on its holding, the Sixth Circuit in \textit{Morris} modified the standard for making a prima facie claim of retaliation under Title VII. \textit{Id.} Consequently, a plaintiff must show that:

(1) she engaged in activity protected by Title VII; (2) this exercise of protected rights was known to defendant; (3) defendant thereafter took adverse employment action against the plaintiff; or the plaintiff was subjected to severe or pervasive retaliatory harassment by a supervisor; and (4) there was a causal connection between the protected activity and the adverse employment action or harassment. \textit{Id.}

\textsuperscript{99} \textit{Id.} at 793.

\textsuperscript{100} \textit{Id.}

\textsuperscript{101} Knox v. Indiana, 93 F.3d 1327, 1334 (7th Cir. 1996).

\textsuperscript{102} \textit{Id.} at 1330. The initial harassment consisted of the employee's supervisor sending electronic mail messages propositioning the employee for sex, and repeatedly asking for dates despite Knox's continued rejections. \textit{Id.} Knox's supervisor then threatened her with a shift change. \textit{Id.} The harassment became so pervasive that co-workers began encouraging the employee to commence an illicit relationship with the supervisor despite her continued rebuffs. \textit{Id.}

\textsuperscript{103} \textit{Id.} at 1331.

\textsuperscript{104} \textit{Id.}

\textsuperscript{105} \textit{Id.} Despite the ominous threats from co-workers, the prison's affirmative action officer refused to take any protective action until the employee submitted a formal list of harassing persons. \textit{Id.}
claiming retaliation in addition to her original employment discrimination complaints.106

The court took a broad, sweeping approach107 and noted that "adverse actions can come in many shapes and sizes. No one would question the retaliatory effect of many actions that put the complainant in a more unfriendly working environment."108 Regarding inaction by the employer, the court said that allowing co-workers to initiate and continue punishment in response to the employee's invocation of Title VII remedies constituted retaliation under the statute.109 The court rationalized the use of this broad approach to determine retaliation under Title VII, commenting that "[t]he law deliberately does not take a 'laundry list' approach to retaliation, because unfortunately its forms are as varied as the human imagination will permit."110

The Tenth Circuit also interpreted the adverse employment action provisions of Title VII broadly.111 In Gunnell v. Utah Valley State College, a secretary complained of sexual harassment.112 The harassment subsided, but Gunnell claimed that she experienced retaliatory treatment from co-workers for making the initial complaint, as well as downgrades in the quality and scope of her employment.113 The employer eventually put her on probation and finally terminated her, citing her poor attitude and workplace conduct.114

106. Id. at 1331-32.
107. Id. at 1334. The Seventh Circuit remarked, "nothing in the law of retaliation . . . restricts the type of retaliatory act that might be visited upon an employee who seeks to invoke her rights by filing a complaint. It need only be an adverse employment action." Id.; see also McKenzie v. Ill. Dep't of Transp., 92 F.3d 473, 486 (7th Cir. 1996) (discussing whether a retaliatory action must be job related); Smart v. Ball State Univ., 89 F.3d 437, 441 (7th Cir. 1996) (emphasizing the Seventh Circuit's broad interpretation of adverse employment actions).

108. Knox, 93 F.3d at 1334 (citation omitted). As examples of such unfriendly working environments, the court considered "actions like moving the person from a spacious, brightly lit office to a dingy closet, depriving the person of previously available support services (like secretarial help or a desktop computer), or cutting off challenging assignments." Id.

109. See id.

110. Id. Thus, the court found it was appropriate for a jury to examine the record in its entirety to determine whether the employer retaliated "by sitting on its hands in the face of the campaign of co-worker harassment about which it knew." Id. at 1334-35.

111. Gunnell v. Utah Valley State Coll., 152 F.3d 1253, 1264 (10th Cir. 1998).

112. Id. at 1257.

113. Id. The alleged retaliation complaint involved the receipt of inferior office products and less job responsibility, in addition to retaliatory treatment from co-workers. Id.

114. Id. at 1258. The employee's probation and termination stemmed from making notes concerning co-workers during the workday and creating an unproductive work atmosphere through complaints and non-cooperation. Id.
The court avoided establishing a specific test for determining what actions constitute retaliation, and instead recognized "a case-by-case approach" for deciding Title VII retaliation cases. Under these guidelines, the court found "that co-worker hostility or harassment, if sufficiently severe, may constitute 'adverse employment action' for purposes of a retaliation claim." Under this standard, the court doubted the actions were sufficient to support a retaliation claim as they seemed to involve mere cases of rudeness, and were "'ordinary tribulations of the workplace.'"

2. The Second Approach: A Deterrence Test: Whether the Action Would Deter Other Employees from Seeking Title VII Remedies

The Ninth Circuit adopted a broad standard for defining retaliation in Title VII actions, focusing on the deterrent effect instead of the "severe or pervasive test." In Ray v. Henderson, an employee made complaints about gender bias in the workplace. The employee alleged that in response to these complaints, his supervisors retaliated by eliminating employee programs, by ending flexible work policies utilized by the em-

115. Id. at 1264. The Tenth Circuit began, however, with a survey of how its "sister circuits have narrowly defined the term 'adverse employment action[s]." Id. The court observed a strict approach in the Fourth (Munday v. Waste Mgmt. of N. Am., Inc., 126 F.3d 239, 243 (4th Cir. 1997)), Fifth (Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997)), and Eighth (Manning v. Metro. Life Ins. Co., 127 F.3d 686, 692 (8th Cir. 1997)) Circuits. Gunnell, 152 F.3d at 1264. On the other hand, the court recognized that some circuits adopt a more lenient approach when considering co-worker harassment as an adverse employment action. Id. (citing Knox v. Indiana, 93 F.3d 1327, 1334 (7th Cir. 1996); Wyatt v. City of Boston, 35 F.3d 13, 15-16 (1st Cir. 1994) (per curiam)). The Tenth Circuit's categorization of the Fourth Circuit's position as a strict interpreter of adverse employment actions ultimately proved false. See Von Gunten v. Maryland, 243 F.3d 858, 865 (4th Cir. 2001).

116. Gunnell, 152 F.3d at 1264 (quoting Jeffries v. Kansas, 147 F.3d 1220, 1231-32 (10th Cir. 1998)). For example, in Berry v. Stevinson Chevrolet, the Tenth Circuit found malicious prosecution sufficient to support a finding of retaliatory adverse employment action. Berry v. Stevinson Chevrolet, 74 F.3d 980, 986-87 (10th Cir. 1996).

117. Gunnell, 152 F.3d at 1264. Additionally, the court established general guidelines for determining when co-worker hostility may be considered intentional employer retaliation. Id. at 1265. On this issue, the court held that "an employer can only be liable for co-workers' retaliatory harassment where its supervisory or management personnel either (1) orchestrate the harassment or (2) know about the harassment and acquiesce in it in such a manner as to condone and encourage the co-workers' actions." Id. The court refused to extend liability for co-worker retaliation when management or supervisors were unaware of the co-worker retaliation. Id.

118. Id. at 1265 (quoting Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998)).


120. Id. at 1237. The employee, a male postal carrier in rural California, along with other co-workers, complained based on apparent harassment and bias against female co-workers at the post office. Id.
ployee, and by causing a disproportionate decrease in pay compared to decreases suffered by other employees.\footnote{121} The Ninth Circuit first recognized “that a wide array of disadvantageous changes in the workplace constitute adverse employment actions.”\footnote{122} The court relied on the EEOC interpretation of “adverse employment action.”\footnote{123} Adopting the EEOC standard, the court held “an action is cognizable as an adverse employment action if it is reasonably likely to deter employees from engaging in protected activity.”\footnote{124} In this case, the court found the alleged retaliation sufficient under Title VII.\footnote{125} The court concluded that the retaliatory actions lowered the employee’s

\footnote{121. Id. at 1238-39. The employee’s supervisor revoked employee involvement programs, as well as a flexible “self-management” policy, which forced the employee to work at breakneck speed in order to complete his route. Id. at 1238. Additionally, the postal routes for all carriers received cuts, but the complaining employee received the biggest cut, which resulted in a decrease in pay. Id. at 1239.}
\footnote{122. Id. at 1240; see also Hashimoto v. Dalton, 118 F.3d 671, 676 (9th Cir. 1997) (providing a negative job reference constitutes adverse retaliation “because it was a ‘personnel action’ motivated by retaliatory animus”); Strother v. S. Cal. Permanente Med. Group, 79 F.3d 859, 869 (9th Cir. 1996) (“[M]ere ostracism in the workplace is not enough to show an adverse employment decision.” However, an employee who was excluded from meetings and positions that would allow merit pay increases, given a heavier work schedule, and “denied secretarial support” may properly be said to have suffered a retaliatory adverse employment action); Yartzoff v. Thomas, 809 F.2d 1371, 1376 (9th Cir. 1987) (“Transfers of job duties and undeserved performance ratings, if proven, would constitute ‘adverse employment decisions . . . .’”).}
\footnote{123. Ray, 217 F.3d at 1242-43 (using EEOC compliance manual as guidance). The EEOC Compliance Manual discusses the scope of retaliatory adverse employment actions under Title VII. See generally EQUAL EMPLOYMENT OPPORTUNITY COMM’N, EEOC COMPLIANCE MANUAL § 8 (1998). According to the manual, “[t]he most obvious types of retaliation are denial of promotion, refusal to hire, denial of job benefits, demotion, suspension, and discharge. Other types of adverse actions include threats, reprimands, negative evaluations, harassment, or other adverse treatment.” Id. § 8-II(D)(1).

The manual explicitly promotes adoption of a broad interpretation of retaliatory adverse employment actions. Id. § 8-II(D)(3). The manual states that “statutory retaliation clauses prohibit any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity.” Id. The manual concedes that “petty slights and trivial annoyances are not actionable.” Id. The EEOC invokes the Supreme Court’s decision in Robinson v. Shell Oil Co. in promoting the broad approach, noting that “the primary purpose of the anti-retaliation provisions . . . is to ‘[m]aintain[]’ unfettered access to statutory remedial mechanisms.’” Id. (alterations in original) (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 338 (1997)); see also Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (stating that EEOC guidelines, while not binding, may be used by courts as guidance).

\footnote{124. Ray, 217 F.3d at 1243. The court also found support in the text of the anti-retaliation provision of Title VII. Id. Title VII’s anti-retaliation provision only prohibits retaliatory “discrimination” against an employee for partaking in Title VII protected activity. See 42 U.S.C. § 2000e-3(a) (2000); Ray, 217 F.3d at 1243. The Ninth Circuit found the lack of a qualifier for the word “discriminate” telling, and remarked “[t]his provision does not limit what type of discrimination is covered, nor does it prescribe a minimum level of severity for actionable discrimination.” Ray, 217 F.3d at 1243.}
\footnote{125. Ray, 217 F.3d at 1244.
compensation, forced the employee to complete the same amount of work in a shorter span of time, and decreased the employee's influence on employment policy. These results "were reasonably likely to deter Ray or other employees from complaining about discrimination in the workplace." The Eleventh Circuit similarly adopted a deterrent-focused approach to the issue of Title VII retaliation. In Wideman v. Wal-Mart Stores, Inc., an employee filed charges of racial discrimination with the EEOC. After filing the charges, the employee claimed to have suffered material disadvantages to the terms and conditions of her employment, including undeserved disciplinary action, administrative errors concerning her work status, and even threats of physical violence by one of the store's assistant managers.

The court held "that Title VII's protection against retaliatory discrimina-
tion extend[ed] to adverse actions which fall short of ultimate employ-
ment decisions." The court adopted a plain language approach to interpreting the retaliation provision of Title VII. The court found that the ordinary understanding of "discriminate" in the retaliation statute is not restricted to "ultimate employment decisions." Additionally, the court recognized the importance of protecting the remedial purpose of Title VII, remarking that an ultimate employment decision standard "could stifle employees' willingness to file charges of discrimination."

126. Id.
127. Id.
129. Id. at 1455. The alleged discrimination involved discriminatory remarks, a pay cut, and a statement from the employee's manager reporting that a certain position "would not be filled by a black person." Id.
130. Id. The employee reported a laundry list of alleged retaliatory actions by her employer and supervisors: (1) she was marked absent on her day off; (2) supervisors required her to work on her day off without a lunch break; (3) she received reprimands and a one-day suspension despite no previous infractions; (4) her supervisor solicited co-workers for negative remarks about the employee; (5) an assistant manager "threatened to shoot her in the head"; and (6) managerial authorization of medical attention was delayed when the employee suffered an allergic reaction at work. Id.
131. Id. at 1456 (finding assistance in the holdings of the First, Ninth, and Tenth Circuits, which found the anti-retaliation provision to protect against employer retaliation falling short of so-called "ultimate employment decisions").
132. Id.
133. Id. ("Read in the light of ordinary understanding, the term 'discriminate' is not limited to 'ultimate employment decisions.' Moreover, our plain language interpretation of 42 U.S.C. § 2000e-3(a) is consistent with Title VII's remedial purpose.").
134. Id. The court stated, "[p]ermitting employers to discriminate against an employee who files a charge of discrimination so long as the retaliatory discrimination does not constitute an ultimate employment action, could stifle employees' willingness to file charges of discrimination." Id.
The D.C. Circuit also adopted a broad deterrence test to retaliation claims under Title VII. In Rochon v. Gonzales, an FBI employee alleged discrimination and retaliation in connection with the Bureau's refusal to investigate a federal prisoner's threats against the employee and his wife. Although FBI policy called for investigation into the threats, and the FBI field office promised to do so, no action was taken.

The D.C. Circuit previously interpreted an analogous retaliation provision in the Age Discrimination in Employment Act and opted for a broad interpretation of "discrimination." The court imported that decision into the Title VII context, and adopted the rule that "a plaintiff must demonstrate the 'employer's challenged action would have been material to a reasonable employee,' which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.' Ultimately, the court found it was an error to dismiss the employee's retaliation complaint on the facts alleged.

II. THE SUPREME COURT ATTEMPTS TO CLARIFY INTERPRETATION OF THE ANTI-RETALIATION PROVISION WITH BURLINGTON NORTHERN & SANTA FE RAILWAY CO. V. WHITE (BURLINGTON III)

Sheila White was the only female at the Burlington Northern & Santa Fe Railway Company's Tennessee Yard. White held the position of track laborer. The job description included "removing and replacing track components, transporting track material, cutting brush, and clearing litter and cargo spillage from the right-of-way." Not long after the beginning of White's employment, her supervisor assigned her forklift op-

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136. Id.
137. Id. at 1213-14.
140. Rochon, 438 F.3d at 1219 (quoting Washington v. Ill. Dep't of Revenue, 420 F.3d 658, 662 (7th Cir. 2005)). The court dismissed any notion that such a broad holding would flood the courts with Title VII retaliation claims. Id. ("[W]e think making actionable insignificant disparities in the treatment of employees of different races, or religions, et cetera, is too absurd to be attributed to the Congress. Such suits are properly precluded, however, not by the court creating an atextual loophole for forms of retaliation unrelated to the plaintiff's employment, but by our requiring that the alleged retaliation be 'material' or 'significant'.").
141. Id. at 1220 ("[A] reasonable FBI agent well might be dissuaded from engaging in 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 family.").
143. Id.
144. Id.
erations as her primary duty.\textsuperscript{145} Within a few months, White complained to company officials about disparaging remarks from her immediate supervisor.\textsuperscript{146} The immediate supervisor allegedly told White that women should not work in the department and “made insulting and inappropriate remarks to her in front of her male colleagues.”\textsuperscript{147} The company subsequently suspended the supervisor, but White was also removed from forklift duties and put on standard track laborer work assignments.\textsuperscript{148} According to another supervisor, “the reassignment reflected co-worker’s [sic] complaints that, in fairness, a ‘more senior man’ should have the ‘less arduous and cleaner job’ of forklift operator.”\textsuperscript{149}

After this transfer, White filed a complaint with the EEOC claiming discrimination and retaliation on the basis of gender.\textsuperscript{150} White went on to file additional retaliation claims after being placed under surveillance and suspended for disagreeing with another supervisor.\textsuperscript{151} White exhausted her administrative remedies and then filed the Title VII claim in federal court arguing that the change in job duties as well as the later suspension constituted impermissible retaliation under Title VII.\textsuperscript{152}

At trial, White succeeded in both claims and received a jury award of $43,500 in compensatory damages.\textsuperscript{153} Later, the Sixth Circuit reversed the judgment.\textsuperscript{154} The Sixth Circuit, however, reheard the case en banc.\textsuperscript{155} On rehearing, the full court of appeals affirmed the lower court’s judgment in favor of White.\textsuperscript{156} Observing the circuit split on what standard to apply in Title VII retaliation cases, the Supreme Court granted certiorari.\textsuperscript{157}

\begin{itemize}
\item[145.] Id.
\item[146.] Id.
\item[147.] Id.
\item[148.] Id.
\item[149.] Id. (quoting White v. Burlington N. & Santa Fe Ry., 364 F.3d 789, 792 (6th Cir. 2004), aff’d, 126 S. Ct. 2405 (2006)).
\item[150.] Id.
\item[151.] Id.
\item[152.] Id. at 2409-10.
\item[153.] Id. at 2410.
\item[154.] White v. Burlington N. & Santa Fe Ry. (\textit{Burlington I}), 310 F.3d 443, 455 (6th Cir. 2002), aff’d in part and remanded, 364 F.3d 789 (6th Cir. 2003) (en banc), aff’d, 126 S. Ct. 2405 (2006). The court in \textit{Burlington I} reasoned that “[w]e fail to see how White suffered an adverse employment action by being directed to do a job duty for which Burlington Northern hired her,” and “Burlington Northern ultimately reversed White’s suspension and reinstated her with full back pay and overtime.” Id. at 451, 454.
\item[155.] White v. Burlington N. & Santa Fe Ry. (\textit{Burlington II}), 364 F.3d 789, 791 (6th Cir. 2004) (en banc), aff’d, 126 S. Ct. 2405 (2006). According to the Sixth Circuit, “[a] reassignment without salary or work hour changes . . . may be an adverse employment action if it constitutes a demotion evidenced by ‘a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.’” Id. at 797 (citation omitted).
\item[156.] Id. at 791.
\end{itemize}
The Court began its analysis by examining the anti-discrimination and anti-retaliation provisions found in Title VII. The Court observed that the anti-discrimination provision limits the scope of included actions with the words "hire," "discharge," "compensation, terms, conditions, or privileges of employment," "employment opportunities," and "status as an employee." These "limiting words" do not appear in the anti-retaliation provision. This difference in language led the Court to infer that the limiting words were intentionally excluded from the anti-retaliation provision. The Court rationalized this inference by noting the purpose of each provision:

The anti-discrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status. The anti-retaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees.

The majority also argued that limiting anti-retaliation actions to incidents in the work environment forecloses remedy for the broad range of retaliation that may occur outside the work environment. The Court noted that failing to allow broad construction of the anti-retaliation provision would inhibit the primary purpose of the law: "maintaining unfettered access to statutory remedial mechanisms."

When it came to establishing the test for anti-retaliation cases, the Court stated, "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."

The Court, however, attempted to mitigate this broad stance. First, the Court used the term "material adversity," which allegedly will act as a filter against "trivial harms." Second, the Court sought to add strength

159. Id. at 2411.
160. Id. at 2412; see also 42 U.S.C. § 2000e-3(a) (2000).
162. Id. (citations omitted).
163. Id. (citing two federal circuit court cases); see Rochon v. Gonzales, 438 F.3d 1211, 1213 (D.C. Cir. 2006) (involving employer's refusal to investigate death threats made against FBI agent and spouse); Berry v. Stevinson Chevrolet, 74 F.3d 980, 986 (10th Cir. 1996) (involving employer that falsely filed criminal charges against employee).
164. Burlington III, 126 S. Ct. at 2412.
165. Id. at 2415 (quoting Rochon, 438 F.3d at 1219).
166. See id.
167. Id. The Court observed that "petty slights or minor annoyances" are unavoidable for employees taking action under Title VII. Id. For a discussion of such "trivial harms"
to the nebulous deterrence test with a reference to a so-called “reasonable worker,” supposedly giving the test an objective basis.\textsuperscript{168}

The Court applied this interpretation of Title VII’s anti-retaliation clause to White’s case against Burlington Northern & Santa Fe Railway Company.\textsuperscript{169} The Court affirmed the Sixth Circuit’s en banc decision.\textsuperscript{170} White produced sufficient evidence of retaliation to support a jury verdict against her employer under Title VII.\textsuperscript{171}

While the Justices reached a unanimous decision, Justice Alito penned a concurrence raising concerns with the efficacy of the majority opinion.\textsuperscript{172} Initially, Justice Alito questioned the Court’s statutory construction of Title VII.\textsuperscript{173} While the majority found significance in the linguistic differences in the anti-discrimination and the anti-retaliation provisions of Title VII, Justice Alito preferred reading the two sections of the Act together.\textsuperscript{174} Therefore, “discriminate” under the anti-retaliation provision is consistent with references to “discriminate” under the anti-discrimination provision.\textsuperscript{175} Justice Alito favored such an interpretation as it harmonized the neighboring sections of the statute.\textsuperscript{176}

Next, Justice Alito criticized the majority’s concern with retaliation occurring outside the work environment.\textsuperscript{177} Justice Alito suggested that employees who wish to retaliate against employees are more likely to do so within the scope of employment.\textsuperscript{178} Additionally, a narrower “terms and conditions” analysis would still be broad enough to encompass potential retaliation outside the workplace.\textsuperscript{179} Thus, it was not necessary for the Court to adopt such a broad approach in order to protect employees inside and outside the workplace.\textsuperscript{180}

cited by the Court, see 1 B. LINDEMANN & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 669 (3d ed. 1996).
\textsuperscript{168} Burlington III, 126 S. Ct. at 2415-16.
\textsuperscript{169} Id. at 2416.
\textsuperscript{170} Id. at 2418.
\textsuperscript{171} Id. at 2416-18.
\textsuperscript{172} Id. at 2418 (Alito, J., concurring). Prior to becoming a Supreme Court Justice, (then Judge) Alito issued an opinion on the anti-retaliation provision of Title VII, while sitting on the Third Circuit. Robinson v. City of Pittsburgh, 120 F.3d 1286, 1291 (3d Cir. 1997). Justice Alito’s majority opted for a terms and conditions test over the broader approach eventually favored by the Supreme Court. Id. at 1300. In the Third Circuit opinion, Justice Alito wrote, “retaliatory conduct must be serious and tangible enough to alter an employee’s compensation, terms, conditions, or privileges of employment.” Id.
\textsuperscript{173} Burlington III, 126 S. Ct. at 2418-19 (Alito, J., concurring).
\textsuperscript{174} Id. at 2419.
\textsuperscript{175} See id.
\textsuperscript{176} See id.
\textsuperscript{177} Id. at 2419-20.
\textsuperscript{178} Id. at 2419.
\textsuperscript{179} Id. at 2420.
\textsuperscript{180} Id. (“While surely one of the purposes of § 704(a) is to prevent employers from engaging in retaliatory measures that dissuade employees from engaging in protected
Later, Justice Alito debated the practical concerns with the majority's decision.\footnote{Id. at 2420-21.} By advocating a test based on whether a reasonable employee would be dissuaded from filing a claim, the Court effectively set up a sliding scale.\footnote{See id. at 2421.} Employees that experience mild discrimination, on the other hand, will be dissuaded rather easily.\footnote{See id.} Employees that experience severe discrimination, on the other hand, will only be dissuaded with extreme forms of retaliation.\footnote{Id.} According to the concurring Justice, "[t]hese topsy-turvy results make no sense."\footnote{Id.} Moreover, Justice Alito expressed concern with the concept of a "reasonable worker," and determining when it would be necessary to include particular characteristics of a complaining employee.\footnote{Id.}

III. COURTS SHOULD EXERCISE DISCRETION IN APPLYING THE BURLINGTON III DECISION TO RETALIATION CLAIMS

The Title VII anti-retaliation provision intends to prevent employers from taking action against employees for utilizing Title VII protections, because such retaliation would likely deter employees from making complaints.\footnote{See 42 U.S.C. § 2000e-3(a) (2000); Ray v. Henderson, 217 F.3d 1234, 1243 (9th Cir. 2000) ("[T]he [deterrence] standard is consistent with our prior case law and effectuates the language and purpose of Title VII . . . an action is cognizable as an adverse employment action if it is reasonably likely to deter employees from engaging in protected activity.").} With the Burlington III decision, the Supreme Court adopted the deterrence test for evaluating employee claims under federal law.\footnote{Burlington III, 126 S. Ct. at 2415.} The deterrence test generally finds retaliatory adverse employment actions where the complained-of events would discourage employees from utilizing Title VII employment protections.\footnote{See Ray, 217 F.3d at 1243 (agreeing with the EEOC opinion that qualifying retaliation consists of unfavorable treatment with a retaliatory purpose that is likely to dissuade similarly situated employees from taking protected activity).}

This broad test adopted by the Court has allowed a vast array of events to be treated as retaliation.\footnote{See id. at 1243-44 (finding elimination of employee programs and flexible time policy, as well as disproportionate decreases in pay and workload constituted retaliation); Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1455 (11th Cir. 1998) (finding retaliation in actions ranging from a denied lunch break to threats of physical violence).} As a result, access to Title VII remains un-
restricted since employees can seek redress for retaliation, regardless of its form.\(^{191}\) With increased access to Title VII remedies, however, comes the potential for courts to be inundated with new Title VII retaliation claims.\(^{192}\)

Additionally, the deterrence test creates the opportunity for retaliation claims to reach the courts with only a tangential connection to the scope of employment.\(^{193}\) As Justice Alito noted in his concurrence, "[t]here is reason to doubt that Congress meant to burden the federal courts with claims involving relatively trivial differences in treatment."\(^{194}\)

Moreover, the deterrence test lacks the clarity of a bright line test—determining what would deter an employee from taking protected action is subject to judicial interpretation.\(^{195}\) While the deterrence test allows the flexibility needed to provide fair results under varied circumstances, it lacks the stability necessary to put employers on notice of what actions need to be prevented to avoid liability.\(^{196}\)

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191. *See Ray*, 217 F.3d at 1243. Since the test is whether the action would deter employees from taking protected action, unfettered access to Title VII protections, as intended by the statute, is a necessary result. *Id.* ("[T]he test focuses on the deterrent effects... it effectuates the letter and the purpose of Title VII.").

192. *See* Linda Greenhouse, *Supreme Court Gives Employees Broader Protection Against Retaliation in Workplace*, N.Y. TIMES, June 23, 2006, at A22. According to one attorney, the Court's ruling will "lead to 'burdensome' litigation and was 'particularly disappointing to small employers.'" *Id.*

193. *See Ray*, 217 F.3d at 1243-44. A necessary evil of the broad approach is the possibility of frivolous retaliation claims achieving success, especially with a deterrence test subject to a judge's view of what would deter an employee from seeking Title VII protections. *Id.; see also Burlington III*, 126 S. Ct. at 2419 (Alito, J., concurring) ("[T]he broad interpretation of Title VII's anti-retaliation provision] 'makes a federal case' out of any small difference in the way an employee who has engaged in protected conduct is treated.").


195. *See Ray*, 217 F.3d at 1243. Judges must look forward and subjectively ask whether the action "is reasonably likely to deter." *Id.* ("Instead of focusing on the ultimate effects of each employment action, the... test focuses on the deterrent effects."). By shifting the analysis away from the effect on the complaining employee, and toward the effect on similarly situated employees, decisions using the deterrence standard become subjective and abstract. *See id.*

196. *See id.* Under this approach, employers lack sufficient parameters concerning what constitutes appropriate activity. *See id.* As a result, employers may find themselves at the mercy of judicial discretion. *See id.* Courts must evaluate the individual facts of each complaint and make a prospective determination of whether the complained-of action would deter employees from taking protected action, and thus constitute retaliation under Title VII. *See id.; see also* Carla J. Rozyczki & David K. Haase, *Supreme Court Eases Standard for Title VII Retaliation Claims*, LAW.COM, Aug. 2, 2006, www.law.com/jsp/l/lf/PubArticleFriendlyLLF.jsp?id=1154423136520 ("Employers faced with employees who have filed discrimination charges will have to take greater care to assure that the employee is not subject to any actions which could be viewed as retaliatory. Even before the Supreme Court's decision in Burlington, management of employees who have filed charges of discrimination has proven challenging to employers.").
Additionally, the Court's rule may cause practical problems in application. A terms and conditions test allows an objective standard to be applied.\textsuperscript{197} The Court's deterrence test, on the other hand, forces courts to apply a sliding scale to determine when retaliation occurs.\textsuperscript{198} Moreover, the scale is based on whether a quasi-reasonable employee would have been dissuaded.\textsuperscript{199}

The terms and conditions test provides flexibility to examine charges of unlawful retaliation\textsuperscript{200} without foreclosing channels of Title VII protection to employees seeking remedies.\textsuperscript{201} For example, an employee that is moved from her spacious, private office to a shared broom closet the week after reporting harassment has undoubtedly experienced a retaliatory adverse employment action.\textsuperscript{202} Such action deserves redress, even though it is not on the level of a pay decrease or termination.\textsuperscript{203} At the same time, while an employee that becomes socially unpopular at work

\begin{footnotesize}
\textsuperscript{197}. Compare supra note 47 and accompanying text, with supra note 193 and accompanying text, and infra note 198 and accompanying text.

\textsuperscript{198}. See Burlington III, 126 S. Ct. at 2420-21 (Alito, J., concurring).

\textsuperscript{199}. See id. at 2415 (majority opinion) (stating that the reasonable employee test is "objective" and "avoids ... uncertainties").

\textsuperscript{200}. Von Gunten v. Maryland, 243 F.3d 858, 865 (4th Cir. 2001). The terms and conditions test is preferable to the deterrence test: although the broad approach offers greater flexibility by giving extensive judicial discretion, the terms and conditions test tempers judicial discretion through the materiality standard. Compare id. ("[N]ecessary in all § 2000e-3 retaliation cases is evidence that the challenged discriminatory acts or harassment adversely affected [sic] 'the terms, conditions, or benefits' of the plaintiff's employment." (quoting Munday v. Waste Mgmt. of N. Am., Inc., 126 F.3d 239, 243 (4th Cir. 1997))), with Ray, 217 F.3d at 1243 ("[A]n action is cognizable as an adverse employment action if it is reasonably likely to deter employees from engaging in protected activity.").

\textsuperscript{201}. Von Gunten, 243 F.3d at 865. The terms and conditions test does not put a strict limitation on retaliation claims like the ultimate employment decision test, and allows exploration of possible cases of retaliation that do not directly relate to salary, promotions, hiring, terminating, or granting leave. See Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997) (requiring an ultimate employment decision to cause the complained-of adverse action).

\textsuperscript{202}. Knox v. Indiana, 93 F.3d 1327, 1334 (7th Cir. 1996). Without serious extenuating circumstances, the proximity of the move and the filing of the harassment claim makes it logical to assume such an action was taken in retaliation. In fact, in Knox v. Indiana, the court stated, "[n]o one would question the retaliatory effect of ... actions like moving the person from a spacious, brightly lit office to a dingy closet." Id.

Nonetheless, a new office is not considered an "ultimate employment decision." See Mattern, 104 F.3d at 707 (requiring an ultimate employment decision to cause the adverse effect). The terms and conditions test, however, would examine the situation outside the harsh construct of the ultimate employment decision test and would likely find a case of retaliatory adverse employment action, despite the employer's novel approach to treating employees after they file Title VII complaints with the EEOC. See Von Gunten, 243 F.3d at 866.

\textsuperscript{203}. See Knox, 93 F.3d at 1334. Courts adopting the terms and conditions test recognize the need to protect employees in situations that go beyond the traditional aspects of employment. See Von Gunten, 243 F.3d at 865 ("[C]onduct short of 'ultimate employment decisions' can constitute adverse employment action for purposes of § 2000e-3.").
\end{footnotesize}
following his invocation of Title VII protections has certainly experienced a hardship, the loss of a social life is unlikely to meet the materiality required for finding retaliatory adverse employment actions under the terms and conditions test. 204

Although the terms and conditions test may allow some potentially frivolous claims of employment retaliation, this intermediate approach still requires the alleged retaliation to materially alter the terms, conditions, or benefits of employment enough to warrant a finding of a Title VII adverse employment action, thus providing a better filter for frivolous claims than the Court's deterrence test. 205 Furthermore, a terms and conditions test provides a measure of certainty to both employees and employers. 206 Employers can be sure that frivolous retaliation claims will be rejected, since they will fail to reach the severe or pervasive threshold. 207 This places the employer on general notice as to what conduct

204. See id. A liberal interpretation of the broad approaches could possibly find such ostracism in the workplace is reasonably likely to deter employees from filing Title VII claims, and thus constitutes retaliatory adverse employment actions. See Ray, 217 F.3d at 1243 (recognizing retaliation occurs in actions that are reasonably likely to deter others from utilizing Title VII protections). Nonetheless, the Ninth Circuit, utilizing the broad approach's deterrence test, has declined to recognize mere ostracism as employment retaliation under their deterrence test. See Strother v. S. Cal. Permanente Med. Group, 79 F.3d 859, 869 (9th Cir. 1996) ("[M]ere ostracism in the workplace is not enough to show an adverse employment decision."). Still, the terms and conditions test is more likely to prevent against such frivolous, tangential complaints by instituting the terms, conditions, or benefits criteria. See Von Gunten, 243 F.3d at 866.

205. See Von Gunten, 243 F.3d at 865-66 (requiring an essential prerequisite of materiality for retaliation claims). Citing the lower court, the Fourth Circuit stated, "evidence that the terms, conditions, or benefits of employment were adversely effected' [sic] is the sine qua non of an 'adverse employment action."' Id. at 866 (quoting Von Gunten v. Md. Dep't of the Env't, 68 F. Supp. 2d 654, 662 (D. Md. 1999)).

206. See id. at 866. Under the terms and conditions test, employers and employees have a fair understanding of the level of conduct that courts will consider retaliatory adverse employment actions. Id. ("terms, conditions, or benefits"). Though the terms and conditions test does not provide the same level of certainty as the "ultimate employment decision" model utilized in the strict approach (only a discrete list of actions will constitute retaliation), the intermediate approach provides parameters for judicial discretion rather than the prospective postulations relied upon under the broad approach's deterrence and threshold tests. See Noviello v. City of Boston, 398 F.3d 76, 89 (1st Cir. 2005) (leaving courts to decide whether retaliation is severe or pervasive); Ray, 217 F.3d at 1243 (asking courts to forecast the deterrent effects of the retaliation in question); Mattern, 104 F.3d at 707 (adopting a bright line rule concerning activities that constitute retaliation).

207. See Von Gunten, 243 F.3d at 866 (setting out the terms and conditions standard). For a Title VII retaliation claim to succeed under the terms and conditions test, a court must determine that the alleged retaliation, at a minimum, materially altered the terms, conditions, or benefits of employment. See id. This requirement should derail frivolous or tangential claims of retaliatory adverse employment action, thus providing employers some piece of mind despite the notoriously litigious nature of American society. See Charles Lane, Court Expands Right to Sue Over Retaliation on the Job, WASH. POST, June 23, 2006, at A16 ("Justice Breyer's standard opens the door to claims based on actions that before today companies would not have suspected were actionable. . . . Companies
The purposes of Title VII are enhanced by the terms and conditions test. Applying a canon of statutory construction, terms should be interpreted similarly throughout a statute. Accordingly, the term "discriminate" should be read similarly throughout Title VII. Thus, where

...
42 U.S.C. § 2000e-2 provides a meaning for "discriminate," it provides guidance for interpretation of the anti-retaliation provision. In fact, § 2000e-2 talks of "terms, conditions, or privileges of employment," which further promotes adoption of a terms and conditions test for the anti-retaliation provision. Although the limiting phrases found in the anti-discrimination provision do not appear in the anti-retaliation provision, reading the sections together provides a unifying solution and supports the terms and conditions test.

When an employee is retaliated against for taking actions protected under Title VII, a terms and conditions test will find liability wherever the retaliation reaches the terms, conditions, or benefits of employment; this test does not constrict findings of retaliation to the traditional methods of employer revenge, nor does it open the floodgates for retaliation claims. This level of protection ensures that multiple forms of retaliatory actions are covered.

This subchapter” (emphasis added)); see also Noviello, 398 F.3d at 90 (applying the canon of construction to the word "discriminate" in Title VII). But see Mattern v. Eastman Kodak Co., 104 F.3d 702, 709 (5th Cir. 1997) (inferring the omission of a definition of “discriminate” implies a more limited use than provided elsewhere in the statute).

214. § 2000e-2. This provision of Title VII makes it unlawful for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” Id.

215. See Ratzlaf, 510 U.S. at 143. Using this canon of construction, the anti-retaliation provision should import § 2000e-2’s meaning of discrimination. See id. Thus, the term “discriminate” as used in the anti-retaliation provision properly refers to “compensation, terms, conditions, or privileges of employment.” See § 2000e-2.

216. § 2000e-2.

217. See Noviello, 398 F.3d at 90. Despite the fact that the preceding section of Title VII explicitly reads “terms, conditions, or privileges of employment,” multiple courts have used the section to support adoption of a broad standard of interpretation. See id. (relaying on other sections of Title VII to interpret “discriminate,” but adopting a broad, threshold test); Morris v. Oldham County Fiscal Court, 201 F.3d 784, 791-92 (6th Cir. 2000) (extending a Supreme Court holding that severe or pervasive harassment can constitute “discrimination” under 42 U.S.C. § 2000e-2 to the anti-retaliation provision of Title VII).

218. See Noviello, 398 F.3d at 90; Morris, 201 F.3d at 791.

219. See Knox v. Indiana, 93 F.3d 1327, 1334 (7th Cir. 1996). Although the Seventh Circuit uses a broad approach in interpreting the anti-retaliation provision of Title VII, the opinion from Knox is useful here. See id. (“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.”); see also Linda M. Glover, Comment, Title VII Section 704(a) Retaliation Claims: Turning a Blind Eye Toward Justice, 38 HOUS. L. REV. 577, 612 (2001) (“The anti-retaliation provision is an enforcement mechanism. If courts allow employers to recriminate, even in seemingly insignificant ways, against employees seeking the protection of Title VII, then the Act’s protections are diminished.”); cf. 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, 653 (2003) (analogizing retaliation to the context of First Amendment freedoms, where “minor retaliatory harassment may be actionable . . . . because . . . less harsh deprivations can also chill speech”).
tions will be punished, thus protecting employee access to the basic protections allotted under Title VII.\footnote{220}

IV. CONCLUSION

After the Supreme Court's decision in *Burlington III*, the anti-discrimination provision of Title VII must be interpreted broadly to include employer actions that "might have dissuaded a reasonable worker from making or supporting a charge of discrimination."\footnote{221} Despite this broad mandate, courts should exercise discretion in their application of *Burlington III*. In doing so, courts should obtain guidance from the now abrogated "terms and conditions" test to prevent the inundation of frivolous retaliation claims only tangentially related to employment. Failure to exercise such discretion promises continued judicial struggles in applying the anti-retaliation provision of Title VII.

\footnote{220. *See* Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997) (extending the protections offered under the anti-retaliation provision of Title VII to former employees). According to Justice Thomas, the "primary purpose of [the] anti-retaliation provisions is maintaining unfettered access to statutory remedial mechanisms." *Id.* Justice Thomas is a former Chairman of the EEOC. Supreme Court of the United States, Biographies of Current Members of the Supreme Court, http://www.supremecourtus.gov/about/biographies current.pdf (last visited Oct. 28, 2006).