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Illusory Protection: The Fifth Circuit's Misguided Interpretation of Title VII's Anti-Retaliation Provision in *Hernandez v. Yellow Transportation, Inc.*

William C. Matthews

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ILLUSORY PROTECTION: THE FIFTH CIRCUIT’S MISGUIDED
INTERPRETATION OF TITLE VII’S ANTI-RETALIATION
PROVISION IN
HERNANDEZ V. YELLOW TRANSPORTATION, INC.

William C. Matthews*

Abstract

After *Burlington Northern & Santa Fe Railway Co. v. White* resolved the issue of what constitutes an “adverse action” under the Title VII anti-retaliation statute, the scope of employer liability was substantially broadened. The Supreme Court’s decision reinforced the broad intent behind the anti-retaliation statute and acknowledged the statute’s remedial purpose. The Fifth Circuit, however, has been reluctant to expand employer liability as evidenced through its interpretation of the “adverse action” prong relating to coworker harassment. More specifically, the Fifth Circuit’s “In Furtherance” standard, which is used to judge whether an employer is liable for coworker harassment in retaliation for an employee opposing unlawful employment activities, conflicts with the underlying purpose of the anti-retaliation statute. No other circuit has such a stringent requirement and, unfortunately, the Fifth Circuit’s unique interpretation prevents many plaintiffs from obtaining justifiable relief. The Fifth Circuit applied this standard in *Hernandez v. Yellow Transportation, Inc.*, which illustrated the frustrations surrounding the denial of John Ketterer’s retaliation claim. By reviewing other circuit courts’ analysis, legislative intent, Supreme Court precedent, and public policy, this Note explains how the Fifth Circuit’s interpretation of the anti-retaliation provision is misguided and proposes a simple solution to this intricate problem.

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INTRODUCTION

Yellow Transportation, Inc. (YTI), now known as “YRC Freight,”¹ was a leading transporter of industrial, commercial, and retail goods throughout North America.² This multibillion-dollar company had shipping terminals located throughout the United States and was known for its dedication to safety, service, and the community.³ The company’s core values included, “[w]ork safely,” “[d]emonstrate good citizenship,”

1. YTI was recently renamed “YRC Freight” and is a freight transportation division of YRC Worldwide, Inc. Mary Mitchell, *Yellow Transportation Inc. Discrimination Case Shows Why Racism Is so Frustrating*, CHI. SUN-TIMES (Aug. 4, 2012, 5:48 PM), <http://www.suntimes.com/news/mitchell/13551623-452/yellow-transportation-inc-discrimination-case-shows-why-racism-is-so-frustrating.html>; see also *YRC Freight Profile*, YRC FREIGHT, <http://www.yrc.com/about/profile.html> (last visited Aug. 20, 2014). Even though YRC Freight is the company that was formed after YTI merged with Roadway Express, Inc., I will be referring to YTI throughout this Note because this is the company that existed at the time John Ketterer brought his Title VII claims against YTI.

2. *YRC Freight Profile*, *supra* note 1.

3. See *id.*

and “[a]ct with integrity.”⁴ “With more than 160 combined years of moving big shipments,”⁵ YTI was, safe to say, an accomplished freight company. However, some of YTI’s terminals did not live up to YTI’s esteemed corporate citizenship.⁶ The Dallas, Texas terminal, in particular, exemplified a workplace that failed to meet YTI’s “commitment to diversity.”⁷

To say that the Dallas terminal was “a work-place that could be quite mean-spirited, crude, and insulting” would be an understatement.⁸ The terminal was rife with racial prejudice, and harassment was common.⁹ For example, white employees broadcasted racial slurs such as “nigger” and “wetback” over company radios, and employees tied nooses onto the terminal’s dock.¹⁰ Racially offensive graffiti, drawings, and cartoons were also located throughout the Dallas terminal.¹¹ Words such as “greaser,” “taco bender,” “cotton picker,” “jiggaboo,” and “[a]ll niggers must die” are just a few examples of the language that was scattered around the workplace.¹²

To make matters worse, this abuse also targeted employees who associated with minority employees.¹³ One of these employees was a white dockworker named John Ketterer (Ketterer), who had worked at YTI’s Dallas terminal since 1990.¹⁴ It was “well known to others at the facility” that Ketterer had “longstanding friendships with African-American and Hispanic co-workers.”¹⁵ As a result of these

4. *Code of Business Conduct*, YRC WORLDWIDE (Aug. 1, 2013), http://www.yrcw.com/corporategovernance/code_of_business_conduct.pdf.

5. *Awards*, YRC FREIGHT, <http://www.yrc.com/award/index.html> (last visited Aug. 20, 2014).

6. *See, e.g., Arrieta v. Yellow Transp., Inc.*, No. 3:05-CV-2271-D, 2008 WL 5220569, at *1 (N.D. Tex. Dec. 12, 2008) (noting a discharge for “engaging in outrageous conduct, including threatening a coworker”); *EEOC v. Yellow Transp., Inc.*, No. 09 C 7693, 2010 WL 2891673, at *1 (N.D. Ill. July 21, 2010) (describing a class action where employees sued YTI for various claims, including employment discrimination).

7. *Diversity*, YRC FREIGHT, <http://www.yrc.com/career-resource-center/diversity.html> (last visited Aug. 20, 2014).

8. *See Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644, 649 (5th Cir. 2012), *cert. denied sub nom. Ketterer v. Yellow Transp., Inc.*, 133 S. Ct. 136 (2012).

9. *See* Petition for a Writ of Certiorari at 5–6, *Hernandez*, 670 F.3d 644 (No. 11-1361) (“Racist language was common. Dockworkers, and at least one supervisor, frequently uttered racial slurs and insults directed at African-American and Hispanic employees.”).

10. *Id.* at 6.

11. *Id.*

12. Transcript of Record at 5092–93, 5100, 5113–15, 5155; *Hernandez*, 670 F.3d 644 (No. 11-1361).

13. *Hernandez*, 670 F.3d at 655.

14. *Arrieta v. Yellow Transp., Inc.*, No. 3:05-CV-2271-D, 2008 WL 5220569, at *1 (N.D. Tex. Dec. 12, 2008).

15. Petition for a Writ of Certiorari, *supra* note 9, at 7; *see* Transcript of Record, *supra* note 12, at 4350, 5109, 5167.

relationships, white coworkers frequently called Ketterer a “nigger lover” and other racial slurs.¹⁶ This verbal abuse eventually escalated into coworkers vandalizing Ketterer’s personal property and work area. For example, coworkers glued his locker shut, cut his vehicle’s brake lines, put human excrement in his lunchbox, and greased his work vehicle.¹⁷ Ketterer began to change his daily routine for the sole purpose of avoiding as much workplace harassment as possible.¹⁸ He even began to take his breaks in a different room and stopped using the company restroom.¹⁹

After finding enough courage to stand up to the continuous barrage of harassment, Ketterer and other minority employees protested against workplace discrimination outside of the Dallas terminal around November 2004.²⁰ Little did Ketterer know, this protest would only exacerbate the problem.²¹ As the abuse escalated, Ketterer began receiving treatment for depression, headaches, anxiety, and sleep disorders.²² Ketterer complained to management on multiple occasions, but management did nothing to curtail the behavior against him and the minorities working for YTI.²³ Furthermore, some complaints by employees “were posted on a public bulletin board, leading to even more harassment of the complaining employees.”²⁴

Realizing YTI would not redress this constant workplace abuse, Ketterer and seven other employees sued YTI in federal court alleging YTI was liable under the Civil Rights Act of 1991, Title VII of the Civil Rights Act of 1964 (Title VII), and the Texas Commission on Human Rights Act (TCHRA).²⁵

After this brief but shocking explanation of what Ketterer endured at YTI, one would expect that, provided he had adequate legal representation, he would receive some sort of legal remedy through his suit against YTI. Unfortunately, the trial and appellate courts awarded Ketterer no legal remedy, and the Supreme Court denied his petition for

16. Transcript of Record, *supra* note 12, at 5170, 5246–48, 5492, 5836–37.

17. *Id.* at 5252, 5263, 5265.

18. *Id.* at 5258.

19. *Id.*

20. *Id.* at 5236, 5248, 5256, 5837–38.

21. See Alex B. Long, *The Troublemaker’s Friend: Retaliation Against Third Parties and the Right of Association in the Workplace*, 59 FLA. L. REV. 931, 933 (2007) (discussing how “[i]ndividuals who complain about workplace discrimination are frequently labeled as troublemakers by those in positions of authority within the organization”).

22. Transcript of Record, *supra* note 12, at 5252, 5257.

23. *Id.* at 5237–38, 5247–48.

24. Petition for a Writ of Certiorari, *supra* note 9, at 10–11.

25. *Arrieta v. Yellow Transp., Inc.*, No. 3:05-CV-2271-D, 2008 WL 5220569, at *1 (N.D. Tex. Dec. 12, 2008) (citing 42 U.S.C. § 1981 (2006); 42 U.S.C. §§ 2000e–2000e-17, and TEX. LAB. CODE ANN. §§ 21.001–.556 (West 2006)).

a writ of certiorari.²⁶ The most troubling aspect of the Fifth Circuit's holding was the court's interpretation of Ketterer's "retaliation" claim under Title VII.²⁷ The court held that YTI was not liable under Title VII's "anti-retaliation provision" because the adverse actions against Ketterer were performed by "ordinary employees" and were not "In furtherance of the employer's business."²⁸ This interpretation of the anti-retaliation provision is impractical and differs from the analysis of all other circuits.²⁹ Furthermore, this decision could have disastrous consequences for the millions of employees who work in the Fifth Circuit's jurisdiction.

With federal retaliation claims increasing significantly over the past ten-to-fifteen years, issues concerning employer liability are becoming more pervasive in our country's legal system.³⁰ For this and many other reasons, this Note aims to address a small part of the employer liability landscape and to shed light on the Fifth Circuit's incorrect interpretation of the anti-retaliation provision. Part I explains the background of the anti-retaliation provision, 42 U.S.C. § 2000e-3(a); the purpose behind the statute; and how retaliation claims are brought under Title VII. Part II discusses the confusion surrounding the proper test to apply to prima facie cases of retaliation and how the Supreme Court resolved this issue. Part III explains the Fifth Circuit case *Hernandez v. Yellow Transportation, Inc.*,³¹ and more specifically, Ketterer's retaliation claim against YTI. Part III also describes how the Fifth Circuit's interpretation of retaliation claims involving coworker harassment differs from all other circuits. Part IV identifies the problems with the Fifth Circuit's analysis of the anti-retaliation provision and proposes a solution to remedy the Fifth Circuit's misguided interpretation.

26. *Docket Files*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/11-1361.htm> (last visited Aug. 20, 2014); *Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644, 656–58 (5th Cir. 2012); *Arrieta*, 2008 WL 5220569, at *1.

27. The provision at issue was 42 U.S.C. § 2000e-3(a).

28. *Hernandez*, 670 F.3d at 657 (citations omitted) (internal quotation marks omitted).

29. *See, e.g.*, Petition for a Writ of Certiorari, *supra* note 9, at 3.

30. *Retaliation-Based Charges FY 1997–FY 2012*, EEOC, <http://www.eeoc.gov/eeoc/statistics/enforcement/retaliation.cfm> (last visited Aug. 20, 2014).

31. 670 F.3d 644.

I. DRUMROLL PLEASE: INTRODUCING THE “ANTI-RETALIATION” PROVISION

Before exploring the legal ramifications of Ketterer’s suit against YTI, one should understand the origins and purpose of the anti-retaliation provision. What makes the statute important in the employment context? How does one actually file a retaliation claim under Title VII? These questions should be answered to fully understand why the Fifth Circuit’s analysis is misguided.

A. *The Origin of the Anti-retaliation Provision*

Title VII’s anti-retaliation provision is part of § 704(a) of Title VII of the Civil Rights Act of 1964.³² Congress passed the Civil Rights Act in response to the racial turbulence that swept the nation during the early 1960’s.³³ The catalyst for these events began on June 11, 1963 when President Kennedy sent National Guard troops to the University of Alabama to enforce a desegregation order.³⁴ This event, coupled with months of riots and demonstrations stemming from racial tension, forced the federal government to take action.³⁵ In addition to publicly denouncing the racially-induced violence, President Kennedy sent proposed legislation to Congress to help alleviate America’s equality problems.³⁶

The proposed legislation was originally titled the “Civil Rights Act of 1963.”³⁷ It was divided into eight Titles, each of which dealt with a separate issue under Title VII of the proposed act.³⁸ In general, the bill “was . . . a remedial measure designed to begin the process of overturning a century’s worth of Jim Crow [laws].”³⁹ Furthermore, Title VII was intended to benefit not just African Americans, but all of America.⁴⁰ This is evident when looking at the legislative history “in the

32. 42 U.S.C. § 2000e-3(a).

33. Michael J. Fellows, *Civil Rights—Shades of Race: An Historically Informed Reading of Title VII*, 26 W. NEW ENG. L. REV. 387, 397 (2004); see also David Benjamin Oppenheimer, *Kennedy, King, Shuttlesworth, and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U.S.F. L. REV. 645, 670 (1995) (explaining how racially fueled events in Birmingham, Alabama, caused President Kennedy to have a civil rights bill drafted).

34. CIVIL RIGHTS 1960–66, at 217–18 (Lester A. Sobel ed., 1967); Fellows, *supra* note 33, at 397. See generally HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960–1972*, at 75 (1992).

35. Fellows, *supra* note 33, at 398–99.

36. CIVIL RIGHTS 1960–66, *supra* note 34, at 175.

37. The Civil Rights Act of 1964 is the same bill as the one cited here, but, because it was not passed until the following year, was retitled with the year 1964. Fellows, *supra* note 33, at 400.

38. *Id.*

39. *Id.* at 401 (footnote omitted).

40. *Id.* at 405.

context of the larger social and historical movements” because theoretically, a more productive African American bettered both himself and the community around him.⁴¹

B. *The Purpose of the Anti-retaliation Provision*

As could be expected, the general purpose of Title VII is to protect individuals from discrimination based on race, color, religion, sex, or national origin.⁴² Oftentimes, because Title VII is known for prohibiting employer discrimination, retaliation claims are brought in conjunction with discrimination claims under Title VII's anti-discrimination provision.⁴³ By definition, the “two provisions work in tandem to protect workers.”⁴⁴ However, the language of the anti-retaliation provision is much broader than the statutory language of the anti-discrimination provision.

Title VII's anti-discrimination provision states:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.⁴⁵

Thus, for an anti-discrimination claim to be valid, “the difference in treatment must be related to the employment relationship.”⁴⁶ This notion is illustrated in subsection (1) where the unlawful employment practice is “with respect to [the employee's] compensation, terms,

41. *Id.*

42. Marilee L. Miller, *The Employer Strikes Back: The Case for a Broad Reading of Title VII's Bar on Retaliation*, 2006 UTAH L. REV. 505, 505 (footnotes omitted); see also Lindsay Roshkind, *Employment Law: An Adverse Action Against Employers: The Supreme Court's Expansion of Title VII's Anti-Retaliation Provision*, 59 FLA. L. REV. 707 (2007) (discussing how the goal of the Civil Rights Act of 1964 is “to compensate individuals who have suffered as a result of an unlawful employment practice”).

43. 42 U.S.C. § 2000e-2(a)(1) (2006).

44. Jessica L. Beeler, Comment, *Turning Title VII's Protection Against Retaliation into a Never-Fulfilled Promise*, 39 GOLDEN GATE U. L. REV. 141, 144 (2008).

45. 42 U.S.C. § 2000e-2(a)(1).

46. Beeler, *supra* note 44, at 144.

conditions, or privileges.⁴⁷

However, this qualifying language does not exist in the anti-retaliation provision. The anti-retaliation provision states:

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.⁴⁸

Nothing in the anti-retaliation provision specifies whether the discrimination must be related to certain aspects of employment.⁴⁹ The statute simply says that an employer cannot discriminate against an employee for opposing an unlawful employment practice.⁵⁰ Furthermore, the anti-retaliation statute does not explain how “harmful the difference in treatment must be in order to constitute retaliation.”⁵¹ Thus, because “Congress acts intentionally and purposely in the disparate inclusion or exclusion” of statutory language, the Supreme Court held that Congress intended for the anti-retaliation provision to have a broad application that differs from the anti-discrimination provision.⁵²

Additionally, while discrimination and retaliation claims are usually brought in conjunction with one another, a plaintiff does not have to be successful on a discrimination claim to still have a valid retaliation claim.⁵³ This reinforces the notion that courts have interpreted the anti-discrimination and anti-retaliation provisions to be similar yet sufficiently distinct from one another.⁵⁴ The Supreme Court bolstered

47. 42 U.S.C. § 2000e-2(a)(1).

48. 42 U.S.C. § 2000e-3(a) (2006).

49. Beeler, *supra* note 44, at 145.

50. 42 U.S.C. § 2000e-3(a).

51. Beeler, *supra* note 44, at 145.

52. *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted); *see also Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 66 (2006) (holding that it is not “anomalous to read the [anti-retaliation provision] to provide broader protection for victims of retaliation than for . . . victims of . . . discrimination”).

53. *Archuleta v. Colo. Dep’t of Insts., Div. of Youth Servs.*, 936 F.2d 483, 487 (10th Cir. 1991).

54. *See id.* at 487 n.2.

this argument in *Burlington Northern & Santa Fe Railway Co. v. White* and added that the anti-retaliation and anti-discrimination statutes should not be limited by each other.⁵⁵ Before exploring the problems with the Fifth Circuit's decision in *Hernandez*,⁵⁶ the procedural aspects of a retaliation claim are important to understand.

C. Procedural Details of Retaliation Claims Under Title VII

Title VII protections are in place because they can provide a remedy to any employee who feels that his or her employer has treated him or her unlawfully.⁵⁷ This unlawful treatment can range from racially based demotions to termination of employment in retaliation for participating in lawfully protected activities.⁵⁸ An employee initiates a retaliation claim by first filing a complaint with the Equal Employment Opportunity Commission (EEOC).⁵⁹ The EEOC has the authority to “investigate individual charges of discrimination, to promote voluntary compliance with the requirements of Title VII, and to institute civil actions against employers . . . named in a discrimination charge.”⁶⁰ As it pertains to retaliation claims that may be pursued in court, a “potential . . . plaintiff must always file a charge with the EEOC and seek a right-to-sue letter before going to court to pursue the retaliation claim.”⁶¹

After an employee has obtained the right to sue from the EEOC, the employee must file a retaliation claim against his or her employer and has the burden of proof to establish a prima facie case of retaliation.⁶² To establish a prima facie case of retaliation, the plaintiff must satisfy the elements laid out in *McDonnell Douglas Corp. v. Green*.⁶³ Under the *McDonnell Douglas* framework, to establish a prima facie case of

55. See *Burlington*, 548 U.S. at 64 (holding that “the antiretaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment”).

56. *Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644 (5th Cir. 2012).

57. Beeler, *supra* note 44, at 146.

58. *Id.* Lawfully protected activities include protesting workplace discrimination, filing complaints to management, filing lawsuits, and many more.

59. 29 C.F.R. § 1614.105(a)–(d) (2011) (explaining how before the actual claim is filed, the employee making the claim must first consult a counselor in order to try and resolve the issue).

60. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

61. Beeler, *supra* note 44, at 147 (citing 42 U.S.C.A. § 2000e-5 (2006)).

62. See John Sanchez, *The Law of Retaliation After Burlington Northern and Garcetti*, 30 AM. J. TRIAL ADVOC. 539, 543–44 (2007) (stating that an employee must “establish[] a prima facie case of retaliation using circumstantial evidence”).

63. 411 U.S. 792, 802 (1973). “Even though the Supreme Court introduced this indirect proof scheme for substantive discrimination claims, lower courts universally have adapted it to retaliation cases as well.” Sanchez, *supra* note 62, at 542–43; e.g., *McMillan v. Rust Coll., Inc.*, 710 F.2d 1112, 1116 (5th Cir. 1983).

retaliation the plaintiff must prove that: “(1) she engaged in statutorily protected activity, (2) she suffered an adverse action, and (3) a causal connection exists between the protected activity and the adverse action.”⁶⁴ Additionally, the plaintiff must prove the prima facie case of retaliation by a preponderance of the evidence.⁶⁵

If the plaintiff successfully establishes a prima facie retaliation case, the burden then shifts to the defendant to provide a “legitimate, non-retaliatory reason for the adverse employment action.”⁶⁶ The defendant’s burden of proof is light in comparison to the plaintiff’s because the defendant simply needs to produce evidence that raises a genuine issue of fact as to whether the defendant acted in a discriminatory manner against the plaintiff.⁶⁷ If the defendant proffers legitimate evidence that rebuts plaintiff’s retaliation claim, the burden of proof then switches back to the plaintiff to persuade the court that the defendant’s reason is merely a pretext.⁶⁸ In other words, the plaintiff must prove that “the employer was in fact motivated by retaliation in making its employment decision.”⁶⁹ The court resolves these procedural issues, and, as will be explained later, the Fifth Circuit differs from the majority interpretation in its analysis of the second element of a prima facie retaliation claim.

II. IT’S A BIRD, IT’S A PLANE, IT’S *BURLINGTON*: *BURLINGTON*’S MUCH NEEDED GUIDANCE

Burlington Northern & Santa Fe Railway. Co. v. White was a pivotal case for employment lawyers across the country. Until *Burlington*, circuits applied different standards to their “adverse action” analysis when deciding retaliation claims. *Burlington* provided much needed guidance to the circuits and helped alleviate most concerns as to the proper interpretation of prima facie retaliation claims. But, unfortunately for John Ketterer, *Burlington* did not resolve all questions related to the adverse action prong.

A. Pre-Burlington: A History of Circuit Court Inconsistency

While the requirements to establish a prima facie case of retaliation seem rather straightforward, courts have struggled with the second

64. Sanchez, *supra* note 62, at 543–44 (footnotes omitted); see, e.g., Taylor v. United Parcel Serv., Inc., 554 F.3d 510, 523 (5th Cir. 2008).

65. E.g., Abbott v. Crown Motor Co., 348 F.3d 537, 542 (6th Cir. 2003).

66. Hernandez v. Yellow Transp. Inc., 670 F.3d 644, 657 (5th Cir. 2012) (quoting Long v. Eastfield Coll., 88 F.3d 300, 305 (5th Cir. 1996)) (internal quotation marks omitted).

67. Tex. Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 254–55 (1981).

68. *Id.* at 255 n.10.

69. Sanchez, *supra* note 62, at 544.

prong of the retaliation analysis.⁷⁰ The second prong of a *prima facie* retaliation claim is that the employee suffered an “adverse action.”⁷¹ Prior to *Burlington*,⁷² courts did not consistently define what constituted an “adverse action.”⁷³ This inconsistency was primarily caused by the differing interpretations of the phrase “discriminate against” in the anti-retaliation statute.⁷⁴ This confusion resulted in three majority interpretations of the correct meaning of “adverse action.”⁷⁵

1. The “Ultimate Employment Actions” Standard

The Fifth Circuit adopted the “ultimate employment actions” standard.⁷⁶ This was the minority interpretation and in accordance with its atypical analysis in *Hernandez*, the Fifth Circuit was unsurprisingly this standard’s most consistent follower.⁷⁷ The crux of this interpretation was that only ultimate employment actions such as wages, benefits, hiring, firing, and demotions satisfy the “adverse action” standard of a retaliation claim.⁷⁸ Even if the action was clearly retaliatory in nature, any lesser actions such as “a negative performance evaluation, an uncomfortable work environment, or lateral job transfers with similar pay” do not qualify as an “adverse action.”⁷⁹ The Fifth Circuit argued that Title VII was created to deal with ultimate employment decisions, not decisions made by employers that may have some “tangential effect upon those ultimate decisions.”⁸⁰ Thus, if a worker who protests workplace discrimination is given a negative performance review solely because of his protest, the Fifth Circuit was content with holding that the negative review did not constitute an

70. *Ray v. Henderson*, 217 F.3d 1234, 1240–42 (9th Cir. 2000).

71. *Taylor v. United Parcel Serv., Inc.*, 554 F.3d 510, 523 (5th Cir. 2008).

72. *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53 (2006).

73. Megan E. Mowrey, *Establishing Retaliation for Purposes of Title VII*, 111 PENN ST. L. REV. 893, 894 (2007).

74. *Burlington*, 548 U.S. at 57.

75. *See Miller*, *supra* note 42, at 513–23 (discussing different interpretations of the term “adverse action”).

76. *Id.* at 513.

77. *Id.* The Eighth Circuit and the Fourth Circuit were the other circuit courts that used to abide by the “ultimate employment actions” standard. *E.g.*, *Munday v. Waste Mgmt. of N. Am.*, 126 F.3d 239, 243 (4th Cir. 1997); *Manning v. Metro. Life Ins. Co.*, 127 F.3d 686, 692 (8th Cir. 1997).

78. *See, e.g.*, *Dollis v. Rubin*, 77 F.3d 777, 781–82 (5th Cir. 1995) (“Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions.”).

79. *Miller*, *supra* note 42, at 513; *e.g.*, *Watts v. Kroger Co.*, 170 F.3d 505, 512 (5th Cir. 1999) (holding that “employment actions are not adverse where pay, benefits, and level of responsibility remain the same”).

80. *Burger v. Cent. Apartment Mgmt., Inc.*, 168 F.3d 875, 878 (5th Cir. 1999) (internal quotation marks omitted).

“adverse action” against the employee. Although alarming because of the numerous ways an employer could lawfully retaliate against an employee, this standard was fortunately the least followed interpretation.

2. The “Materially Adverse” Standard

The U.S. Courts of Appeals for the Second, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits adopted the “materially adverse” standard.⁸¹ Most courts defined the materially adverse standard as a retaliatory action that “must result in an adverse effect on the terms, conditions, or privileges of employment.”⁸² In other words, there must be a close relationship between the retaliatory act and employment.⁸³ Thus, unlike the “ultimate employment action” standard, the “materially adverse” test considered hostile or abusive work environments as adverse actions against an employee.⁸⁴ This is because an abusive work environment undoubtedly can negatively affect the employee’s “conditions . . . of employment.”⁸⁵ The “materially adverse” test did not, however, include minor complaints and other actions that were not employment related.⁸⁶ Unfortunately, this standard produced many unpredictable results because of courts’ subjective interpretations of which actions actually qualified as “employment related.”⁸⁷

3. The “Deterrence” Standard

The third and final standard was known as the “deterrence” standard.⁸⁸ The “deterrence” standard took a more lenient approach and mirrored the EEOC’s definition of an adverse employment action.⁸⁹ Plaintiffs must first file their claims with the EEOC before bringing their action in federal court.⁹⁰ The EEOC defines its adverse action standard as “an action taken to try to keep someone from opposing a discriminatory practice, or from participating in an employment

81. Miller, *supra* note 42, at 515–17; Petersen v. Utah Dep’t of Corr., 301 F.3d 1182, 1189 (10th Cir. 2002).

82. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 60 (2006) (internal quotation marks omitted) (brackets omitted).

83. *Id.*

84. Miller, *supra* note 42, at 515.

85. *Burlington*, 548 U.S. at 60 (internal quotation marks omitted).

86. *See id.* (excluding mention of minor complaints and other actions not employment related in the standard of retaliation).

87. *See* Miller, *supra* note 42, at 515 (“[T]he Second Circuit has evaluated each case based on its specific fact pattern.”).

88. *Id.* at 520.

89. *See id.* (discussing the EEOC’s definition of retaliation).

90. *See supra* Section I.B.

discrimination proceeding.”⁹¹ Other courts defined the “deterrence” standard as an action that would “dissuade[] a reasonable [employee] from making or supporting a charge of discrimination.”⁹²

Thus, this standard covered retaliatory measures such as lateral transfers, negative reviews, and changes in work schedules.⁹³ The reasoning was that these types of employment actions were likely to deter employees from participating in protected activities, such as protesting work discrimination or filing claims against their employer.⁹⁴ Because the intent behind the anti-retaliation statute is to protect employees who have participated in lawfully protected activities from retaliatory acts at the hands of their employers, excluding these retaliatory acts is simply ignoring the intent and meaning behind the anti-retaliation statute. Therefore, if a court does not qualify these types of employment actions as “adverse,” that court is essentially circumventing the fundamental purpose behind the anti-retaliation statute.⁹⁵ With three different interpretations of what “adverse action” truly meant, circuit courts needed further guidance in their analyses of the anti-retaliation statute.

B. Burlington Finally Resolves the “Adverse Action” Debate

The Supreme Court finally provided such guidance through its decision in *Burlington Northern & Santa Fe Railway Co. v. White*.⁹⁶ In *Burlington*, Burlington Northern & Santa Fe Railway Company (Burlington) hired Sheila White in June 1997 to work as a “track laborer” at the company’s Tennessee stockyard.⁹⁷ Shortly after hiring her, Burlington reassigned White to a more desirable position as a “forklift operator.”⁹⁸ Only a couple of months into the job, White’s supervisor began making sexist remarks to White and continually insulted her in front of her coworkers.⁹⁹ Eventually, White complained

91. *Facts About Retaliation*, EEOC, <http://www.eeoc.gov/laws/types/facts-retal.cfm> (last visited Aug. 20, 2014).

92. *Washington v. Ill. Dep’t of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005); *see, e.g., Rochon v. Gonzales*, 438 F.3d 1211, 1218 (D.C. Cir. 2006) (noting that Title VII’s statutory retaliation clauses prohibit adverse action based on retaliatory motive aimed to deter employees from making a charge of discrimination).

93. *Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir. 2000).

94. *Id.*

95. *Id.*

96. 548 U.S. 53 (2006).

97. *Id.* at 57 (explaining that a track laborer is “a job that involves removing and replacing track components, transporting track material, cutting brush, and clearing litter and cargo spillage from the right-of-way”).

98. *Id.*

99. Her supervisor continually told her that women should not be working in his department and he made numerous inappropriate remarks about her in front of her male coworkers. *Id.* at 58.

to Burlington management about her supervisor's behavior, and, shortly after complaining, White was reassigned to her old position as a standard "track laborer."¹⁰⁰

After being reassigned, White filed a complaint with the EEOC, asserting that her job reassignment amounted to unlawful gender discrimination and retaliation for complaining to management about her supervisor's behavior.¹⁰¹ Only a few days later, Burlington suspended White without pay for insubordination resulting from a workplace dispute.¹⁰² After exhausting her available remedies through the EEOC, White filed suit in federal court alleging that Burlington retaliated against her by changing her job responsibilities and suspending her for thirty-seven days without pay.¹⁰³ The district court ruled in favor of White, and, on appeal, the Sixth Circuit upheld the lower court's decision but was still conflicted as to the proper standard to apply in regards to the "adverse action" analysis.¹⁰⁴

After granting certiorari to resolve this disagreement, the Supreme Court explained that the anti-retaliation provision "is intended to provide 'exceptionally broad protection' for protestors of discriminatory employment practices."¹⁰⁵ This is evident when comparing the language of the anti-retaliation provision and the anti-discrimination provision.¹⁰⁶ The anti-discrimination provision contains language such as, "hire," "discharge," "compensation," "privileges of employment," and "status as an employee," all of which limit the provision's scope to "actions that affect employment or alter the conditions of the workplace."¹⁰⁷ The anti-retaliation provision contains no such language that limits its scope to employment or workplace conditions.¹⁰⁸

The Court interpreted this difference in language as purposeful because of the different objectives served under both provisions.¹⁰⁹ The

100. *Id.* Management "explained that the re-assignment reflected co-workers' complaints that, in fairness, a 'more senior man' should have the 'less arduous and cleaner job' of forklift operator." *Id.* (internal quotation marks omitted).

101. *Id.*

102. *Id.* The event of insubordination was in dispute between White and her new supervisor and through internal grievance procedures, Burlington later concluded that White had *not* been insubordinate. *Id.* She later was reinstated with "backpay for the 37 days she was suspended." *Id.* at 58–59.

103. *Id.* at 59.

104. *Id.*

105. OFFICE OF COMPLIANCE, EEOC, INTERPRETIVE MANUAL: A REFERENCE MANUAL TO TITLE VII LAW FOR COMPLIANCE PERSONNEL OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION § 491.2, at 383 (1972) [hereinafter EEOC INTERPRETIVE MANUAL], *cited with approval in Burlington*, 548 U.S. at 65.

106. *Burlington*, 548 U.S. at 61–63.

107. *Id.* at 62; 42 U.S.C. § 2000e-2(a)(1)–(2) (2006).

108. *See Burlington*, 548 U.S. at 62.

109. *Id.* at 63.

anti-discrimination provision intends to prevent, in the workplace, individuals from being discriminated against because of their status.¹¹⁰ To accomplish this goal, Congress only needed to prohibit employment-related discrimination.¹¹¹ The anti-retaliation provision, however, intends to “prevent[] an employer from interfering (through retaliation) with an employee’s efforts to secure or advance enforcement of [Title VII’s] basic guarantees.”¹¹² Simply prohibiting employment-related discrimination would not accomplish this objective because there are many effective ways an employer can retaliate against an employee that are not strictly employment related.¹¹³ Thus, *Burlington* held that the scope of the anti-retaliation provision is not limited to actions affecting employment or even actions occurring at the workplace.¹¹⁴

Through this decision, the Court expressly rejected the “ultimate employment action” standard because of that standard’s adherence to excluding any action unrelated to the employment relationship.¹¹⁵ Instead, the Court adopted more of a “deterrence” standard, as followed by the Seventh, Ninth, and D.C. Circuits. The Court explained that the anti-retaliation provision only covers employer actions that would have been materially adverse to a reasonable employee.¹¹⁶ Justice Stephen Breyer defined this materially adverse standard as employer actions that “could well dissuade a reasonable worker from making or supporting a charge of discrimination.”¹¹⁷

While Justice Breyer claimed that the standard was objective, it seems clear that there is some subjective element.¹¹⁸ Courts use an objective standard to evaluate whether a worker was *reasonable* in being deterred from bringing a retaliation claim.¹¹⁹ This allows a court to avoid guessing whether a plaintiff would be deterred from bringing a retaliation claim because of some unusual subjective reason that is difficult to verify.¹²⁰ However, “[c]ontext matters” and, thus, there should be a certain degree of subjective analysis applied to the

110. *Id.*

111. *Id.* Employment-related discrimination refers to aspects of employment that fell under the “ultimate employment actions” standard discussed in Subsection II.A.1. This includes wages, hiring, firing, and benefits.

112. *Id.*

113. *Id.* For a discussion of the ways that employers can effectively retaliate against employees through actions not employment related, which in *Burlington* means actions that are not “ultimate employment actions,” see *supra* Subsection II.A.1.

114. *Burlington*, 548 U.S. at 67.

115. For a review and explanation of the “ultimate employment actions” standard, see *supra* Subsection II.A.1.

116. *Burlington*, 548 U.S. at 68.

117. *Id.* at 57.

118. *Id.* at 68–69; see Beeler, *supra* note 44, at 152.

119. *Burlington*, 548 U.S. at 68.

120. *Id.* at 68–69.

retaliation claim.¹²¹ Justice Breyer illustrated this point by using an example where changing an employee's hours may make little difference to many workers, but to a young mother with school-age children, it could make her life exceedingly more difficult.¹²²

Thus, the Court held that Burlington's act of reassigning White to a less desirable position after she complained to management was materially adverse and, therefore, violated the anti-retaliation statute.¹²³ The act was materially adverse because any reasonable employee, after observing how White's discrimination complaint was handled, would think twice before complaining to management in fear of being demoted to a less desirable position.¹²⁴ Furthermore, the Court held that even though White was awarded full back pay for her thirty-seven day suspension, an indefinite suspension without pay is in and of itself a deterrent for an employee who is thinking about reporting a charge of workplace discrimination.¹²⁵ Thirty-seven days of an unpaid suspension can be a serious financial hardship for most employees and a strong deterrent against bringing a discrimination complaint.¹²⁶

After *Burlington* defined the test used to determine what constitutes an "adverse action," the circuits finally had a unitary standard they could follow when analyzing retaliation claims. Unfortunately, the Supreme Court did not resolve all issues surrounding the "adverse action" prong of a prima facie retaliation claim. In particular, the question is still unresolved as to whether an *employer* is liable under the anti-retaliation statute if *coworkers* retaliate against an employee for participating in lawfully protected activities and the employer tolerates it. This issue and many other retaliation questions are discussed in *Hernandez v. Yellow Transportation, Inc.*¹²⁷

121. *Id.* at 69 ("[T]he significance of any given act of retaliation will often depend upon the particular circumstances.").

122. *Id.*

123. *Id.* at 71.

124. *Id.* at 73.

125. *Id.* at 71–73.

126. *Id.* at 72–73.

127. 670 F.3d 644 (5th Cir. 2012).

III. THE FIFTH CIRCUIT'S INTERPRETATION OF *HERNANDEZ V. YELLOW TRANSPORTATION, INC.*

A. *The Fifth Circuit's Controversial Decision*

As explained in the Introduction, John Ketterer had worked for YTI for fourteen years before filing suit against the company in 2006.¹²⁸ After viewing firsthand the way minority employees were treated by many white coworkers, Ketterer sympathized with the minority employees and associated almost exclusively with them.¹²⁹ For his empathy, white coworkers verbally and physically harassed Ketterer for years.¹³⁰ Eventually, after a black employee was unexpectedly discharged, Ketterer and other minority coworkers picketed outside of YTI to protest workplace discrimination.¹³¹ The protests were considered lawfully protected activities because the protests opposed workplace discrimination, which is an unlawful employment practice under the anti-retaliation provision,¹³² In other words, the purpose of the anti-retaliation provision is to protect employees who oppose unlawful employment practices, and because the protests were opposing unlawful employment practices, the protests were held to be lawfully protected activities.¹³³ “This finding is not in dispute.”¹³⁴

Thus, considering the anti-retaliation provision only protects employees if there was a causal connection between an employee engaging in protected conduct and suffering an adverse action, the Fifth Circuit limited its analysis to events after the protests began.¹³⁵ This is because retaliatory conduct can only occur as a reaction to some event or action and in this case, it was after Ketterer participated in protests against YTI. Ketterer claimed that after participating in the November 2004 protests, the harassment by his coworkers continued and escalated.¹³⁶ On a day when he was not protesting, Ketterer was called “shitbag” over the company radio and asked why he was not across the street with his minority friends.¹³⁷ Additionally, Ketterer claimed that a coworker threw a lit firecracker at him.¹³⁸ Ketterer finally complained to two of his dock supervisors in 2005, after several weeks of being circled

128. *Arrieta v. Yellow Transp., Inc.*, No. 3:05-CV-2271-D, 2008 WL 5220569, at *1 (N.D. Tex. Dec. 12, 2008).

129. Transcript of Record, *supra* note 12, at 4350, 5492–93.

130. *E.g., id.* at 5170.

131. *Id.* at 5236, 5248, 5256, 5837–38.

132. See 42 U.S.C. § 2000e-3(a) (2006).

133. *Hernandez*, 670 F.3d at 657.

134. *Id.*

135. *Id.*

136. Transcript of Record, *supra* note 12, at 5243, 5247–48.

137. *Id.*

138. *Id.* at 5152.

in the parking lot by his coworkers in their vehicles.¹³⁹ Unfortunately, YTI did nothing to curtail this workplace harassment.¹⁴⁰ Realizing this behavior would continue as long as YTI did not ameliorate the situation, Ketterer and seven other employees sued YTI in federal court alleging, among other things, that YTI was liable under Title VII.¹⁴¹

After filing suit in district court, the court granted summary judgment in favor of YTI in regards to Ketterer's retaliation claim.¹⁴² As to the first prong, the district court held that Ketterer had offered evidence to show he had engaged in protected activity by protesting YTI.¹⁴³ As to the second prong (suffered an adverse action) and third prong (causation), Ketterer alleged that:

(1) coworkers called him racial names; (2) a coworker threw a firecracker at him; (3) a group of coworkers intimidated him by circling him with their buggies while he was in the yard; (4) his supervisors stared at him and did not have casual conversations with him; (5) he was assigned more work and dirtier jobs; and (6) he was discharged and reinstated without backpay following an altercation with a coworker.¹⁴⁴

The trial court held that “[a] reasonable jury could not [have found] . . . the first three acts imputable to YTI, because they were made by ordinary employees and were not made in furtherance of YTI's business.”¹⁴⁵ The court held that the fourth allegation was not materially adverse because it would not have discouraged a reasonable employee from making a discrimination claim.¹⁴⁶ Ketterer did not produce enough evidence for the fifth allegation to overcome summary judgment, and the sixth allegation lacked sufficient evidence of a causal link between the action and Ketterer's participation in protesting, the protected activity.¹⁴⁷ Thus, largely because Ketterer did not satisfy the “adverse action” prong, he failed to establish a prima facie case of retaliation by

139. *Id.* at 5247–48 (describing how on numerous occasions, Ketterer would finish work and as he walked to the parking lot to leave, his coworkers would circle him in their work vehicles in menacing, threatening, and intimidating ways).

140. *Id.* at 5248.

141. *Arrieta v. Yellow Transp., Inc.*, No. 3:05-CV-2271-D, 2008 WL 5220569, at *1 (N.D. Tex. Dec. 12, 2008).

142. *Id.* at *29 (“The court grants summary judgment dismissing all of plaintiffs’ . . . retaliation claims . . .”).

143. *Id.* at *18.

144. *Id.* at *22.

145. *Id.*

146. *Id.*

147. *Id.* The trial court also stated that even if Ketterer could establish causation, “YTI has provided evidence of a legitimate, nondiscriminatory reason for [his] discharge and reinstatement without backpay.” *Id.*

YTI.

On appeal, the Fifth Circuit affirmed the lower court's ruling that Ketterer did not suffer any adverse employment actions.¹⁴⁸ The Fifth Circuit stated that allegations one through three, addressing whether the incidents of coworker harassment were valid, were irrelevant because they were "perpetrated by . . . ordinary employees [and] . . . the alleged harassment [was not] committed in furtherance of Yellow Transportation's business."¹⁴⁹ As to allegations four and five, the Fifth Circuit held that they were not supported by evidence nor had Ketterer established a causal link between the actions and the protests.¹⁵⁰ Lastly, the Fifth Circuit held that Ketterer's allegation that he was reinstated without back pay¹⁵¹ was without merit because he failed to "demonstrate that 'but for' his participation in protected activities, he would not have been reinstated without back-pay."¹⁵²

This Note is primarily concerned with the Fifth Circuit's analysis of allegations one through three, addressing coworker harassment. The Fifth Circuit's standard for evaluating coworker retaliatory harassment is troubling. Unlike any other circuit, the Fifth Circuit maintains that if an employer tolerates coworker harassment against an employee in retaliation for that employee opposing unlawful employment practices, the actions of that employee "are not imputable to their employer unless they are conducted 'in furtherance of the employer's business.'"¹⁵³ Applied to *Hernandez*, the court explained that the extent of coworker harassment that Ketterer endured and whether YTI did anything to curb this abuse is irrelevant as a matter of law.¹⁵⁴ The Fifth Circuit was only concerned with whether the coworkers' actions were conducted in furtherance of YTI—not the severity of the coworkers' actions or whether YTI tolerated the harassment in retaliation for Ketterer's participation in the protests. As Part IV explains, the Fifth Circuit's standard is contrary to the intent of the anti-retaliation statute, differs from Supreme Court precedent, and is almost impossible to satisfy. But first, what are the other standards that circuits apply to situations like *Hernandez*?

148. *Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644, 657–58 (5th Cir. 2012).

149. *Id.* at 657 (citing *Long v. Eastfield Coll.*, 88 F.3d 300, 306 (5th Cir. 1996)).

150. *Id.* at 658.

151. "A common remedy for wage violations," back pay is defined as "an order that the employer make up the difference between what the employee was paid and the amount he or she should have been paid." *Back Pay*, U.S. DEP'T OF LABOR, <http://www.dol.gov/dol/topic/wages/backpay.htm> (last visited Aug. 20, 2014).

152. *Hernandez*, 670 F.3d at 658; *see Long v. Eastfield Coll.*, 88 F.3d 300, 308 (5th Cir. 1996) (explaining that to defeat a motion for summary judgment, a plaintiff must demonstrate a conflict in substantial evidence on the ultimate issue of but-for causation).

153. *Hernandez*, 670 F.3d at 657 (quoting *Long*, 88 F.3d at 306).

154. *Id.*

B. *The Fifth Circuit's Self-Inflicted Loneliness*

The Fifth Circuit's reasoning that successful retaliation claims are contingent on proof that the harassment, if committed by ordinary employees, is in furtherance of the employer's business is completely unprecedented.¹⁵⁵ To begin, the First,¹⁵⁶ Second,¹⁵⁷ Third,¹⁵⁸ Sixth,¹⁵⁹ Seventh,¹⁶⁰ Ninth,¹⁶¹ and Tenth¹⁶² Circuits have expressly held that a Title VII retaliation claim can be based on the employer's toleration of harassment by coworkers.¹⁶³ These circuits apply different variations of a negligence standard to measure employer liability and typically hold that an employer can be liable for retaliation "if it 'knew or should have known about the harassment' but tolerated or acquiesced in it."¹⁶⁴ If this standard was applied in *Hernandez*, Ketterer would most likely have prevailed on his retaliation claim against YTI and received some form of relief for YTI's toleration of coworkers' behavior towards Ketterer and other minority employees.

In *Knox v. Indiana*, the Seventh Circuit became the first court to hold that "employers can be liable for co-worker actions when they know about and fail to correct the offensive conduct."¹⁶⁵ In *Knox*, a woman filed a sexual harassment complaint against her coworkers and subsequently suffered "fellow worker harassment and vicious gossip."¹⁶⁶ After her employer waited more than a month to do anything about the harassment, she filed a Title VII retaliation claim against her employer.¹⁶⁷ The Seventh Circuit eventually held that the employer was liable because of its "acquiescence" and emphasized that "[n]othing indicates why . . . retaliating against a complainant *by permitting her fellow employees to punish her for invoking her rights under Title*

155. See Petitioner's Reply Brief at 3; *Ketterer v. Yellow Transp., Inc.*, 133 S. Ct. 136 (2012) (No. 11-1361) (observing that all courts other than the Fifth Circuit have required proof of the harassment being committed in furtherance of the employer's business).

156. *E.g.*, *Wyatt v. City of Bos.*, 35 F.3d 13, 15-16 (1st Cir. 1994).

157. *E.g.*, *Richardson v. N.Y. State Dep't of Corr. Servs.*, 180 F.3d 426, 441 (2d Cir. 1999). Additionally, *Rivera v. Rochester Genesee Regional Transportation Authority*, 702 F.3d 685, 698 (2d Cir. 2012), follows verbatim the "material adverse action" standard established by *Burlington* and clarifies any doubt surrounding the standard used in *Richardson*. *Rivera* abrogates rulings different from the retaliation analysis used in *Richardson*.

158. *E.g.*, *Jensen v. Potter*, 435 F.3d 444, 453 (3d Cir. 2006).

159. *E.g.*, *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 345 (6th Cir. 2008).

160. *E.g.*, *Knox v. Indiana*, 93 F.3d 1327, 1334 (7th Cir. 1996).

161. *E.g.*, *Watson v. Las Vegas Valley Water Dist.*, 268 F. App'x 624, 627 (9th Cir. 2008) (citation omitted).

162. *E.g.*, *Gunnell v. Utah Valley State Coll.*, 152 F.3d 1253, 1261 (10th Cir. 1998).

163. Petition for a Writ of Certiorari, *supra* note 9, at 15.

164. *Id.* at 16 (quoting *Jensen v. Potter*, 435 F.3d 444, 453 (3d Cir. 2006)).

165. 93 F.3d at 1334.

166. *Id.* at 1335.

167. *Id.* at 1331.

VII . . . does not fall within this statute."¹⁶⁸

Following the same line of reasoning in *Knox*, the Third Circuit held in *Jensen v. Potter* that the anti-retaliation provision protects an employee from harassment by coworkers where "management knew or should have known about the harassment, but 'failed to take prompt and adequate remedial action.'"¹⁶⁹ In *Jensen*, after the plaintiff reported a sexual harassment claim to her employer, she was moved to a more hostile workstation and was constantly harassed for reporting her previous complaint to management.¹⁷⁰ She reported this new harassment to her employer, but her employer did not attempt to curtail the workplace harassment, and after nineteen months of suffering, she filed a retaliation claim against her employer.¹⁷¹ The Third Circuit reversed the lower court's grant of summary judgment and held the employer liable for not taking remedial action to curtail the coworker retaliatory harassment when it knew or should have known that the harassment was occurring.¹⁷²

The First, Second, and Ninth Circuits agree with the Seventh and Third Circuits' interpretation of the anti-retaliation provision.¹⁷³ All three circuits have ruled that an employer will be held liable under the anti-retaliation provision for failing to act or stop coworker harassment in retaliation for an employee who participated in a lawfully protected activity, if the employer knows or should know about the harassment.¹⁷⁴

The Sixth Circuit, unlike the Fifth Circuit, acknowledged that it was following the majority interpretation when it reversed a lower court's grant of summary judgment for the employer in a Title VII retaliation case.¹⁷⁵ Along with following the majority's negligence standard, the Sixth Circuit also affirmatively stated that an employer could be held

168. Petition for a Writ of Certiorari, *supra* note 9, at 16–17 (alteration in original) (emphasis added) (quoting *Knox*, 93 F.3d at 1334, 1336) (internal quotation marks omitted).

169. *Jensen*, 435 F.3d at 453 (quoting *Andrews v. City of Phila.*, 895 F.2d 1469, 1486 (3d Cir. 1990)). *Mandel v. M & Q Packaging Corp.*, 706 F.3d 157 (3d Cir. 2013) does not overrule *Jensen* with respect to the Third Circuit's retaliation analysis. Instead, it addresses procedural formalities that petitioners must satisfy when filing Title VII claims with administrative agencies like the EEOC. *Id.* at 167.

170. *Jensen*, 435 F.3d at 447.

171. *Id.*

172. *Id.* at 453. By overturning a lower court's summary judgment and establishing a new line of precedent that only one circuit court at the time had established, one can infer that the Third Circuit felt very confident in their interpretation of the Title VII anti-retaliation provision.

173. Petition for a Writ of Certiorari, *supra* note 9, at 17.

174. *Fielder v. UAL Corp.*, 218 F.3d 973, 984–85 (9th Cir. 2000), *vacated on other grounds*, 536 U.S. 919 (2002); *Richardson v. N.Y. State Dep't of Corr. Servs.*, 180 F.3d 426, 446 (2d Cir. 1999); *see, e.g., Watson v. Las Vegas Valley Water Dist.*, 268 F. App'x 624, 626–27 (9th Cir. 2008); *see also Noviello v. City of Bos.*, 398 F.3d 76, 89–90, 95–97 (1st Cir. 2005); *Wyatt v. City of Bos.*, 35 F.3d 13, 15–16 (1st Cir. 1994).

175. *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 345–46 (6th Cir. 2008).

liable if it had “actual or constructive knowledge” of the coworkers’ retaliatory harassment.¹⁷⁶

The Tenth Circuit applies a stricter negligence standard in that an employer is only liable if management “know[s] about the [coworker] harassment and acquiesce[s] it in such a manner as to condone and encourage the coworkers’ actions.”¹⁷⁷ While this does slightly differ from the majority negligence standard, it does not come close to the Fifth Circuit’s narrow standard that coworker harassment must be in furtherance of the employer’s business.¹⁷⁸

The Fourth, Eighth, and Eleventh Circuits have not affirmatively ruled in accordance with the majority negligence standard, but they have stated in dicta that they agree with the majority approach.¹⁷⁹ In addition to the federal circuit court of appeals, most state courts that have addressed Title VII anti-retaliation issues agree with the majority negligence standard.¹⁸⁰ For example, the New Hampshire Supreme Court held that “an employer [may] be liable for co-worker retaliatory harassment for negligently failing to discover or remedy it.”¹⁸¹ Thus, most states and all federal circuits differ from the Fifth Circuit’s analysis that coworker retaliatory harassment must be “in furtherance of the employer’s business.”¹⁸² This divergence from the majority’s reasoning ignores the underlying intent of the anti-retaliation statute, differs from Supreme Court precedent, and is a “Catch-22” standard that is nearly impossible to satisfy.

IV. THE FUNDAMENTAL PROBLEMS WITH THE FIFTH CIRCUIT’S “IN FURTHERANCE” STANDARD AND RECOMMENDATIONS FOR A PRACTICAL SOLUTION

The Fifth Circuit’s “In Furtherance” standard is unique and unprecedented. The standard seems to contradict the legislative intent behind the anti-retaliation provision and ignores similar case law decided by the Supreme Court. Furthermore, the standard legitimately

176. Petition for a Writ of Certiorari, *supra* note 9, at 19 (quoting *Hawkins*, 517 F.3d at 347) (internal quotation marks omitted).

177. *Gunnell v. Utah Valley State Coll.*, 152 F.3d 1253, 1265 (10th Cir. 1998).

178. Petition for a Writ of Certiorari, *supra* note 9, at 20.

179. *See Csicsmann v. Sallada*, 211 F. App’x 163, 168 (4th Cir. 2006); *Carpenter v. Con-Way Cent. Express, Inc.*, 481 F.3d 611, 618 (8th Cir. 2007); *Graham v. State Farm Mut. Ins. Co.*, 193 F.3d 1274, 1283 (11th Cir. 1999).

180. *See, e.g., Madeja v. MPB Corp.*, 821 A.2d 1034, 1045 (N.H. 2003); *Channon v. United Parcel Serv., Inc.*, 629 N.W.2d 835, 865 (Iowa 2001); *Blakey v. Cont’l Airlines, Inc.*, 751 A.2d 538, 548–49 (N.J. 2000).

181. *Madeja*, 821 A.2d at 1045 (citing *Knox v. Indiana*, 93 F.3d 1327, 1334 (7th Cir. 1996)).

182. *Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644, 657 (5th Cir. 2012) (quoting *Long v. Eastfield Coll.*, 88 F.3d 300, 306 (5th Cir. 1996)).

allows for coworker harassment to exist through a “Catch-22” loophole that enables employers to avoid liability. With these negative effects readily apparent to the Fifth Circuit, what is the best solution to remedy this problem? Should the Fifth Circuit fall in line with its sister circuits and amend its stringent and overbearing analysis? The answer is multifaceted but, put simply, the standard must change.

A. *How the Standard Is Contrary to the Intent Behind the Anti-Retaliation Provision*

No textual provision in Title VII's anti-retaliation statute suggests that discrimination against an employee must be employment related.¹⁸³ No such provision exists because Congress and the EEOC intended for the anti-retaliation provision to have a broad application that would protect any employee who had opposed discriminatory employment practices.¹⁸⁴ By denying Ketterer's retaliation claim because Ketterer was harassed by “ordinary employees” and not “in furtherance of the employer's business,” the Fifth Circuit ignored the broad intent of the anti-retaliation provision.¹⁸⁵ This disregard is evident when evaluating scenarios analogous to *Hernandez*.

Consider the following scenario: An employee opposes an unlawful employment practice and, as a result, is harassed by his coworkers. The employer knows about the harassment but does nothing to remedy the situation. In theory, the Fifth Circuit's “In Furtherance” standard would let the employer off the hook as long as the harassment was not in furtherance of the employer's business.¹⁸⁶ This scenario begs the question: how often does employee harassment ever “further” the employer's business? The answer, unsurprisingly, is very rarely. Moreover, it appears that the “In Furtherance” standard may only apply to scenarios where coworkers harass others to force them to work longer hours to benefit the employer.¹⁸⁷ Regardless of the potentially applicable scenarios, the fact that it is difficult to even imagine a case where coworkers harass other employees to further the employer's business evinces the limited application of the Fifth Circuit's standard. Thus, by its very nature, the Fifth Circuit's unique and limiting

183. See 42 U.S.C. § 2000e-3(a) (2006).

184. EEOC INTERPRETIVE MANUAL, *supra* note 105, at 383; see also *Burlington*, 548 U.S. at 65.

185. *Hernandez*, 670 F.3d at 657 (internal quotation marks omitted).

186. *Id.*

187. *Cf.* *Faragher v. City of Boca Raton*, 524 U.S. 775, 798–800 (1998) (acknowledging that it would be rare for harassment to be within the scope of employment, but refusing to hold categorically that it was always outside the scope of employment); *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1422 (1986) (“It would be the rare case where racial harassment against a co-worker could be thought by the author of the harassment to help with the employer's business.”).

restrictions on Title VII retaliation claims in no way follows the statute's purpose of "exceptionally broad protection."¹⁸⁸

B. How Supreme Court Precedent Can Help

Although the Supreme Court has not specifically addressed the issue presented in *Hernandez*, the Court has used a similar analyses in cases involving vicarious liability of employers.¹⁸⁹ In *Faragher v. City of Boca Raton*¹⁹⁰ and *Burlington Industries, Inc. v. Ellerth*,¹⁹¹ employees "sought to recover against the employer without showing [that] the employer [was directly] negligent or otherwise at fault."¹⁹² The majority in both cases stated that "[a]n employer is negligent with respect to . . . harassment if it knew or should have known about the conduct and failed to stop it."¹⁹³ Even the dissenting opinions in both cases recognized that the employer should be liable if he or she were negligent in allowing the supervisor's conduct to occur.¹⁹⁴ Thus, it seems improbable that the Court would differ in its interpretation of the Fifth Circuit's "In Furtherance" standard, especially when following the "broad" intent of the anti-retaliation provision.¹⁹⁵

C. The Fifth Circuit's Glorified "Catch-22"

Another basic but important goal of the anti-retaliation provision is simply "avoiding harm to employees."¹⁹⁶ This is where the Fifth Circuit's interpretation of the anti-retaliation provision truly goes awry. Because the second prong of a prima facie retaliation claim is not established when the harassment by ordinary employees is not in furtherance of the employer's business,¹⁹⁷ almost all types of harassment by ordinary employees are allowed under the Fifth Circuit's "In Furtherance" standard. Almost by definition, coworker harassment

188. EEOC INTERPRETIVE MANUAL, *supra* note 105, at 383; *see also* *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 65 (2006).

189. Petition for a Writ of Certiorari, *supra* note 9, at 25.

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

191. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

192. Petition for a Writ of Certiorari, *supra* note 9, at 26 (quoting *Burlington Indus.*, 524 U.S. at 747) (internal quotation marks omitted).

193. *Id.* (alteration in original) (quoting *Burlington Indus.*, 524 U.S. at 759) (internal quotation marks omitted).

194. *Id.* (summarizing the dissents in *Burlington Indus.*, 524 U.S. at 767 (Thomas, J., dissenting) and *Faragher*, 524 U.S. at 810–11 (Thomas, J., dissenting)).

195. *Id.*

196. *Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 555 U.S. 271, 279 (2009) (quoting *Faragher*, 524 U.S. at 806) (internal quotation marks omitted).

197. *See Long v. Eastfield Coll.*, 88 F.3d 300, 306 (5th Cir. 1996) (observing that "the 'in furtherance of the employer's business' aspect of the doctrine of respondeat superior suggests that liability requires a direct relationship between the allegedly discriminatory conduct and the employer's business" (citing *Shagner v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990))).

inherently “falls outside the scope of employment,”¹⁹⁸ as “[i]t would be the rare case where . . . harassment . . . could be thought by the author of harassment to help the employer’s business.”¹⁹⁹ This simple but important logic illustrates the “Catch-22” of the Fifth Circuit’s reasoning. By stating that the harassment by ordinary employees must be in furtherance of the employer’s business, “[t]he Fifth Circuit has effectively closed the door on co-worker retaliation claims that other circuits would entertain.”²⁰⁰ This extreme limitation on retaliation claims contradicts the statute’s legislative intent and can potentially deter employees who are gauging whether to oppose unlawful employment activities.²⁰¹

This potential and arguably unavoidable deterrent effect starkly contrasts the remedial nature of the anti-retaliation provision.²⁰² The drafters of the anti-retaliation provision intended for the statute to limit employer retaliation as much as possible,²⁰³ regardless of whether it was “in furtherance of the employer’s business.”²⁰⁴ This stringent limitation imposed by the Fifth Circuit creates a judicial interpretation of the anti-retaliation provision that, in a way, significantly alters the statute’s plain meaning. By imposing this harsh standard on employees attempting to bring anti-retaliation claims, the Fifth Circuit is indirectly admitting that certain forms of workplace harassment are legal. This unfortunate reality is contrary to the fundamental purpose of the anti-retaliation provision and hopefully the Fifth Circuit will have a change of heart in the coming years.

D. A Practical Solution That Reflects Reality

While there is no perfect answer as to how to interpret the anti-retaliation provision, one thing is clear: the Fifth Circuit’s method is far from ideal. The Fifth Circuit’s reasoning has created a higher standard for successful coworker retaliation claims and unfortunately, has limited many employees’ options along the way.²⁰⁵ The Fifth Circuit’s

198. *Faragher*, 524 U.S. at 800.

199. *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1422 (7th Cir. 1986) (emphasis added).

200. Petitioner’s Reply Brief, *supra* note 155, at 6.

201. This deterrent effect conflicts with the legislative intent of the anti-retaliation provision. *Fellows*, *supra* note 33, at 423 (“Congress had made clear that one of the purposes of Title VII was to encourage private voluntary efforts to improve the racial situation in the United States.”).

202. *See id.* at 409 (noting that Title VII is a “remedial statute”).

203. *See id.* (“[Title VII], if ‘literally constructed,’ appears to prohibit all forms of racial discrimination in employment.”).

204. *Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644, 657 (5th Cir. 2012) (quoting *Long v. Eastfield Coll.*, 88 F.3d 300, 306 (5th Cir. 1996)).

205. Amicus Curiae Brief of Employment Law Professors in Support of Petition for a Writ of Certiorari at 18; *Ketterer v. Yellow Transp., Inc.*, 133 S. Ct. 136 (2012) (No. 11-1361).

limitation on what constitutes an adverse action is the reason for this higher standard and subsequently contradicts the intent behind the anti-retaliation provision's broad applicability.²⁰⁶ In order to conform with Supreme Court precedent, legislative intent, and a practical standard that is reasonably plausible to satisfy, the Fifth Circuit should eliminate its "in furtherance of the employer's business"²⁰⁷ requirement and replace it with something similar to the negligence standard used by almost all circuit courts.²⁰⁸ The negligence standard prevents employers from turning a blind eye to coworker harassment without legal ramifications. The negligence standard holds employers accountable and allows employees to have a remedy besides simply finding another job. The negligence standard reinforces the public policy argument of fostering workplaces free of discrimination because, under the Fifth Circuit's current standard, this goal is a true legal fiction.

CONCLUSION

John Ketterer witnessed firsthand the effects of workplace harassment against minorities. His sympathy toward minority employees led him to become good friends with them at his workplace.²⁰⁹ Unfortunately, this sympathy backfired and, because of his association with minorities, Ketterer endured severe harassment from his white coworkers.²¹⁰ The worst part about this troubling situation is that, when Ketterer turned to the legal system for relief, he received none.²¹¹ The Fifth Circuit's restrictive interpretation of the anti-retaliation provision is the fundamental reason why employees in situations similar to Ketterer's are denied any sort of legal remedy for their credible retaliation claims.

The primary objective of the anti-retaliation and anti-discrimination provision is to "avoid[] harm to employees."²¹² The Fifth Circuit's

206. EEOC INTERPRETIVE MANUAL, *supra* note 105, at 383; *see also* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 65 (2006).

207. *Hernandez*, 670 F.3d at 657 (quoting *Long v. Eastfield Coll.*, 88 F.3d 300, 306 (5th Cir. 1996)). Although Ketterer in *Hernandez* "urge[d] the panel] to abandon [the Fifth Circuit's] framework for coworker retaliation as articulated in *Long*," the panel had to "decline [the] invitation" because "one panel of the court cannot overturn another." *Id.* at 657–58. Accordingly, the Fifth Circuit will need to hear a case en banc to overrule *Long*.

208. For reminder purposes, the negligence standard and its variations are all in accordance with the underlying theory that an employer can be liable for retaliation if it knew or should have known about the harassment but tolerated or acquiesced in it. *See supra* Section III.B and accompanying text and footnotes.

209. Transcript of Record, *supra* note 12, at 4350.

210. *Id.* at 5170, 5246–48, 5492, 5836.

211. *See Hernandez*, 670 F.3d at 649 (affirming the district court's grant of a summary judgment against Ketterer).

212. *Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 555 U.S. 271, 279 (2009) (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998)).

reasoning undermines this objective and Ketterer's lack of relief is a byproduct of this impractical interpretation. The Fifth Circuit should discontinue using its "In Furtherance" standard and should adopt the negligence standard as followed by the majority of circuit courts. Millions of employees who work in the Fifth Circuit's jurisdiction are not afforded the same Title VII protections as other employees across the United States. The Fifth Circuit's "Catch-22" interpretation of the anti-retaliation provision needs to change for the sake of employees who deserve the fundamental right to act against discrimination, without the fear of employment based retaliation.

