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Walking on Eggshells: The Effect of the United States Supreme Court's Ruling in Burlington Northern & Santa Fe Railway Co. v. White

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WALKING ON EGGSHELLS: THE EFFECT OF THE UNITED STATES SUPREME COURT'S RULING IN *BURLINGTON NORTHERN & SANTA FE RAILWAY CO. V. WHITE*

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I. INTRODUCTION

In recent history, there has been an increase in the number of retaliation claims filed by employees who suffer adverse consequences after bringing Title VII discrimination claims. Retaliation charges are independent legal claims that do not depend on the success of the underlying discrimination claim.[1] Because retaliation claims are frequently successful with juries, plaintiffs often add them to discrimination claims.[2] In fact, retaliation claims filed with the U.S. Equal Employment Opportunity Commission ("EEOC")[3] increased 10 percent during the 1990s.[4] Specifically, Title VII retaliation claims increased from 16,394 (20.3 percent of all

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1. Joan M. Savage, Note, *Adopting the EEOC Deterrence Approach to the Adverse Employment Action Prong in a Prima Facie Case for Title VII Retaliation*, 46 B.C. L. REV. 215, 219 (2004).

2. *Id.*

3. The EEOC was created to enforce and coordinate all federal government workplace-discrimination laws and policies. *See* U.S. Equal Employment Opportunity Comm'n, Overview - Laws, http://www.eeoc.gov/abouteeo/overview_laws.html (last visited Feb. 12, 2008).

4. *See* U.S. Equal Employment Opportunity Comm'n, Charge Statistics, FY 1997–2007, http://eeoc.gov/stats/charges.html (last visited Feb. 12, 2008); *id.*, FY 1992–1996, http://eeoc.gov/stats/charges-a.html (last visited Feb. 12, 2008).

claims filed) in 1997 to 19,560 (25.8 percent of all claims filed) in 2006.[5]

In *Burlington Northern & Santa Fe Railway Co. v. White*,[6] the United States Supreme Court held that the Title VII anti-retaliation provision is not confined to employment- or workplace-related actions or harms, and it created a material adversity standard to adjudicate such retaliation claims.[7] The Court found that under the circumstances of the case, a reassignment of duties and a thirty-seven day suspension without pay met the material adversity standard.[8] Since courts had previously differed in their approach to Title VII, the Court resolved the circuit splits through the decision in *Burlington*.[9]

This Comment addresses the *Burlington* standard and its implications. Part II begins by briefly describing the circuit splits and the various interpretations of Title VII's anti-retaliation provision prior to *Burlington*. Part III summarizes the facts, procedural history, and the Supreme Court's analysis in *Burlington*. Part IV argues that instead of delineating a uniform rule for the courts, the Supreme Court created an ambiguous standard that leaves courts and employers confused. Part V addresses the harmful and costly implications of *Burlington*. Finally, Part VI concludes that the Supreme Court erred in creating a highly subjective and unclear standard that broadens the scope of the anti-retaliation provision.

II. HISTORICAL FRAMEWORK: CONFLICT AMONG THE CIRCUITS

Prior to the United States Supreme Court's decision in *Burlington*, the circuits were split regarding the interpretation of Title VII's anti-retaliation provision and the character and extent of retaliatory conduct.[10] The circuits differed on whether the retaliatory act must be employment or workplace related and whether the

5. *Id.*

6. 126 S. Ct. 2405 (2006).

7. *Id.* at 2409.

8. *Id.* at 2418.

9. *Id.* at 2408.

10. *See* Scott Rosenberg & Jeffrey Lipman, *Developing a Consistent Standard for Evaluating a Retaliation Case Under Federal and State Civil Rights Statutes and State Common Law Claims: An Iowa Model for the Nation*, 53 DRAKE L. REV. 359, 363–64 (2005).

magnitude of harm could be a determinative factor.[11] The United States Supreme Court granted certiorari to resolve the disagreement between the circuits.[12]

A. Fifth and Eighth Circuits

The Fifth and Eighth Circuits employed a restrictive approach that used an "ultimate employment decision" test as the standard to prove a retaliation claim.[13] Under the "ultimate employment decision" test, an employee was liable for retaliatory conduct only for acts "such as hiring, granting leave, discharging, promoting, and compensating."[14] In *Harlston v. McDonnell Douglas Corp.*,[15] the Eighth Circuit held that a secretary's reassignment to a different position without any reduction in title, salary, or benefits—even though the new position "involved fewer secretarial duties and was more stressful"—was not an adverse employment action.[16] Although the employee suffered a loss of status and prestige, the employee's reassignment did not satisfy the "ultimate employment decision" test.[17] Thus, the Fifth and Eighth Circuits' test was more restrictive and only pertained to cases dealing specifically with employment- and workplace-related actions.

B. Fourth and Sixth Circuits

While using a broader standard than the Fifth or Eighth Circuits, the Fourth and Sixth Circuits restricted the challenged conduct to employment- or workplace-related actions.[18] The Sixth Circuit adopted a "materially adverse" standard, which required that a plaintiff show that the employer's action had an adverse effect on the employment "'terms, conditions, or benefits.'"[19] For example, in

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11. *Burlington*, 126 S. Ct. at 2410–11.

12. *Id.* at 2411.

13. *See* Manning v. Metro. Life Ins. Co., 127 F.3d 686, 692 (8th Cir. 1997); Rosenberg & Lipman, *supra* note 10, at 373.

14. Page v. Bolger, 645 F.2d 227, 233 (4th Cir. 1981).

15. 37 F.3d 379 (8th Cir. 1994).

16. *Id.* at 382.

17. *Id.* The court did not use the term "ultimate employment decision" but applied the same test, finding that the reassignment did not affect her "title, salary, or benefits." *Id.*

18. *See Burlington*, 126 S. Ct. at 2410.

19. *Id.* (quoting Von Gunten v. Maryland, 243 F.3d 858, 866 (4th Cir. 2001)).

Munday v. Waste Management of North America, Inc.,[20] the Fourth Circuit court applied this standard and held that the employer did not act adversely.[21] In *Munday*, the employee alleged that after she settled her sexual harassment and discrimination claim, her employer yelled at her and instructed other employees to avoid her and to report back anything she said.[22] The court determined that an employer's instructions to ignore and spy on another employee did not constitute an adverse employment action because it did not go to the "terms, conditions, or benefits of her employment."[23] Since the Fourth and Sixth Circuits incorporated both a materiality standard and an employment-related requirement, it established an intermediate threshold.[24]

C. Seventh and District of Columbia Circuits

Unlike the Sixth Circuit, which required a materially adverse change in the terms of employment, the Seventh and District of Columbia Circuits implemented a broader standard that focused on the materiality of the challenged action and not on whether the action was employment related.[25] The Seventh and District of Columbia Circuits found anti-retaliatory conduct when an employer acted in a manner that was "material to a reasonable employee."[26] The act was material if it would have "dissuaded a reasonable worker from making or supporting a charge of discrimination."[27] For instance, in *Rochon v. Gonzales*,[28] the District of Columbia Circuit found the Federal Bureau of Investigation's ("FBI") refusal to investigate a death threat against its agent "'material to a reasonable employee.'"[29] The FBI's inaction might dissuade a reasonable FBI agent from reporting a discrimination claim against the FBI if he knew he would be "unprotected by the FBI in the face of threats against him or his

20. 126 F.3d 239 (4th Cir. 1997).
21. *Id.* at 243.
22. *Id.* at 241.
23. *Id.* at 243.
24. *See* Savage, *supra* note 1, at 225.
25. *Id.*
26. Washington v. Ill. Dep't of Revenue, 420 F.3d 658, 662 (7th Cir. 2005).
27. *Id.*
28. 438 F.3d 1211 (D.C. Cir. 2006).
29. *Id.* at 1219 (quoting *Washington*, 420 F.3d at 662).

family."[30] Because this standard was broader and focused on an objective reasonableness standard, it necessitated a case-by-case approach.[31]

D. Ninth Circuit

Similar to the Seventh and District of Columbia Circuits, the Ninth Circuit endorsed a broad approach to anti-retaliatory conduct.[32] The Ninth Circuit adopted the EEOC's approach, which states that Title VII prohibits "adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity."[33] Although it is a broad standard that "covers lateral transfers, unfavorable job references, and changes in work schedules," it does not cover "every offensive utterance."[34] This standard focuses more on the deterrent effects and less on the ultimate effects of each action.[35] The Ninth Circuit applied this standard in *Ray v. Henderson* and found adverse employment actions.[36] When the employer eliminated a flexible start-time policy, enforced lock-down procedures, and disproportionately reduced the employee's pay and workload, the court held that these actions were reasonably likely to deter an employee from filing a discrimination complaint.[37] In comparison to the other circuits, the Ninth Circuit implemented the broadest standard.

III. FACTUAL BACKGROUND

A. Background and Procedural Facts

In June 1997, Burlington Northern & Santa Fe Railway Company ("Burlington"), through its roadmaster[38] Marvin Brown,

30. *Id.* at 1220.

31. *See* Savage, *supra* note 1, at 225.

32. *Id.*

33. U.S. EQUAL OPPORTUNITY COMM'N, EEOC COMPLIANCE MANUAL § 8, at 8–13 (1998), *available at* http://www.eeoc.gov/policy/docs/retal.pdf.

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

35. *Id.*

36. *Id.* at 1244.

37. *Id.* at 1243–44.

38. A roadmaster is someone who is in charge of the railroad track. *See* Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2409 (2006).

hired Sheila White as a track laborer and quickly assigned her as a forklift operator when a position became available.[39] White was the only woman working in the Maintenance of Way department.[40] In September 1997, White complained to Burlington officials that her immediate supervisor had made insulting remarks to her and told her that women should not be working in the Maintenance of Way department.[41] After an investigation, Burlington officials suspended her supervisor.[42]

In late September, Brown reassigned White to perform only track laborer duties.[43] He rationalized that "'a more senior man' should have the 'less arduous and cleaner job' of forklift operator."[44] In October, White filed a complaint with the EEOC and asserted that her reassignment was due to unlawful gender discrimination and retaliation for her earlier complaint.[45]

In early December, White filed a second retaliation complaint asserting that Brown monitored her activities through surveillance.[46] Brown received a copy of her charge.[47] A few days later, White and her immediate supervisor argued over a transport issue and her supervisor reported her "insubordination" to Brown.[48] Brown then suspended White without compensation.[49] White then pursued internal grievance procedures, and the company found that she had not been insubordinate.[50] As a result, Burlington reinstated White and awarded her back pay for her thirty-seven day suspension.[51] White filed another retaliation charge with the EEOC based on the suspension.[52]

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39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* (citing White v. Burlington N. & Santa Fe Ry. Co., 2002 FED App. 0391P at 21 (6th Cir.)).

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

White subsequently filed a Title VII action against Burlington for reassigning her to another position and suspending her without pay for thrity-seven days.[53] The district court found in favor of White and awarded her $43,500 in compensatory damages, which included $3,250 in medical expenses.[54]

A Sixth Circuit panel reversed the judgment and found in favor of Burlington.[55] The panel decided that the reassignment, which was to a different position within the same job classification, and the suspension, which was later compensated with back pay, were not adverse employment actions.[56] However, the full court vacated the panel's decision and heard the matter en banc,[57] ultimately affirming the district court's judgment.[58]

B. The Reasoning of the United States Supreme Court

In a unanimous decision,[59] the United States Supreme Court held that Title VII's anti-retaliation provision does not confine the prohibited actions to employment- or workplace-related occurrences.[60] Instead, it prohibits employer actions that are "materially adverse to a reasonable employee or job applicant."[61] Justice Alito concurred with the judgment but disagreed with the reasoning,[62] arguing in favor of the lower court's standard that restricts anti-retaliation claims to employment-related actions.[63]

1. Broadening the Anti-Retaliation Provision

By affirming the lower court's decision, the United States Supreme Court found that Burlington violated Title VII's anti-retaliation provision.[64] The Court, however, used a different standard

53. *Id.* at 2410.

54. *Id.*

55. *Id.*

56. White v. Burlington N. & Santa Fe Ry. Co., 2002 FED App. 0391P at 21 (6th Cir.).

57. *Burlington*, 126 S. Ct. at 2410.

58. *Id.*

59. *Id.* at 2408.

60. *Id.* at 2409.

61. *Id.*

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

63. *See id.* at 2419 (Alito, J., concurring); *id.* at 2410 (discussing the lower court's reasoning).

64. *Id.* at 2416.

from the lower court.[65] Rather than using the Sixth Circuit's restrictive employment-related-conduct rule that defines an adverse employment action as a "'materially adverse change in the terms and conditions' of employment,"[66] the Court created a broader standard.[67] Specifically, the Court implemented a new standard that does not limit the anti-retaliation provision to actions "that are related to employment or occur at the workplace."[68]

The Court compared the language of Title VII's anti-discrimination provision with Title VII's anti-retaliation provision.[69] Section 703(a) of Title VII, 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.[70]

By contrast, the anti-retaliation provision in Title VII, section 704(a), states that "[i]t shall be an unlawful employment practice for an employer *to discriminate against* any of his employees or applicants for employment . . . ."[71] In the anti-discrimination provision, the Court found explicit language, such as "'compensation, terms, conditions, or privileges of employment,'" that limits the reach of the provision to actions that affect employment or the workplace.[72] However, in the anti-retaliation provision, the Court found "[n]o

65. *Id.* at 2414.

66. *Id.* at 2410 (quoting White v. Burlington N. & Santa Fe Ry. Co., 2004 FED App. 0102P at 11 (6th Cir.)).

67. *Id.* at 2414.

68. *Id.* at 2409.

69. *Id.* at 2411.

70. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) to (2) (2000) (emphasis added).

71. 42 U.S.C. § 2000e-3(a) (emphasis added).

72. *Burlington*, 126 S. Ct. at 2411–12 (quoting 42 U.S.C. § 2000e-2(a)(1)).

such limiting words."[73] The Court quickly dismissed an *in pari materia* argument because of the linguistic differences between the provisions.[74] Instead, the Court focused on the intent of the drafters and cited *Russello v. United States*,[75] where the Court noted that "'Congress acts intentionally and purposely in the disparate inclusion or exclusion'" of statutory language.[76]

To ascertain the intent of Congress, the Court looked at precedent to determine the objectives of the two provisions.[77] The Court found that the anti-discrimination provision aims to prevent workplace discrimination based on "racial, ethnic, religious, or gender-based status."[78] The Court maintained that the goal of the anti-retaliation provision is to supplement the anti-discrimination provision by preventing an employer from retaliating against an employee who attempts to secure protection under the anti-discrimination provision.[79] The Court also declared that the anti-retaliation provision's primary purpose was to "'[m]aintain[] unfettered access to statutory remedial mechanisms.'"[80] The Court distinguished the two provisions by reasoning that the substantive anti-discrimination provision prevents injury based on an individual's status, while the anti-retaliation provision prevents injury based on an individual's conduct.[81]

The Court found that the anti-retaliation provision's objective could not be secured by limiting actions only to the workplace and that the language of the provision is comparatively broad. Accordingly, the Court held that the anti-retaliation provision should apply to actions and harms outside the realm of employment or the workplace.[82] To support its reasoning, the Court cited *Rochon v. Gonzales*,[83] where the FBI retaliated against an employee by refusing

73. *Id.* at 2412.

74. *Id.* The phrase "*in pari materia*" translates to "in the same matter." Statutes *in pari materia* are to be construed together. *See* BLACK'S LAW DICTIONARY 807 (8th ed. 2004).

75. 464 U.S. 16 (1983).

76. *Burlington*, 126 S. Ct. at 2412 (quoting *Russello*, 464 U.S. at 23).

77. *Id.*

78. *Id.*

79. *Id.*

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

81. *Id.*

82. *Id.* at 2412–13.

83. 438 F.3d 1211 (D.C. Cir. 2006).

to investigate death threats against the agent, and *Berry v. Stevinson Chevrolet*,[84] where an employer filed false criminal charges against an employee who complained about discrimination.[85] Thus, by interpreting the statutory language and prior case law, the Court held that employees can file anti-retaliatory claims that are unrelated to employment or the workplace.[86]

2. The Material Adversity and Reasonableness Standard

In reviewing the anti-retaliation provision, the *Burlington* Court added another component to its standard—the employer's actions must be materially adverse to a reasonable employee or applicant.[87] The Court found that a plaintiff must establish that a reasonable employee would find the employer's action materially adverse.[88] In effect, this means that it would have "'dissuaded a reasonable worker from making or supporting a charge of discrimination.'"[89]

The Court established the material adversity standard to "filter out complaints attacking 'the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.'"[90] The Court noted that since petty slights or minor annoyances are ordinary actions, the material adversity standard would distinguish between egregious and minimal harms.[91] Essentially, since an employer's petty actions would not dissuade an employee from complaining to the EEOC, this behavior would not be material under the new standard.[92]

In addition to the material harm standard, the Court implemented the reasonableness standard because the Court wanted an objective test by which to judge an employee's harm.[93] The Court argued that an objective standard is judicially administrable and avoids "uncertainties and unfair discrepancies."[94] The Court noted,

84. 74 F.3d 980 (10th Cir. 1996).
85. *Burlington*, 126 S. Ct. at 2412.
86. *Id.* at 2414.
87. *Id.* at 2415.
88. *Id.*
89. *Id.* (quoting *Rochon*, 438 F.3d at 1219).
90. *Id.* (quoting Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998)).
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*

however, that the general reasonableness standard should consider the particular circumstances of each individual employee.[95] The Court cited *Washington v. Illinois Department of Revenue*,[96] where a schedule change was deemed critical to an employee with a disabled child,[97] to demonstrate that context and "'surrounding circumstances, expectations, and relationships'" are essential to finding reasonableness.[98] The Court further noted that reasonableness "is tied to the challenged retaliatory act, not the underlying" discriminatory conduct.[99]

In applying the new standard, the Court found that Burlington retaliated against White by reassigning her from a forklift operator to a track laborer and by giving her a thirty-seven day suspension without pay.[100] The reassignment was materially adverse because the forklift operator position required more qualifications and was more prestigious.[101] Thus, a reasonable employee under these particular circumstances would consider this transfer to a "more arduous and dirtier" job to be materially adverse.[102] Moreover, the Court deemed the thirty-seven day suspension materially adverse since a reasonable employee would find a month without pay to be a hardship.[103] White demonstrated this hardship when she obtained treatment for her emotional distress.[104] Therefore, the Court held that Burlington violated Title VII by retaliating against White.[105]

IV. ANALYSIS OF THE SUPREME COURT'S DECISION

By not reading Title VII sections 703(a) and 704(a) *in pari materia*, [106] the Supreme Court erred in its interpretation of Title

95. *Id.*

96. 420 F.3d 658, 662 (7th Cir. 2005).

97. *Id.* at 662.

98. *Burlington*, 126 S. Ct. at 2415 (quoting Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 81–82 (1998)).

99. *Id.* at 2416.

100. *Id.*

101. *Id.* at 2417.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 2416.

106. As *Black's* explains:

> It is a canon of construction that statutes that are *in pari materia* may be construed together, so that inconsistencies in one statute may be resolved by looking at another

VII's definition of "to discriminate."[107] Instead of harmonizing sections 703(a) and 704(a), the Court erroneously took a broader approach and created a new standard that deems retaliatory all acts which "'dissuade[] a reasonable worker from making or supporting a charge of discrimination.'"[108]

Rather than enact new measures through a single statute, the Court should consider both "the specific context in which that language is used, and the broader context of the statute as a whole."[109] Accordingly, the Court should follow reasoning articulated in prior cases, where it emphasized that it should not "construe statutory phrases in isolation."[110] If the Court had followed this approach, it would have concluded that the context and statutory language of Title VII sections 703(a) and 704(a) should be harmonized to restrict retaliatory acts to employment-related conduct.

The historical development of Title VII makes it clear that the two sections should be read together. Title VII was enacted as part of the Civil Rights Act of 1964.[111] During the 1950s and 1960s, the United States experienced social and racial tension because of the government's attempts to desegregate schools and increase voting rights.[112] To clarify the government's position, Congress proposed statutes that would "eradicate discrimination in voting, public accommodation, education, and employment."[113] Because Congress passed the Civil Rights Act of 1964 quickly, Title VII received little official attention and therefore lacks an adequate legislative history.[114] Although the House Judiciary Committee submitted a

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> statute on the same subject. . . . '[W]hen an earlier statute is *in pari materia* with a later one, it is simply part of its context to be considered by the judge in deciding whether the meaning of a provision in the later statute is plain.'

BLACK'S LAW DICTIONARY 807 (8th ed. 2004) (quoting RUPERT CROSS, STATUTORY INTERPRETATION 128 (1976)).

107. *See* 42 U.S.C. §§ 2000e-3(a), -2(a) (2000).

108. *Burlington*, 126 S. Ct. at 2415 (quoting Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).

109. Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997).

110. United States v. Morton, 467 U.S. 822, 828 (1984).

111. *See* Eric M.D. Zion, *Overcoming Adversity: Distinguishing Retaliation from General Prohibitions under Federal Employment Discrimination Law*, 76 IND. L.J. 191, 197 (2001).

112. *See id.* at 195.

113. *Id.*

114. *See id.* at 197.

report to Congress, it did not contain any helpful explanation of Title VII.[115] The lack of legislative guidance places the burden on the courts to resolve ambiguities in the Act.

When individual sections of a statute have ambiguous legislative history and address the same subject matter, the sections should be construed "as if they were one law."[116] For instance, in *United States v. Riverside Bayview Homes, Inc.*,[117] the Court read the Clean Water Act and its amendments *in pari materia* to interpret the provisions of the Act.[118] Congress usually "uses a particular word with a consistent meaning in a given context."[119] This assumes that Congress knew of the sections, especially if they were enacted at the same time.[120]

The concept of *in pari materia* can be applied to Title VII. The two sections were enacted at the same time by the same Congress.[121] Since Title VII has little legislative history,[122] however, it is impossible to find a reliable interpretation of sections 703(a) and 704(a). Despite this lack of legislative guidance, it is nonetheless clear that Congress intended that Title VII eradicate discrimination on the basis of "race, color, religion, sex, or national origin."[123] Section 703(a) furthered that intent when it made it unlawful to discriminate "against any individual with respect to his compensation, terms, conditions, or privileges of employment . . . ."[124] Similarly, section 704(a) addressed the anti-retaliatory behavior and made it unlawful "for an employer to discriminate against any of his employees or applicants for employment . . . ."[125]

Unlike section 703(a), however, section 704(a) contains the ambiguous phrase "to discriminate." "To discriminate" can be broadly interpreted to mean any acts, either employment or

115. *Id.* at 196.

116. Erlenbaugh v. United States, 409 U.S. 239, 243 (1972) (internal citations omitted).

117. 474 U.S. 121 (1985).

118. *Id.* at 138–39 (noting that the term "waters" does not exclude "wetlands" since other sections of the Act use the term "navigable waters").

119. *Erlenbaugh*, 409 U.S. at 243.

120. *Id.* at 244.

121. *See* EQUAL EMPLOYMENT OPPORTUNITY COMM'N, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 8–11 (1968).

122. Zion, *supra* note 111, at 197.

123. 42 U.S.C. § 2000e-2(a) (2000).

124. *Id.*

125. *Id.* § 2000e-3(a)

nonemployment related, or it can be narrowly interpreted to mean acts strictly relating to employment.[126] By applying *in pari materia*, sections 703(a) and 704(a) should be construed "as if they were one law."[127] Section 703(a) relates specifically to employment- and workplace-related acts, such as "compensation, terms, conditions, or privileges of employment."[128] Thus, by reading the sections together, section 704(a) should also relate to employment- and workplace-related actions. Congress merely used "to discriminate" as a shorthand version and continuation of section 703(a), not as a purposeful means of distinguishing the two sections. Moreover, there is no express limitation to prevent the Court from interpreting the statutes *in pari materia*. Therefore, the Court should have narrowly interpreted section 703(a) and restricted the anti-retaliation provision to employment-related acts.

V. IMPLICATIONS OF *BURLINGTON*

A. The Materially Adverse Standard Creates Inverse Proportionality

Although the Court intended to protect alleged victims of discrimination from an employer's retaliatory conduct, the effect of the Court's holding will do the opposite. The Court's new standard permits actions against employers where the retaliatory conduct is "materially adverse" and "dissuade[s] a reasonable worker from making or supporting a charge of discrimination."[129] However, as Justice Alito argued in his concurrence, the degree of protection granted to an employee is "inversely proportional to the severity of the original act of discrimination . . . ."[130]

A "reasonable employee" who suffers from severe discrimination is less likely to be dissuaded from making a charge of discrimination.[131] By weighing the consequences of filing a charge (possible retaliation) and not filing a charge (continual discrimination), that employee will find it difficult not to file a

126. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2408 (2006).

127. Erlenbaugh v. United States, 409 U.S. 239, 243 (1972) (internal citation omitted).

128. 42 U.S.C. § 2000e-2(a) (2000).

129. *Burlington*, 126 S. Ct. at 2415.

130. *See id.* at 2421 (Alito, J., concurring).

131. *Id.*

charge.[132] Thus, a reasonable employee in this situation would not be dissuaded from making a discrimination charge no matter how egregious the retaliatory behavior. As a result, even blatantly retaliatory behavior would not be actionable because it would not sufficiently dissuade a reasonable employee from filing a discrimination claim.

On the other hand, an employee who suffers mild discrimination will incur less benefit from filing a charge because the retaliatory effects might outweigh the relief from discrimination.[133] Thus, under this scheme of inverse proportionality, a reasonable employee in this situation would be dissuaded from filing a discrimination charge, satisfying the material adversity test.

These two examples demonstrate that the Court's reasonable materiality standard creates an inversely proportional statutory scheme that causes an adverse effect. Instead of providing greater protection for employees who endure severe discrimination, the Court's standard does the opposite by constructing a hurdle for anti-retaliatory suits. By mechanically applying this new standard, courts will impose upon employees a greater burden to prove retaliatory conduct.

B. The Materially Adverse Standard Might Open the Floodgates to Litigation

The objective reasonableness standard is highly problematic to adjudicate. Despite the Court's reasoning that the objective standard for material adversity is easier to administer and thus more certain, the Court imposed an additional component to the general standard that necessitates consideration of individual circumstances.[134] The "particular circumstances" component establishes an intricate and arduous standard, which makes it virtually impossible to enforce a uniform and fair standard across the country.[135] For instance, the Court acknowledges that an employer's simple refusal to invite an employee to lunch is non-retaliatory conduct.[136] However, if the lunch was a weekly training session that would contribute to the

132. *Id.*

133. *Id.*

134. *Id.* at 2415.

135. *Contra id.*

136. *Id.*

employee's professional advancement, then it is materially adverse since it might deter a reasonable employee from submitting a discrimination claim.[137] The Court gives another example where it recognizes that a change in work schedule is trivial.[138] However, if the employee is a "young mother with school age children," it might be material.[139] Thus, a single circumstance can transform a trivial matter into a materially adverse action.

The preceding examples demonstrate that the Court's method of determining objective reasonableness is unpredictable and arbitrary.[140] Instead of using the reasonableness of an objective person, the *Burlington* Court used the reasonableness of a person with the individual characteristics of the employee.[141] If the courts were open to considering every "particular circumstance," each court would determine reasonableness based on its own subjective bias. This arbitrary analysis would allow plaintiffs to conjure up any rationale that would magnify their situation. In its illustrations, the Court considers individual characteristics such as age, ambition, gender, and family responsibilities.[142] Because the *Burlington* Court does not provide clear guidelines on which individual characteristics courts should consider, courts are left with an arbitrary and capricious standard that can be contextualized and molded to suit the plaintiff. As a result, courts have little guidance because the *Burlington* Court does not distinguish what should be included or excluded in an evaluation of a retaliation case.

A court can take the material adversity standard to extremes by painstakingly combing through every single circumstance or by quickly plowing through the general substance of the case without prying into any details. There is little predictability of the "materiality" of an action. Because of this, employers will walk on eggshells as they try to circumvent any action that might constitute retaliatory conduct.

Furthermore, the subjective, fact-specific nature of retaliation claims will make courts reluctant to dismiss adverse employment

137. *Id.* at 2415–16.

138. *Id.* at 2415.

139. *Id.*

140. *See id.* at 2421 (Alito, J., concurring).

141. *See id.* at 2415.

142. *See id.* at 2421.

actions through summary judgment. The courts will more likely permit the claims to go to trial before a jury. Not only does this hinder judicial economy, it also produces a thorny situation for employers. Ultimately, the problem trickles down to employees since employers become arbiters of every petty employment dispute. As long as claims are made in good faith, courts have even sustained retaliation claims when the underlying discrimination claim was dismissed.[143]

The *Burlington* Court also did not delineate other guidelines, such as the relevant interval of time between the filing of a complaint and an alleged retaliatory act. Are employees immunized from discipline or entitled to preferential treatment during that interval? Since employers do not want to be subject to the whims of a jury, they will not expose themselves to any action that might be deemed retaliatory. Thus, employers might address performance issues ahead of time or restrict favorable actions in order to avoid future consequences. Additionally, employers might preempt a discrimination or retaliation claim by aggressively dismissing a troublesome employee because of fear of future reprisal.

In order to avoid retaliation claims under the new material adversity standard, employers can reduce the chances of an adverse employment claim by taking proactive steps. Employers can update their employee handbooks and management policies to reflect an anti-retaliation policy. In addition, employers can offer training programs for supervisors to understand and prevent adverse employment claims. Employers can also mitigate the risk of retaliation claims by requiring employees to report any suspected retaliatory behavior after a discrimination claim. As another safeguard, employers can provide an independent review procedure of any actions that can be deemed retaliatory.

However, these tactics come at a cost to the employer and employee. They can be costly to implement, and the costs might outweigh the benefits. Even if they are implemented, the vague and indefinite holding of *Burlington* gives little incentive for employers to take every precaution.

143. *See, e.g.*, Pryor v. Seyfarth, Shaw, Fairweather & Geraldson, 212 F.3d 976, 980 (7th Cir. 2000).

V. CONCLUSION

Due to an increase in the number of retaliation claims and the circuits' different approaches towards Title VII adverse retaliatory conduct, the United States Supreme Court granted certiorari to resolve the conflicting standards. By analyzing the anti-discrimination and anti-retaliation provisions separately, the Court created a material adversity standard that permits retaliation claims for both employment- and nonemployment-related actions. However, the Court should have used the *in pari materia* doctrine to harmonize Title VII statutory language, which would establish that the anti-retaliation provision only covers workplace-related actions. Instead of seizing this opportunity to resolve the differences in the circuits, the Court constructed a vague, subjective standard that leaves courts and employers confused. By failing to delineate the specifics of its material adversity standard, the Court created an amorphous criterion that allows the courts and parties to subjectively evaluate and contextually rationalize every case.