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EMPLOYMENT LAW: AN ADVERSE ACTION AGAINST EMPLOYERS: THE SUPREME COURT'S EXPANSION OF TITLE VII'S ANTI-RETALIATION PROVISION

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

Lindsay Roshkind[*]

The goal of Title VII of the Civil Rights Act of 1964[1] is to compensate individuals who have suffered as a result of an unlawful employment practice.[2] Respondent's supervisor sexually harassed her, so Respondent complained to Petitioner, her employer.[3] Subsequently, Respondent was reassigned to a less desirable job and suspended for thirty-seven days for insubordination.[4] After Respondent invoked Petitioner's internal grievance procedure, it was determined that Respondent was in fact not insubordinate.[5] Respondent was thus reinstated and awarded backpay for the suspension period.[6]

Respondent filed a Title VII action in federal district court.[7]

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* J.D. anticipated May 2008, University of Florida Levin College of Law; B.B.A. 2005, The George Washington University. I would like to thank my mom, Robin Roshkind, and my dad, David Roshkind, for always encouraging me to pursue a legal career and for their love and support over the years. I would also like to thank my sister, Corey Gil, for always challenging me to succeed at things I thought were impossible and my aunt, Susan Jacobson, for being my biggest fan. To my grandparents, thank you for always being there for me and lastly, I would not be who I am today if it were not for my friends - Thank you all!

1. 42 U.S.C. § 2000e-2(a) (2000). Title VII prohibits discrimination against any individual on the basis of "race, color, religion, sex, or national origin." *Id.*; Jan W. Henkel, *Discrimination by Supervisors: Personal Liability under Federal Employment Discrimination Statutes*, 49 FLA. L. REV. 765, 768 (1997). Additionally, Title VII includes an anti-retaliation provision, which prohibits discrimination against an employee or job applicant who opposes an employment practice which is unlawful under Title VII or who has "made a charge, testified, assisted, or participated in" a Title VII proceeding or investigation. § 2000e-3(a).

2. Faragher v. City of Boca Raton, 524 U.S. 775, 805-06 (1998) (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975)).

3. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2409 (2006).

4. *Id.* Prior to Respondent's reassignment, her primary responsibility was to operate a forklift. *Id.* However, after she was reassigned, her responsibilities involved cleaning up trash along the railway, cutting back bushes, and transporting track materials. *Id.* Thereafter, Respondent filed two complaints with the Equal Employment Opportunity Commission (EEOC). *Id.*

5. *Id.* Respondent not only took advantage of Petitioner's internal grievance procedure, but also filed complaints with the EEOC. *Id.* The EEOC formulates guidelines that are not binding authority, but courts use them as a source of informed judgment. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (quoting Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141-42 (1976)).

6. *Burlington*, 126 S. Ct. at 2409.

7. *Id.* at 2410.

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Respondent claimed that the change in her job responsibilities and the thirty-seven day suspension violated Title VII's anti-retaliation provision.[8] The jury found in Respondent's favor.[9] The district court denied Petitioner's motion for judgment as a matter of law and entered judgment for Respondent.[10] The Sixth Circuit Court of Appeals, sitting en banc, affirmed the district court's judgment, finding in favor of Respondent on both retaliation claims.[11] The United States Supreme Court granted certiorari,[12] recognizing the need to conform the courts of appeals' conflicting opinions regarding the scope of Title VII's anti-retaliation provision.[13] The Court affirmed the Sixth Circuit,[14] and HELD: (1) the

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8. *Id.* Title VII's anti-retaliation provision prohibits discrimination against employees or job applicants who oppose a business practice proscribed by the Act. *See* Civil Rights Act of 1964 tit. VII, 42 U.S.C. § 2000e-3(a) (2000). Title VII also forbids retaliation against employees or job applicants who make a "charge, testif[y], assist[], or participate[] in" a Title VII proceeding or investigation. *Id.*

9. *Burlington*, 126 S. Ct. at 2410. The jury awarded Respondent $43,500 in compensatory damages. *Id.*

10. *Id.*; *see also* FED. R. CIV. P. 50(b) (allowing a court to reconsider and reverse an issue presented to the jury if it finds that no reasonable jury could find for that party based on the evidence presented at trial).

11. White v. Burlington N. & Santa Fe Ry. Co., 364 F.3d 789, 791 (6th Cir. 2004) (en banc), *aff'd*, 126 S. Ct. 2405 (2006). The Sixth Circuit initially disagreed and held that neither the change in job responsibilities nor the suspension constituted retaliation as contemplated by Title VII. White v. Burlington N. & Santa Fe Ry. Co., 310 F.3d 443, 445-46 (6th Cir. 2002). However, the court's panel decision was vacated by the court sitting en banc. White v. Burlington N. & Santa Fe Ry. Co., 321 F.3d 1203, 1203-04 (6th Cir. 2003). Although the en banc court voted to affirm the district court's judgment, the judges disagreed on the standard to apply in adverse employment action cases. The majority opinion did not accept the EEOC's recommendation of a "reasonably likely to deter" standard, whereas the concurring opinion advocated for such a standard. *Compare White*, 364 F.3d at 798-800, *with id.* at 809 (Clay, J., concurring).

12. *Burlington*, 126 S. Ct. at 2411.

13. *Id.* at 2408. Judicial circuits have come to differing conclusions as to the scope of the anti-retaliation provision of Title VII. *Id.* at 2410. The conflict concerns whether the challenged retaliatory action must be employment- or workplace-related and what degree of harm must result in order to constitute retaliation. *Id.* For instance, the Sixth Circuit concluded that the same standard should apply to both the retaliation provision and the substantive discrimination provision. *Id.* Specifically, the Sixth Circuit concluded that "the challenged action must 'resul[t] in an adverse effect on the 'terms, conditions, or benefits' of employment.'" *Id.* (alteration in original) (quoting Von Gunten v. Maryland, 243 F.3d 858, 866 (4th Cir. 2001)). Additionally, the Fifth and Eighth Circuits restricted the application of the retaliation provision to acts "'such as hiring, granting leave, discharging, promoting, and compensating.'" *Id.* (quoting Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997)). However, both the Seventh and D.C. Circuits broadened the scope of the anti-retaliation provision to employer actions that would be "material to a reasonable employee," which means the employer's conduct would have "'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Id.* at 2410-11 (quoting Washington v. Ill. Dep't of Revenue, 420 F.3d 658, 662 (7th Cir. 2005)). Furthermore, the Ninth Circuit followed the EEOC Guidelines and concluded that the employer's conduct must be based on a retaliatory motive and be "'reasonably likely to deter the charging party or others from engaging in protected activity.'"

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anti-retaliation provision is not confined to actions related to employment or that occur in the workplace, and (2) the provision prohibits acts that would be considered materially adverse by a reasonable employee or job applicant.[15]

The language Congress used in Title VII's substantive anti-discrimination provision differs from that used in the anti-retaliation provision.[16] The conflict between judicial circuits as to the scope of the anti-retaliation provision revolved around how these differences should be interpreted.[17] In *Mattern v. Eastman Kodak Co.*,[18] the Fifth Circuit Court of Appeals confronted such an issue.[19] Appellee Eastman Kodak Company (Eastman) appealed the denial of a motion for judgment as a matter of law[20] after the jury awarded Mattern damages for retaliation.[21] The court

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Id. at 2411 (quoting Ray v. Henderson, 217 F.3d 1234, 1242-43 (9th Cir. 2000)). The United States Supreme Court granted certiorari to align the conclusions of the judicial circuits. *See id.*

14. *Id.* at 2418.

15. *Id.* at 2409. According to the Court, the jury reasonably concluded that suspension without pay was materially adverse. *Id.* at 2418.

16. *Id.* at 2411. The 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.

Civil Rights Act of 1964 tit. VII, 42 U.S.C. § 2000e-2(a) (2000) (emphasis added). That provision is limited to discrimination in the employment context. *See Burlington*, 126 S. Ct. at 2411-12. However, compare the language of the above-outlined anti-discrimination provision with that of the following anti-retaliation provision:

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

§ 2000e-3(a) (emphasis added). In comparing the provisions, it is clear that the limiting language included in the anti-discrimination provision is not evident in the anti-retaliation provision.

17. *See Burlington*, 126 S. Ct. at 2411. The question is whether Congress intended a legal difference in how the provisions were applied. *See id.* at 2412.

18. 104 F.3d 702 (5th Cir. 1997).

19. *Id.* at 708-09.

20. *See* FED. R. CIV. P. 50(b).

21. *Mattern*, 104 F.3d at 704.

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of appeals reversed and rendered judgment for Eastman.[22]

The court followed its longstanding rule that Title VII's anti-retaliation provision was designed to address only "ultimate employment decisions."[23] The court defined "ultimate employment decisions" to include acts such as "hiring, granting leave, discharging, promoting, and compensating."[24] Thus, finding that no ultimate employment decisions were made regarding Mattern's employment,[25] the court granted Eastman's motion for judgment as a matter of law.[26]

Four years later, the Fourth Circuit Court of Appeals, in *Von Gunten v. Maryland*,[27] rejected the "ultimate employment decision" standard articulated by the Fifth Circuit in *Mattern*[28] in favor of conformity between Title VII provisions.[29] In *Von Gunten*, an employee claimed that her employer took adverse employment actions against her, thereby violating Title VII's anti-retaliation provision.[30] The district court had granted summary judgment to the employer, and the Fourth Circuit Court of Appeals affirmed.[31] In reaching its decision, the Fourth Circuit interpreted the anti-retaliation provision to prohibit acts that adversely affect "'the terms, conditions, or benefits'" of employment.[32]

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22. *Id.* at 710.

23. *Id.* at 707.

24. *Id.* (citing Dollis v. Rubin, 77 F.3d 777, 782 (5th Cir. 1995)). Along with the Fifth Circuit, the Eighth Circuit followed this restricted approach to the interpretation of the anti-retaliation provision. *See* Burlington N. & Santa Fe Ry. Co., 126 S. Ct. 2405, 2410 (2006). In effect, the Fifth and Eighth Circuits restricted the application of the anti-retaliation provision by interpreting its language to be more limited than that of the general anti-discrimination provision. *See Mattern*, 104 F.3d at 708-09. The court noted that the anti-discrimination provision is broadened by the inclusion of the phrase "which deprive or 'would tend to deprive,'" whereas the anti-retaliation provision does not exclude such vague harms and only protects against "discrimination." *Id.* at 709. The court interpreted the exclusion to mean the discrimination had to be against the employee in an ultimate employment action and not just an action that may lead to an ultimate employment action. *See id.* at 708-09.

25. Mattern contested that her transfer to another crew was a retaliatory act. *See id.* at 704. Although Mattern was transferred, her departmental supervisor remained the same. *See id.*

26. *Id.* at 709-10.

27. 243 F.3d 858 (4th Cir. 2001).

28. 104 F.3d at 709.

29. *See Von Gunten*, 243 F.3d at 865 (quoting Ross v. Commc'ns Satellite Corp., 759 F.2d 355, 366 (4th Cir. 1985)).

30. *See id.* at 862. Von Gunten claimed the following acts were retaliatory: taking away the state car that had been issued to Von Gunten; forcing her to use her own car for work and travel; reassigning her to other work duties; improperly handling administrative matters; and subjecting her to harassment. *See id.* at 862-63.

31. *See id.* at 861.

32. *Id.* at 865 (quoting Munday v. Waste Mgmt. of N. Am., Inc., 126 F.3d 239, 243 (4th Cir. 1997)). Such an articulation of what constitutes an "adverse employment action" aligns the standards of the anti-discrimination and anti-retaliation provisions of Title VII. *See* Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2410 (2006). The Sixth Circuit also applied such

However, in *Ray v. Henderson*,[33] the Ninth Circuit Court of Appeals articulated yet another standard. In *Ray*, the employee asserted that the district court erred in granting summary judgment for his employer because he suffered retaliation in violation of Title VII.[34] The court of appeals reexamined the scope of the anti-retaliation provision, reversed the grant of summary judgment, and remanded the case for trial.[35] In reaching its decision, the court rejected the standards articulated by the Second, Third, Fifth, and Eighth Circuits.[36] Instead, the court of appeals adopted the EEOC interpretation of an "adverse employment action."[37] Because the court believed the EEOC test properly focuses on deterrent effects, thereby effectuating the purpose of Title VII, it held that an adverse employment action must be "reasonably likely to deter employees from engaging in protected activity."[38]

In contrast, the Seventh Circuit, in *Washington v. Illinois Department of Revenue*,[39] held that retaliation can occur from acts either inside or outside the workplace and need not entail an adverse employment action.[40] In *Washington*, an employee brought suit against her employer for alleged retaliation.[41] The magistrate granted summary judgment for the Department of Revenue, reasoning that the employee had not established a prima facie case for retaliation.[42] According to the magistrate, there had not been an adverse employment action, and without an adverse employment action,

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alignment of the standards. *See id.*

33. 217 F.3d 1234 (9th Cir. 2000).

34. *See id.* at 1239-40. The employee claimed his employer retaliated by changing the work policy and pay. *See id.* at 1240.

35. *See id.* at 1244-46.

36. *See id.* at 1242. The Second and Third Circuits interpreted an adverse employment action as something that materially affected the terms and conditions of employment. *See id.* (citing Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997); Torres v. Pisano, 116 F.3d 625, 640 (2d Cir. 1997)). The Fifth and Eighth Circuits adopted the restrictive "ultimate employment action" test, which required that the act be related to hiring, firing, promoting, and demoting to constitute an adverse employment action. *See id.* (citing Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997); Ledergerber v. Stangler, 122 F.3d 1142, 1144 (8th Cir. 1997)).

37. *Id.* at 1243. The EEOC considers an adverse employment action to include acts that are "'reasonably likely to deter the charging party or others from engaging in protected activity.'" *Id.* at 1242-43 (quoting EEOC, COMPLIANCE MANUAL § 8 (1998)). Although the EEOC Guidelines are not binding authority, they "'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *Id.* at 1243 (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986)).

38. *Id.* at 1243.

39. 420 F.3d 658 (7th Cir. 2005).

40. *Id.* at 660.

41. *Id.* at 659. The employee challenged a change in work hours as retaliatory. *Id.*

42. *Id.* The parties agreed to have a magistrate resolve the dispute. *Id.*; *see also* 28 U.S.C. § 636(c) (2000) (allowing a magistrate judge to conduct all proceedings in a civil matter upon consent of the parties).

there was no violation of Title VII.[43] On appeal, the court reversed the magistrate's decision and remanded the case for trial.[44]

The court recognized that the term "adverse employment action" is not an explicit requirement of Title VII itself.[45] Rather, the court believed that "adverse employment action" is just "judicial gloss" on the word "discrimination."[46] Therefore, the court considered what the word "discrimination" meant within the context of Title VII.[47] The court concluded that an action is discriminatory if a reasonable employee considers such action "material."[48] The court then defined "material" as an action that would dissuade "a reasonable worker from making or supporting a charge of discrimination."[49]

The *Washington* court took an important step in recognizing the illusory requirement that a retaliatory act be an adverse employment action in order to be cognizable under the anti-retaliation provision of Title VII.[50] Such a possibility was not considered in the decisions of *Mattern*,[51] *Von Gunten*,[52] or *Ray*.[53] The instant Court considered these conflicting decisions in articulating a comprehensive and unified standard for applying the anti-retaliation provision of Title VII.[54] The instant Court

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

44. *Id.* at 663.

45. *Id.* at 660.

46. *Id.* The court noted that care should be taken not to confuse gloss with the language of the statute. *Id.*

47. *Id.*

48. *Id.* at 662. The D.C. Circuit also applied this standard. *See* Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2410 (2006) (citing Rochon v. Gonzales, 438 F.3d 1211, 1217-18 (D.C. Cir. 2006)).

49. *Washington*, 420 F.3d at 662. Therefore, the court concluded that a reassignment that did not affect pay or promotion opportunities was not material because it would not dissuade a reasonable employee from making or supporting a charge of discrimination, and thus, such conduct did not support a cause of action for retaliation. *See id.* However, if the employee had a vulnerability, the analysis of materiality should be done within the context of a reasonable employee with a similar vulnerability. *See id.* The court also noted that the articulated definition of discrimination applied to all provisions of Title VII that use the word "discrimination," including, but not limited to, both the anti-discrimination and anti-retaliation provisions. *Id.*

50. *See id.* at 660.

51. Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997) (treating adverse employment action as a required element of a retaliation claim); *see also supra* notes 23-26 and accompanying text.

52. Von Gunten v. Maryland, 243 F.3d 858, 866 (4th Cir. 2001) (holding Congress intended adverse employment action to be a requisite for a retaliation claim); *see also supra* note 32 and accompanying text.

53. Ray v. Henderson, 217 F.3d 1234, 1242-43 (9th Cir. 2000) (accepting that to establish a retaliation claim, a plaintiff must show an adverse employment action); *see also supra* notes 37-38 and accompanying text.

54. *See* Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2410-11 (2006).

rejected the standards applied by the courts of appeals that (1) treated the anti-retaliation and the anti-discrimination provisions as prohibiting the same conduct,[55] and (2) limited actionable retaliation to "ultimate employment decisions."[56] Finding that Title VII's anti-discrimination and anti-retaliation provisions are not coterminous,[57] the instant Court extended the anti-retaliation provision to those acts that would "'dissuade[] a reasonable worker from making or supporting a charge of discrimination.'"[58]

The instant Court first analyzed the difference between the words used in the anti-discrimination and anti-retaliation provisions and noted that courts presume that Congress acted intentionally when words differ "'in the disparate inclusion or exclusion'" of words.[59] To support the belief that Congress intended a difference in application for the two provisions, the Court examined the provisions' different purposes.[60] The substantive anti-discrimination provision seeks to provide a workplace where individuals are not discriminated against, whereas the anti-retaliation provision seeks to prevent an employer from interfering with an employee's effort to enforce Title VII's guarantees.[61] To secure the objective of the substantive provision, the Court found that only employment-related discrimination needs to be prevented.[62] To achieve the second objective, however, more than mere employment-related actions need to be prevented.[63] The Court reasoned that limiting the provision's application to only employment-related actions would not deter many forms of effective retaliation, and, therefore, it would fail to achieve the purpose of granting unfettered access

55. *See Von Gunten*, 243 F.3d at 866 (articulating the standard for both the Fourth and Sixth Circuits).

56. *Mattern*, 104 F.3d at 707 (articulating the standard for both the Fifth and Eighth Circuits).

57. *See Burlington*, 126 S. Ct. at 2414.

58. *Id.* at 2415 (quoting Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006)). This standard extends the protection against retaliation beyond workplace- or employment-related acts. *See id.* at 2414.

59. *Id.* at 2412 (quoting Russello v. United States, 464 U.S. 16, 23 (1983)). The specific wording of the anti-discrimination provision that the Court considered was the following: "'It shall be an unlawful employment practice for an employer—(1) *to fail or refuse to hire or to discharge* . . . or otherwise to discriminate against any individual *with respect to his compensation, terms, conditions, or privileges of employment* . . . .'" *Id.* at 2411 (quoting Civil Rights Act of 1964 tit. VII, 42 U.S.C. § 2000e-2(a) (2000) (emphasis added)). Compare this with the specific wording of the anti-retaliation provision that the Court considered: "'It shall be an unlawful employment practice for an employer to *discriminate against* any of his employees . . . .'" *Id.* (quoting Civil Rights Act of 1964 tit. VII, 42 U.S.C. § 2000e-3(a) (2000) (emphasis added)).

60. *Id.* at 2412.

61. *Id.*

62. *Id.*

63. *Id.*

to the remedies available under Title VII.[64] Furthermore, the Court noted that the enforcement of Title VII depends on employees who are willing to cooperate, file complaints, and act as witnesses.[65] Thus, interpreting the anti-retaliation provision as granting broad protection against retaliation helps to assure employee cooperation.[66] Consequently, the Court extended the scope of the anti-retaliation provision beyond employment-related retaliatory acts.[67]

However, the Court was conscious of the need to put limits on the types of harms that would amount to retaliation.[68] As a result, the Court held that the anti-retaliation provision does not protect an individual from all retaliation, but only from retaliation that produces injury or harm.[69] Again, the Court was faced with conflicting conclusions from differing courts of appeals.[70] The Court agreed with the formulation adopted by the Seventh and D.C. Circuits.[71] Thus, the standard for determining whether an act constitutes retaliation is whether a "reasonable employee would have found the challenged action materially adverse."[72] The Court defined a "materially adverse act" as an act which would "'dissuade[] a reasonable worker from making or supporting a charge of discrimination.'"[73] The standard is general because the significance of a retaliatory act will often depend on the particular circumstances.[74] An act that may be immaterial

64. *Id.* (citing Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997)).

65. *Id.* at 2414.

66. *Id.*

67. *Id.*

68. *See id.* at 2415.

69. *Id.* at 2414.

70. *Id.* at 2415; *see also supra* notes 23-24 and accompanying text (establishing the standard of the Fifth Circuit in *Mattern*); *supra* notes 32, 38, and accompanying text (establishing the Fourth Circuit's standard in *Von Gunten* and the Ninth Circuit's standard in *Ray*).

71. *Burlington*, 126 S. Ct. at 2415. The formulation by these circuits was set out in *Washington*. *See supra* notes 48-49 and accompanying text.

72. *Burlington*, 126 S. Ct. at 2415. The Court referred to reactions of a reasonable employee to establish an objective standard for judging harm. *See id.* Applying an objective standard enables a court to avoid the uncertainties and unfairness that typically plague the determination of subjective feelings. *See id.*

73. *Id.* (quoting Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006)). The Court defined a "materially adverse act" because it is important to distinguish material from trivial harms. *See id.* The Court noted that Title VII does not set out a general civility code that protects an employee from petty slights or minor annoyances. *Id.* Rather, Title VII's anti-retaliation provision seeks to prevent an employer from interfering with an employee's access to Title VII's remedies. *See id.* Therefore, the anti-retaliation provision prohibits those actions that are likely to deter victims of discrimination from filing a complaint with the EEOC, the courts, or their employer. *See id.*

74. *See id.* For example, a schedule change may make little difference to many workers but may matter to a young mother, or similarly, a supervisor's refusal to invite an employee to lunch may not matter unless the lunch consists of a training session that would contribute to an

in some situations may be material in others.[75]

Applying the articulated standard to the facts of the instant case, the Court found that there was sufficient evidence to support the jury's verdict in Respondent's favor.[76] The Court held that the change in work assignments[77] was a form of forbidden retaliation because it would tend to discourage a reasonable employee from bringing discrimination charges.[78] Further, the Court found that a reasonable employee would consider an indefinite suspension without pay a deterrent to filing a discrimination complaint, even if the employee eventually received backpay.[79] Thus, after resolving the conflict among the circuit courts' interpretations of the anti-retaliation provision of Title VII, the Court upheld the Sixth Circuit's judgment in Respondent's favor.[80]

By broadening the anti-retaliation provision, the Court has granted employees an enormous victory by extending the reach of the provision to acts outside the scope of employment. One can only speculate whether such an extension will serve the purpose of Title VII or whether the Court

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employee's professional development. *See id.* at 2415-16.

75. *See id.* at 2416 (citing Washington v. Ill. Dep't of Revenue, 420 F.3d 658, 661 (7th Cir. 2005)); *see also supra* note 74 (providing examples).

76. *See Burlington*, 126 S. Ct. at 2416. The jury found that both the reassignment of Respondent's work duties and the thirty-seven day suspension without pay amounted to retaliation. *Id.*

77. Respondent was reassigned from forklift duty to standard track laborer tasks. *See supra* note 4.

78. *See Burlington*, 126 S. Ct. at 2416. This is consistent with the EEOC Guidelines. *See id.* However, it should be noted that reassignments are not automatically actionable. *See id.* at 2417. There must first be a showing that the reassignment is materially adverse. *See id.* Whether the reassignment is materially adverse depends on the circumstances of the particular case and should be analyzed from the perspective of a reasonable person in the plaintiff's position. *See id.* In the instant case, there was sufficient evidence that (1) the track labor duties were more onerous, (2) the forklift position was more prestigious, and (3) the forklift position was considered a better job. *See* White v. Burlington N. & Santa Fe Ry. Co., 364 F.3d 789, 803 (6th Cir. 2004). Therefore, a reasonable jury could conclude the reassignment would have been materially adverse to a reasonable employee. *See Burlington*, 126 S. Ct. at 2417.

79. *See Burlington*, 126 S. Ct. at 2417. Therefore, the Court found it was reasonable for the jury to conclude that the thirty-seven day suspension without pay was materially adverse. *See id.* at 2418.

80. *See id.* at 2418. Justice Breyer delivered the opinion of the Court and was joined by Chief Justice Roberts and Justices Stevens, Scalia, Kennedy, Souter, Thomas, and Ginsburg. *See id.* at 2408. Justice Alito concurred in the judgment. *See id.* at 2418 (Alito, J., concurring). Justice Alito interpreted the anti-retaliation provision to be harmonized with the anti-discrimination provision and thus to prohibit retaliation "'with respect to . . . compensation, terms, conditions, or privileges of employment." *Id.* Alito further articulated that the action must be materially adverse, which he defined as a significant change in employment status (such as hiring, firing, failing to promote, reassignment, or significant change in benefits). *Id.* Under this interpretation, Alito would affirm the judgment of the Court of Appeals since the reassignment and suspension without pay qualify as adverse employment actions. *See id.* at 2421.

has simply opened the floodgates to excessive litigation. However, the fact that the Court's articulated standard has already been applied effectively in the Seventh and D.C. Circuits seems to contradict any skepticism concerning future application of the standard.[81]

If the Court had followed the standard articulated by the Fourth Circuit, retaliatory claims would encompass "ultimate employment decisions" and extend only to acts that adversely affect "the terms, conditions, or benefits" of employment.[82] Although such a restriction would not encompass retaliatory acts that occur outside the workplace, this standard would have provided a degree of protection to employers. The "terms, conditions, or benefits"-of-employment standard balances employees' need for protection beyond "ultimate employment decisions" with employers' need for a bright-line standard when taking actions that may affect employees.

In contrast, the reasonableness standard articulated by the Court does not provide employers with a bright-line rule. Because the reasonableness standard calls for an examination of whether a reasonable employee in similar circumstances would have been dissuaded from taking advantage of Title VII's guarantees, what is reasonable in one situation may not be reasonable in another.[83] Thus, employers can take few precautions to protect themselves against retaliation claims.

Although the conclusion of the Court is consistent with the purpose of Title VII,[84] the holding has implications on the standard for granting summary judgment.[85] Previously, in circuits that required a connection between the victim's employment and the challenged retaliatory act, judges could grant summary judgment to an employer if no connection between the challenged act and the victim's employment existed.[86]

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81. *See supra* notes 48-49 and accompanying text.

82. Von Gunten v. Maryland, 243 F.3d 858, 865-66 (4th Cir. 2001) (citing Munday v. Waste Mgmt. of N. Am., Inc., 126 F.3d 239, 243 (4th Cir. 1997)).

83. *See supra* notes 74-75 and accompanying text. For example, a change in work hours to a childless employee may be reasonable, but if an employee had children, the change may be unreasonable. Similarly, transferring an employee to another department to separate the harasser from the victim may be reasonable in some situations and unreasonable in others. Therefore, the burden placed on employers is incredibly high. The employer must take the factors into consideration before making a judgment call as to whether a jury will view such acts as reasonable.

84. *See supra* note 2 and accompanying text (noting that primarily, the purpose of the Act is to compensate individuals who have suffered as a result of an unlawful employment practice).

85. *See* Tyree P. Jones, Jr., *Litigation Strategy: Summary Judgment, Including Views from the Bench*, *in* EMPLOYMENT LAW INSTITUTE (35TH ANNUAL) 785, 794-95 (Practicing Law Inst. ed., 2006).

86. *See generally* Von Gunten v. Maryland, 243 F.3d 858 (4th Cir. 2001) (assessing whether the district court's grant of summary judgment as to the retaliation claim was appropriate); Ray v. Henderson, 217 F.3d 1234 (9th Cir. 2000) (assessing whether the district court's grant of summary judgment as to the retaliation claim was appropriate).

However, because the Court's articulated standard requires an analysis of what would deter a reasonable employee, obtaining summary judgment will now be much more difficult for the employer. Because the reasonableness factor requires submission of the issue to a jury, it would be improper to resolve the issue via summary judgement.[87] Thus, with summary judgment no longer available to employers, the cost of and time spent defending against retaliation claims will increase exponentially.[88] Furthermore, employers must now be much more cognizant of the actions taken against an employee who has made, or is supporting, a charge of discrimination.[89] In effect, the Court's standard for retaliation limits an employer's ability to investigate charges of discrimination.[90]

Furthermore, the articulated standard, as it applies to the anti-retaliation provision of Title VII, will likely have future implications on the interpretation of the anti-retaliation provision of the Age Discrimination in Employment Act (ADEA) because the ADEA has an anti-retaliation provision similar to that of Title VII.[91] Both Acts prohibit "discrimination"

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87. This issue must be submitted to the jury because "reasonableness" is a matter of fact rather than law. *See* Jones, *supra* note 85, at 794; Tori L. Winfield, *Labor and Employment Law: Retaliation: Employers Had Better Watch Their Backs:* Burlington Northern & Santa Fe Railway Company v. White, 80 FLA. BAR J. 53, 55 (Dec. 2006). Further, the Court's standard requires an examination of the retaliation in light of the victim's specific circumstances. *See supra* note 74 and accompanying text.

88. *See* Winfield, *supra* note 87, at 55; *see also* Craig Robert Senn, *Knowing and Voluntary Waivers of Federal Employment Claims: Replacing the Totality of Circumstances Test with a "Waiver Certainty" Test*, 58 FLA. L. REV. 305 (2006) (demonstrating other obstacles employers face when they attempt to resolve discrimination lawsuits).

89. For example, if an employee has complained of sexual harassment and the employer suspends the employee to conduct a formal internal investigation, the employer may be liable for retaliation because, according to the Court, a reasonable employee would deem suspension without pay a deterrent from filing a charge of discrimination. *See supra* note 79 and accompanying text.

90. For example, it is not atypical for an employer to transfer an employee to another department while conducting an internal investigation. *See, e.g.*, Saxton v. AT&T, 10 F.3d 526, 535 (7th Cir. 1993). However, under the Court's standard, the employer may be liable for retaliation if the jury concludes that such an action would deter a reasonable employee from filing a discrimination complaint. *See* Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2409 (2006).

91. The Age Discrimination in Employment Act's prohibition against retaliation states:

> It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment . . . because such individual . . . has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this [Act].

Age Discrimination in Employment Act, 29 U.S.C.A. § 623(d) (West 2007). Compare this standard with Title VII's anti-retaliation provision. *See supra* note 16. *See also* Winfield, *supra* note 87, at 55.

against an employee who opposes an employment practice made unlawful by the Act or who has "made a charge, testified, assisted, or participated in" a proceeding or investigation.[92] Whether the Court will interpret the provisions consistently is open to speculation because the Court's decision in the instant case rested upon enforcement of the Title's purpose.

Nonetheless, the need for conformity and the importance of promoting Title VII's purpose weigh in favor of the Court's holding. The primary purpose of Title VII is to compensate individuals who have suffered from an unlawful employment practice.[93] The Court's decision to expand the protection granted by Title VII, rather than limit it, is consistent with this goal. If, after reviewing the Court's analysis, Congress does not feel as though its intent was correctly articulated, then Congress may change the statutory provisions of Title VII to express the correct standard. Until then, the Court's expansive standard is certain to be applied in favor of employees.

92. *See supra* notes 16, 91.

93. *See supra* note 2.