

## The Retaliatory Harassment Claim: Expanding Employer Liability in Title VII Lawsuits

By: Irene Gamer<sup>†</sup>

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<sup>†</sup> J.D., 2006, Seton Hall School of Law; B.S., 2003, Rutgers University. The author would like to thank her parents for their unwavering support and encouragement. The author would also like to thank Professor Michael Zimmer of Seton Hall School of Law for his help with this Comment.

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### I. INTRODUCTION

Recently, in *Burlington Northern & Santa Fe Railway Co. v. White*,<sup>1</sup> the Supreme Court defined the scope of employer conduct that violates the retaliation provision embedded in Title VII of the Civil Rights Act of 1964.<sup>2</sup> The Court's definition is broad enough to encompass the retaliatory harassment claim recognized by numerous courts.<sup>3</sup> Retaliatory harassment subjects an employer to liability when its employee encounters a hostile work environment ("HWE") in retaliation for engaging in protected activity. While, prior to *Burlington Northern*, some courts have refused to recognize retaliatory harassment, no court has fully explored the practical consequences of this claim on American employers. This comment reviews the scope of employer liability for retaliatory harassment and the impediments an employer may face in attempting to avoid such liability.

Congress passed Title VII to combat discriminatory employment practices.<sup>4</sup> Title VII consists of two provisions: the main discrimination provision that proscribes "discrimination" against an employee because of her "race, color, religion, sex, or national origin," and the retaliation provision that proscribes "discrimination" against an employee because she accused her employer of violating a Title VII provision.<sup>5</sup> The Supreme Court construed the term "discrimination" under the main discrimination provision to prohibit tangible practices, such as hiring, firing or failing to promote, and intangible practices, whereby an employee's co-workers or supervisors expose her to a HWE because of her protected characteristic.<sup>6</sup> However, prior to *Burlington Northern*, the

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<sup>1</sup> 126 S. Ct. 2405, 2414-15 (2006).

<sup>2</sup> 42 U.S.C. § 2000e-3(a) (2006).

<sup>3</sup> *Burlington Northern*, 126 S. Ct. at 2415 (adopting the definition of retaliatory conduct relied upon by the Seventh and District of Columbia Circuits, which both recognize retaliatory harassment).

<sup>4</sup> 42 U.S.C. § 2000e-2(a), -3(a) (2006).

<sup>5</sup> § 2000e-2(a), -3(a).

<sup>6</sup> *Meritor Sav. Bank, F.S.B. v. Vinson*, 477 U.S. 57, 66 (1986).

Supreme Court had provided little guidance on the meaning of “discrimination” under the retaliation provision, causing circuits to adopt one of three definitions.<sup>7</sup>

The narrow-view circuits decided that “discrimination” in the retaliation context refers only to ultimate employment decisions that produce “tangible change[s] in duties or working conditions” and result in “material employment disadvantage[s].”<sup>8</sup> By contrast, the broad-view circuits held that “discrimination” includes any adverse actions reasonably likely to discourage employees from participating in protected activities.<sup>9</sup> In the middle of these two standards were the moderate circuits that defined “discrimination” as ultimate employment decisions and other decisions that materially affect employment privileges, conditions, terms or compensation.<sup>10</sup> In *Burlington Northern*, the Supreme Court adopted the broad-view circuits’ definition.<sup>11</sup> Based on these definitions, the broad-view and moderate-view circuits recognized retaliatory harassment as actionable discrimination.<sup>12</sup>

The broad-view circuits justified their position on the grounds that retaliatory harassment is reasonably likely to discourage an employee from participating in protected expression.<sup>13</sup> The moderate-view circuits reasoned that retaliatory harassment could materially affect employment privileges, conditions, terms or compensation.<sup>14</sup> These courts combined the law developed under the retaliation provision with the HWE law developed under the main discrimination provision to adjudicate retaliatory harassment claims. The narrow-view courts rejected the retaliatory harassment claim on the grounds that it can never constitute an ultimate employment decision.<sup>15</sup> Because *Burlington Northern* has embraced the broad-view circuits’ approach, all courts must now

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<sup>7</sup> Cathy Currie, Case Note, *Staying on the Straighter and Narrower: A Criticism of the Court’s Definition of Adverse Employment Action Under the Retaliation Provision of Title VII* in Ray v. Henderson, 217 F.3d 1234 (9th Cir. 2000), 43 S. TEX. L. REV. 1323, 1333 (2002).

<sup>8</sup> See, e.g., Manning v. Metro. Life Ins. Co., 127 F.3d 686, 692 (8th Cir. 1997).

<sup>9</sup> See, e.g., Wyatt v. City of Boston, 35 F.3d 13, 15-16 (1st Cir. 1994) (holding that “discrimination” includes refusals to promote, undesirable transfers and assignments, bad references and “toleration of harassment by other employees”).

<sup>10</sup> See, e.g., Von Gunten v. Maryland, 243 F.3d 858, 865 (4th Cir. 2001) (quoting Ross v. Comm’n Satellite Corp., 759 F.2d 355, 357 (4th Cir. 1985)) (holding that limiting employee’s job responsibilities, refusing to give her “a performance review and annual salary and benefit increases” and giving references based on false information can constitute adverse employment actions).

<sup>11</sup> Burlington N. & Santa Fe Ry. v. White, 126 S. Ct. 2405, 2415 (2006).

<sup>12</sup> See *infra* Part V.B-C.

<sup>13</sup> See *id.*

<sup>14</sup> See *id.*

<sup>15</sup> See *infra* Part V.A.

recognize retaliatory harassment. However, *Burlington Northern* does not require courts to rely on HWE harassment law in adjudicating retaliatory harassment claims.

This comment addresses the confusion that results when courts use HWE harassment law from the main discrimination provision to adjudicate retaliatory harassment claims and the practical effects of this approach on employers' ability to assess and prevent liability. Part II of this comment describes Title VII's main provisions. Part III discusses the Supreme Court's interpretations of "discrimination" under the main discrimination provision, the development of HWE law and the circuit courts' divergent interpretations of the HWE standard. Part IV explains the circuit courts' conflicting definitions of "discrimination" under the retaliation provision and the Supreme Court's attempt to resolve the conflict in *Burlington Northern*. Part V discusses the broad-view and moderate-view circuits' use of HWE law to create a new breed of retaliatory harassment claims. Part VI argues that this approach to adjudicating retaliatory harassment claims makes it extremely difficult for employers to avoid liability and allows plaintiffs with weak HWE claims to bypass HWE requirements and still recover damages. Finally, this comment suggests that, rather than continue to import HWE harassment law into the retaliation provision, lower courts should develop a new standard for adjudicating retaliatory harassment claims.

## II. TITLE VII GENERALLY

Congress enacted Title VII of the Civil Rights Act of 1964 primarily to effect a national commitment to ending racial discrimination in employment.<sup>16</sup> However, Congress extended Title VII to proscribe employment discrimination based on race, color, religion and national origin.<sup>17</sup> The Act's ban on sex discrimination was attached as "an eleventh-hour amendment in an effort to kill the bill."<sup>18</sup>

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<sup>16</sup> See WILLIAM M. McCULLOCH ET AL., ADDITIONAL VIEWS ON H.R. 7152, H.R. REP. NO. 88-914, as reprinted in 1964 U.S.C.C.A.N. 2391, 2513-16. In this excerpt, several members of Congress explain the great inequality in employment that African Americans experienced in the 1960s. *Id.* at 2513. African American communities incurred much larger unemployment percentages than white communities, and African American citizens were "largely concentrated among the semiskilled and unskilled occupations." *Id.* Congress recognized that employers' disparate treatment of African Americans stigmatized them and undermined their "incentive to strive for excellence in employment and education." *Id.* at 2514; see S. REP. NO. 88-872, as reprinted in 1964 U.S.C.C.A.N. 2355, 2362-63. The background note describes that in 1960, the major political parties committed themselves to "a program of equal opportunity and elimination of racial discrimination." *Id.* at 2362.

<sup>17</sup> S. REP. NO. 88-872, as reprinted in 1964 U.S.C.C.A.N. 2355, 2356.

<sup>18</sup> *Burlington Indus. v. Ellerth*, 524 U.S. 742, 767 n.1 (1998) (Thomas, J., dissenting).

“Although Title VII seeks ‘to make persons whole for injuries suffered on account of unlawful employment discrimination,’ its ‘primary objective,’ like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm.”<sup>19</sup> To that end, Title VII encourages employers to take reasonable measures to prevent employment discrimination, including advising employees of their rights under Title VII and establishing complaint procedures for discrimination victims.<sup>20</sup> Title VII also provides for the creation of the Equal Employment Opportunity Commission (“EEOC”), a federal agency charged with enforcing the Act.<sup>21</sup>

Title VII’s main discrimination provision, section 703(a), makes it unlawful 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.<sup>22</sup>

Additionally, Title VII’s retaliation provision, section 704(a), prohibits an employer from

discriminat[ing] against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by this title . . . or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.<sup>23</sup>

Section 703(a) and section 704(a) both proscribe “discrimination,” but it is not clear from the Statute’s text which employer acts constitute “discrimination.”<sup>24</sup> The Supreme Court’s interpretation of

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<sup>19</sup> Faragher v. City of Boca Raton, 524 U.S. 775, 805-06 (1998).

<sup>20</sup> *See id.*

<sup>21</sup> 42 U.S.C. § 2000e-4 (2006); *see* United States Equal Employment Opportunity Commission, <http://www.eeoc.gov>.

<sup>22</sup> 42 U.S.C. § 2000e-2(a) (2006).

<sup>23</sup> 42 U.S.C. § 2000e-3(a) (2006).

<sup>24</sup> Donna Smith Cude & Brian Steger, *Does Justice Need Glasses? Unlawful Retaliation Under Title VII Following Mattern: Will Courts Know It When They See It?*, 14 LAB. LAW. 373, 396-97 (1998). Cude and Steger write:

“discrimination” under section 703(a) is vague in numerous respects.<sup>25</sup> Consequently, lower courts disagree on key issues concerning section 703(a) discrimination.<sup>26</sup> Courts also disagree on various issues concerning section 704(a) discrimination, such as what kind of activity is protected from retaliation and what is the required connection between the protected activity and the employer’s discriminatory action.<sup>27</sup> The Supreme Court’s decision in *Burlington Northern* did not resolve these issues; the Court only described employer reactions to protected activity that could constitute retaliation.<sup>28</sup> When lower courts combine their interpretations of discrimination under section 703(a) with their interpretations of section 704(a) to adjudicate retaliatory harassment claims, they pile circuit splits on top of circuit splits. This approach leaves employers confused about the measures they must take to prevent liability.

### III. WHAT IT MEANS TO DISCRIMINATE UNDER THE MAIN DISCRIMINATION PROVISION

The main discrimination provision proscribes employment policies that have a “disparate impact” on protected individuals or groups, and “disparate treatment” of protected individuals or groups.<sup>29</sup> A disparate-impact claim typically entails a facially neutral policy that produces an adverse effect on a protected class.<sup>30</sup> The policy may expose an employer to liability if he cannot justify it as being necessary for business.<sup>31</sup> To prevail on a disparate impact claim, the plaintiff does not need to prove a causal link between the employer’s policy and her protected characteristic.<sup>32</sup>

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It is undisputed that the word “discriminate” means “to make a difference in treatment or favor.” In the legal context, the word ‘against’ is defined as “adverse to.” Thus, it logically follows that by prohibiting “discrimination against” employees, Section 704(a) forbids employers from adversely treating employees for engaging in protected activity. The degree of harm necessary to trigger Section 704(a)’s protection is, however, unclear from the statute.

*Id.*

<sup>25</sup> Kingsley Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 502 (1991).

<sup>26</sup> See *infra* Part III.B.

<sup>27</sup> See *infra* Part IV.A.1-2.

<sup>28</sup> *Burlington N. & Santa Fe Ry. v. White*, 126 S. Ct. 2405, 2415 (2006).

<sup>29</sup> I MARK ROTHSTEIN ET AL., *EMPLOYMENT LAW* 182-256 (3d ed. 2004).

<sup>30</sup> MACK A. PLAYER, *FEDERAL LAW OF EMPLOYMENT DISCRIMINATION: IN A NUTSHELL* 111-13 (5th ed. 2004).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

A disparate treatment claim can be based on a tangible discriminatory practice that “constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”<sup>33</sup> Alternatively, it can be based on an intangible discriminatory practice that creates “a working environment heavily charged with . . . discrimination.”<sup>34</sup> Both discrimination forms require proof of a causal link between the employer’s action and the plaintiff’s protected characteristic.<sup>35</sup>

In tangible discrimination cases, the plaintiff can prove causation by showing her employer acted with discriminatory intent.<sup>36</sup> The plaintiff can proffer direct<sup>37</sup> or circumstantial<sup>38</sup> discriminatory intent evidence. If the plaintiff relies on circumstantial evidence, she must establish that: (1) she belongs to a class protected under Title VII; (2) she qualified for the job, promotion or benefit at issue; and (3) the job, promotion or benefit “either remained open or was instead given to a person who is a member of a different class.”<sup>39</sup> Subsequently, the burden shifts to the employer to establish a nondiscriminatory justification for its action.<sup>40</sup> If the employer meets its burden, the plaintiff will have to prove that the employer’s justification is really a pretext for discrimination.<sup>41</sup>

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<sup>33</sup> Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998); see ROBERT N. COVINGTON & KURT H. DECKER, EMPLOYMENT LAW: IN A NUTSHELL 220 (2d ed. 2002) (discussing the two forms of tangible employment actions).

<sup>34</sup> COVINGTON & DECKER, *supra* note 33, at 220 (quoting Meritor Sav. Bank, F.S.B. v. Vinson, 477 U.S. 57, 66 (1986)).

<sup>35</sup> ROTHSTEIN ET AL., *supra* note 29, at 246.

<sup>36</sup> David S. Schwartz, *When is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1710 (2002).

<sup>37</sup> MICHAEL ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 90, 92-93 (6th ed. 2003) (explaining that this proposition was established in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)); see also ROTHSTEIN ET AL., *supra* note 29, at 191-93. Rothstein writes that direct evidence consists of statements demonstrating the decision-maker’s bias toward a protected characteristic. *Id.* Rothstein cites the following remarks that courts accepted as direct evidence of discriminatory intent: “calling an employee a ‘damn woman’ for gender discrimination; telling an employee that she ‘needed a good Christian boyfriend to teach her to be submissive’ for religious discrimination; . . . and calling an employee a ‘black radical’ who would stir up racial discontent as evidence of racial discrimination.” *Id.* at 192-93.

<sup>38</sup> See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (prescribing a framework for proving discriminatory intent through circumstantial evidence); see also Tex. Dep’t of Cmty. Affairs Bd. v. Burdine, 450 U.S. 248 (1981) (expanding on the McDonnell Douglas framework).

<sup>39</sup> COVINGTON & DECKER, *supra* note 33, at 212-13. Covington and Decker note that circumstantial evidence of discrimination is much more common than direct evidence because an employer seldom “publicize[s] its bias.” *Id.* at 212.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

*A. Hostile Work Environment Discrimination*

The plaintiff alleging disparate treatment based on intangible employment practices must prove causation by showing that her employer exposed her to HWE harassment because of her protected characteristic. In the past two decades, the Supreme Court has provided several guidelines for pleading a prima facie HWE harassment claim. However, the HWE precedent still contains many gaps and ambiguities that have resulted in numerous circuit splits on the HWE standard.

The Supreme Court for the first time recognized and defined HWE harassment in *Meritor Savings Bank v. Vinson*.<sup>42</sup> In *Vinson*, the plaintiff brought a sexual harassment suit against her employer, the bank, alleging that her manager groped her, exposed himself to her and had a continuous sexual relationship with her.<sup>43</sup> However, the employer did not expressly promise the plaintiff employment security or other benefits in exchange for sexual favors.<sup>44</sup> The Supreme Court held that even though the plaintiff's claim did not involve tangible discrimination or economic loss, it is still cognizable under section 703(a) as HWE harassment.<sup>45</sup> The Court explained that section 703(a) covers two general types of sexual harassment: quid pro quo and HWE.<sup>46</sup> Quid pro quo harassment is a form of tangible discrimination, whereby a supervisor demands a sexual favor from his employee in exchange for an employment benefit.<sup>47</sup> HWE harassment, on the other hand, does not involve a conditional demand for sexual favors, but rather exists where the plaintiff's work environment is filled with sexually charged conduct.<sup>48</sup> The Court then defined HWE harassment as "conduct [having] the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."<sup>49</sup> The Court also held that HWE harassment is actionable only if it is unwelcome and

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<sup>42</sup> *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986). It is important to note that while *Vinson* and its progeny address sexual harassment claims, the HWE framework these cases establish also applies to racial, ethnic and religious discrimination. Jennie Randall, Comment, *Don't You Say That!: Injunctions Against Speech Found to Violate Title VII are Not Prior Restraints*, 3 U. PA. J. CONST. L. 990, 998-1003 (2001).

<sup>43</sup> *Vinson*, 477 U.S. at 59-61.

<sup>44</sup> *See id.*

<sup>45</sup> *Id.* at 64. The Court stated that section 703(a)'s prohibition on discrimination with regard to "terms, conditions, or privileges of employment" refers to a wide range of disparate treatment of women and men, not just to "economic' or 'tangible' discrimination." *Id.*

<sup>46</sup> *Id.* at 65.

<sup>47</sup> *See id.* (citing 29 C.F.R. § 1604.11(a) (1985)).

<sup>48</sup> *See id.* (citing 29 C.F.R. § 1604.11(a)(3)).

<sup>49</sup> *Id.*



so severe and pervasive that it changes the plaintiff's terms and conditions of employment.<sup>50</sup>

In *Harris v. Forklift Systems, Inc.*,<sup>51</sup> the Supreme Court developed two standards for determining whether workplace discrimination is sufficiently "severe or pervasive."<sup>52</sup> First, the Court held that the plaintiff must prove that a reasonable person would have perceived her environment as hostile and abusive, and that she subjectively perceived her environment as such.<sup>53</sup> Second, the Court added that "whether an environment is 'hostile' or 'abusive' can be determined only by looking at all of the circumstances."<sup>54</sup> Some relevant circumstances, according to the Court, are whether the conduct threatened or humiliated the employee or unreasonably interfered with her job performance.<sup>55</sup>

Further, in *Oncale v. Sundowner Offshore Services, Inc.*,<sup>56</sup> the Supreme Court explained that the *Harris* test requires a "careful consideration of the social context in which particular behavior occurs and is experienced by its target."<sup>57</sup> The Court provided the following example: "A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field—even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office."<sup>58</sup> The Supreme Court also imposed a limitation on HWE claims: they are not a means of regulating workplace etiquette. In *Oncale*, the Court stated that Title VII is not intended as a "general civility code."<sup>59</sup> The Court explained that by requiring discrimination to be "because of" a protected characteristic, Title VII precludes regulation of conduct that is not premised on a protected characteristic.<sup>60</sup>

Last, the Supreme Court grappled with the issue of employer liability for HWE harassment in two landmark cases: *Burlington Industries v. Ellerth*<sup>61</sup> and *Faragher v. City of Boca Raton*.<sup>62</sup> Both cases hold an employer vicariously liable for a supervisor's harassment

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<sup>50</sup> *Id.* at 67-69.

<sup>51</sup> 510 U.S. 17 (1993).

<sup>52</sup> *Id.* at 21 (quoting *Meritor Sav. Bank, F.S.B. v. Vinson*, 477 U.S. 57, 67 (1986)).

<sup>53</sup> *Id.* at 21-22.

<sup>54</sup> *Id.* at 23.

<sup>55</sup> *Id.*

<sup>56</sup> 523 U.S. 75 (1998).

<sup>57</sup> *Id.* at 81.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> 524 U.S. 742 (1998).

<sup>62</sup> 524 U.S. 775 (1998).

culminating in a tangible employment action.<sup>63</sup> The *Ellerth* Court determined employer liability based on the “aided in the agency relation standard.”<sup>64</sup> The Court explained that according to this standard, an employer is liable for his supervisor’s discrimination when the existence of the employment relationship, i.e., the nature of the supervisor’s authority within the company, enables the supervisor’s actions.<sup>65</sup> The Court reasoned that an employer is always liable for its supervisor’s tangible employment actions, because by making someone a supervisor, the employer gives that individual authority to hire, fire, promote, demote or make other significant alterations in a subordinate’s employment status.<sup>66</sup>

With respect to HWE cases, the Court held that it might be unfair to impute vicarious liability to the employer for a supervisor’s harassment because the agency relation does not necessarily aid the supervisor’s conduct.<sup>67</sup> The Court reasoned that by making one a supervisor, the employer does not enable him to harass his subordinates.<sup>68</sup> The Court noted that the supervisor does not rely on his job title to harass another employee and that he could harass even if he weren’t the supervisor.<sup>69</sup> Thus, the Court held that an employer is liable for a supervisor’s HWE harassment subject to an affirmative defense requiring the employer to prove that (a) it “exercised reasonable care to prevent and correct” the harassment; and (b) the plaintiff “unreasonably failed to take advantage of any preventive or corrective opportunities . . . or to avoid harm otherwise.”<sup>70</sup> The Supreme Court never resolved the issue of employer liability for co-worker harassment. However, the *Faragher* Court noted a general agreement among circuit courts that employer liability is governed by the negligence standard.<sup>71</sup>

### *B. Courts’ Divergent Interpretations of HWE Law*

The vagueness of the HWE standard has engendered circuit splits on key issues concerning its application. Lower courts vary in their interpretations of what kind of speech rises to the “severe and pervasive”

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<sup>63</sup> *Ellerth*, 524 U.S. at 760-62; *Faragher*, 524 U.S. at 807.

<sup>64</sup> *Ellerth*, 524 U.S. at 760.

<sup>65</sup> *Id.*

<sup>66</sup> *See id.* at 761-62.

<sup>67</sup> *Id.* at 763.

<sup>68</sup> *Id.*

<sup>69</sup> *See id.*

<sup>70</sup> *Id.* at 765.

<sup>71</sup> *Faragher v. City of Boca Raton*, 524 U.S. 775, 799 (1998).

level.<sup>72</sup> The Supreme Court's decisions in *Harris* and *Oncale* direct the fact finder to look at the totality of the circumstances to determine whether a plaintiff's environment was objectively and subjectively abusive. However, as the Eighth Circuit noted in *Hathaway v. Runyon*, this standard is so vague that it leaves lower-court judges confused and juries "virtually unguided" about the bounds of employer liability.<sup>73</sup>

In *Hathaway*, the plaintiff was a postal service employee who claimed that her co-worker made sexual advances toward her and groped her rear end on two occasions.<sup>74</sup> The plaintiff alleged that she rejected her co-worker's advances and that he, in response, conspired with his friend to create a HWE by making noises when she walked by them.<sup>75</sup> The noises were described as "a purring or growling noise made in the throat . . . [or] a clicking of the tongue."<sup>76</sup> The jury awarded the plaintiff \$75,000 for her HWE claim.<sup>77</sup> However, the district court ordered a judgment in favor of the defendant, because the plaintiff failed to prove a HWE that was sufficiently severe and pervasive.<sup>78</sup> The district court stated, with regard to the co-worker's noises, "if that type of conduct can rise to the level of a sexual harassment claim in this country, we're in deep trouble because it does go on in the workplace."<sup>79</sup> On appeal, the Eighth Circuit vacated the district court's judgment and ordered that the jury's verdict be reinstated.<sup>80</sup> The Eighth Circuit noted: "There is no bright line between sexual harassment and merely unpleasant conduct, so a jury's decision must generally stand unless there is trial error."<sup>81</sup>

Other courts have also punished offensive conduct that either goes on in the workplace quite often or is not likely to be considered severe and pervasive harassment by a mainstream American worker. For instance, one Florida district court found a HWE where a work atmosphere was filled with sexual jokes and caricatures.<sup>82</sup> A Massachusetts court held a worker liable for sexual harassment when he attached a photograph of a female, who was running for union office, to

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<sup>72</sup> David E. Bernstein, *Hostile Environment Law and the Threat to Freedom of Expression in the Workplace*, 30 OHIO N.U. L. REV. 1, 3 (2004).

<sup>73</sup> 132 F.3d 1214, 1221 (8th Cir. 1997) (reacting to the *Harris* test).

<sup>74</sup> *Id.* at 1217.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 1220.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 1225.

<sup>81</sup> *Id.* at 1221 (citing *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 431 (7th Cir. 1995)).

<sup>82</sup> Bernstein, *supra* note 72, at 3 (citing *Cardin v. Via Tropical Fruits, Inc.*, No. 88-14201, 1993 U.S. Dist. LEXIS 16302, at \*24-26 (S.D. Fla. 1993)).

the body of a *Hustler* centerfold and circulated it around the office.<sup>83</sup> Another Massachusetts court found that an Iranian employee was exposed to a HWE because a co-worker hung pictures in her cubicle of Ayatollah Khomeini and other Iranians burning the U.S. flag.<sup>84</sup> Additionally, a Pennsylvania court held that “publishing religious articles in a company newsletter and printing Christian-themed verses on company paychecks constituted ‘harassment’ of a Jewish employee.”<sup>85</sup>

Ultimately, the Supreme Court’s decision in *Harris* created a circuit split concerning the application of the reasonable person standard. The *Harris* Court held that the “reasonable person” standard should be used to determine whether the victim rightfully perceived her environment as hostile or abusive.<sup>86</sup> However, in applying this principle, the Court simply cited to the lower court’s analysis, which actually employed the “reasonable woman” standard.<sup>87</sup> *Harris* never resolved which standard is best or whether the standards are interchangeable. Consequently, in the sexual harassment context, courts are split on whether the existence of a HWE is determined from the perspective of a reasonable person or a reasonable woman.<sup>88</sup>

In the racial and national origin harassment contexts, some courts have abandoned the reasonable person standard in favor of the reasonable black person<sup>89</sup> or the reasonable person of specific national origin standards.<sup>90</sup> Courts using the gender, race, or national-origin-specific standards reason that protected groups perceive workplace

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<sup>83</sup> Eugene Volokh, *How Harassment Law Restricts Free Speech*, 47 RUTGERS L. REV. 563, 566 (1995) (citing *Bowman v. Heller*, No. 90-3269, 1993 WL 761159 (Mass. Super. Ct. 1993)). In a footnote, Professor Volokh explains that the employee’s actions involved not only pornography but also political speech about a union candidate that is at the core of First Amendment protection. *Id.* at 566 n.10.

<sup>84</sup> *Id.* at 565-66 (citing *Pakizegi v. First Nat’l Bank*, 831 F. Supp. 901, 908-09 (D. Mass. 1993)).

<sup>85</sup> Bernstein, *supra* note 72, at 5 (citing *Brown Transp. Corp. v. Pa. Human Relations Comm’n*, 578 A.2d 555, 562 (Pa. 1990)).

<sup>86</sup> *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

<sup>87</sup> *See id.* at 20.

<sup>88</sup> Jessica M. Karner, Comment, *Political Speech, Sexual Harassment, and a Captive Workforce*, 83 CAL. L. REV. 637, 643 (1995); *see also* Mary Beth Heinzlmann, Comment, *A Review of Lesbian, Gay, Bisexual, and Transgender Legal Issues*, 12 LAW & SEX 337, 341-44 (2003). In addition, *see Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986), for an example of the reasonable person approach, and *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991), for an example of the reasonable woman approach.

<sup>89</sup> ROTHSTEIN ET AL., *supra* note 29, at 229 (citing *Harris v. Int’l Paper Co.*, 765 F. Supp. 1509 (D. Me. 1991)). The *Harris* Court expressly adopted the “reasonable black person” standard. *Id.*

<sup>90</sup> *Id.* (citing *Kang v. U. Lim Am., Inc.*, 296 F.3d 810 (9th Cir. 2002)). In *Kang*, the court employed the “reasonable Korean” standard. *Id.*

behavior differently from the average American.<sup>91</sup> Implicit in this reasoning is the assumption that application of a gender, race or national-origin-specific standard to a HWE claim is likely to produce different results than the application of the reasonable person standard.<sup>92</sup>

The circuits also dispute whether it matters that the alleged harassment occurred in a white-collar or a blue-collar environment.<sup>93</sup> This confusion stems from the Supreme Court's decisions in *Harris*, which requires courts to look to the totality of circumstances, and *Oncala*, which requires courts to examine the social context of the plaintiff's workplace.<sup>94</sup> Some courts hold that the nature of the plaintiff's work environment is relevant to whether she was harassed.<sup>95</sup> For example, the Tenth Circuit in *Gross v. Burggraf*<sup>96</sup> was among the first courts to take this position. In *Gross*, the plaintiff was a construction-site truck driver who brought a HWE suit against her employer because her supervisor made several offensive statements.<sup>97</sup> The Tenth Circuit held that the plaintiff's claim must be judged in the context of a blue-collar environment.<sup>98</sup> The court concluded that the supervisor's speech was not sufficiently severe and pervasive to create a HWE because in a blue-collar workplace, "crude language is commonly used by male and female employees," and the plaintiff admitted to personally contributing to the "use of crude language on the job site."<sup>99</sup>

On the other hand, courts like the Sixth Circuit in *Williams v. General Motors Corp.* find the nature of plaintiff's work environment irrelevant to whether she was harassed.<sup>100</sup> In *Williams*, the plaintiff was a warehouse worker who alleged that she was exposed to a HWE because

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<sup>91</sup> See, e.g., *Harris*, 765 F. Supp. at 1515-16 (explaining that black Americans perceive racial behavior differently from white Americans).

<sup>92</sup> See Heinzlmann, *supra* note 88, at 343. Opponents of the reasonable woman standard assert that it highlights the differences in male and female viewpoints and fails to represent the experiences of all women. *Id.* They argue that this test only accounts for the dominant female group: "white, affluent, heterosexual women." *Id.* (quoting MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 244 (1999)).

<sup>93</sup> Jeffrey Lyons, Comment, *Be Prepared: Unsuspecting Employers are Vulnerable for Title VII Sexual Harassment Environment Claims*, 37 U.S.F. L. REV. 467, 483-85 (2003).

<sup>94</sup> *Id.* at 484-85.

<sup>95</sup> Michael Frank, *The Social Context Variable in Hostile Environment Litigation*, 77 NOTRE DAME L. REV. 437, 440 (2002) (citing the Fifth, Seventh, Eighth, Tenth and the District of Columbia Circuits, along with various district and state courts, as proponents of this approach).

<sup>96</sup> 53 F.3d 1531 (10th Cir. 1995).

<sup>97</sup> *Id.* at 1535.

<sup>98</sup> *Id.* at 1537-38.

<sup>99</sup> *Id.* at 1537-38, 1542.

<sup>100</sup> 187 F.3d 553 (6th Cir. 1999); see also Frank, *supra* note 95, at 441 (citing the First and Fourth Circuits as proponents of the *Williams* approach).

her supervisor made sexual remarks toward her, other employees used vulgar language around her, other employees treated her poorly, and she was denied certain employment benefits.<sup>101</sup> The Sixth Circuit stated that it rejects “the view that the standard for sexual harassment varies depending on the work environment” because “women working in the trades do not deserve less protection from the law.”<sup>102</sup> The Sixth Circuit based its decision on equality considerations, not on the *Harris* and *Oncala* tests.<sup>103</sup>

Because of these circuit splits an employer who wants to avoid liability by preventing and detecting a HWE cannot effectively regulate employee conduct. These mixed messages also fail to provide juries with clear guidance on the bounds of employer liability.<sup>104</sup> Consequently, juries have awarded thousands of dollars to accusers for claims that were later dismissed on appeal for failure to raise genuine issues of material fact as to the employers’ guilt.<sup>105</sup> In fact, employers often settle claims that lack merit, because they fear losing thousands of dollars from juries’ largely subjective HWE findings.<sup>106</sup> Although a meritless claim would likely be overturned on appeal, few employers take the risk to find out.<sup>107</sup> Employers would rather settle than appeal a verdict because appellate courts apply the deferential “clearly erroneous” standard to review HWE findings.<sup>108</sup> Litigating an appeal is not only risky, but can also cost hundreds of thousands of dollars.<sup>109</sup> Therefore, it makes more economic sense for employers to settle.

#### IV. WHAT IT MEANS TO DISCRIMINATE UNDER THE RETALIATION PROVISION

The retaliation provision, section 704(a), prohibits an employer from discriminating against an employee, because she engaged in activity protected by Title VII.<sup>110</sup> Courts agree that a retaliation claim requires proof of an employee’s protected activity, an employer’s adverse action and a causal link between the two.<sup>111</sup> However, the circuit

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<sup>101</sup> *Id.* at 559.

<sup>102</sup> *Id.* at 564.

<sup>103</sup> Lyons, *supra* note 93, at 484-85.

<sup>104</sup> *See* Bernstein, *supra* note 72, at 3-4.

<sup>105</sup> *Id.* at 4.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* (explaining that an appeals court will only overrule a jury’s HWE finding if it is “clearly erroneous”).

<sup>109</sup> *Id.*

<sup>110</sup> *See supra* note 23 and accompanying text.

<sup>111</sup> Currie, *supra* note 7, at 1329 (explaining that most circuits have relied on this standard since the early 1980s).

courts have issued divergent opinions interpreting all three requirements; the circuit splits have caused much confusion for employers seeking to prevent section 704(a) liability. In *Burlington Northern*, the Supreme Court clarified the meaning of adverse employment action.<sup>112</sup> However, the Court did not resolve the remaining section 704(a) ambiguities concerning the scope of protected conduct and the required causal link.

#### A. The Retaliatory Discrimination Standard

To plead a prima facie retaliation claim, the plaintiff must prove that (1) she engaged in protected expression; (2) her employer subjected her to an adverse employment action; and (3) there was a causal connection between her protected act and the employer's adverse action.<sup>113</sup> The causal connection can be proven by direct evidence of retaliatory intent or by circumstantial evidence of disparate treatment.<sup>114</sup> When the plaintiff relies on circumstantial evidence, the *McDonnell Douglas* burden-shifting framework that was developed for cases brought under the main discrimination provision will apply.<sup>115</sup> Thus, the burden shifts to the employer to proffer a nondiscriminatory, legitimate justification for taking the adverse employment action.<sup>116</sup> Then the burden shifts again to the plaintiff to show that the employer's proffered justification is just a pretext for discrimination.<sup>117</sup>

##### 1. First Prong—Engagement in Protected Expression

The first prong requires a showing that the plaintiff engaged in expression protected by Title VII. The language of section 704(a) refers to two kinds of protected expression: participation in enforcing Title VII and opposition to any practice “made an unlawful employment practice by [Title VII].”<sup>118</sup> Participation includes a wide variety of activities, which include making a charge or assisting in a Title VII investigation, hearing, or proceeding.<sup>119</sup> Opposition is a more complex standard, which entails communicating to the employer or another entity a belief that

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<sup>112</sup> *Burlington N. & Santa Fe Ry. v. White*, 126 S. Ct. 2405, 2415 (2006).

<sup>113</sup> ROTHSTEIN ET AL., *supra* note 29, at 221.

<sup>114</sup> *Id.*

<sup>115</sup> *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *see also Cude & Steger*, *supra* note 24, at 376 (noting that, although the Supreme Court articulated this burden-shifting framework for disparate treatment cases litigated under the main discrimination provision, most lower courts have applied it to retaliation cases).

<sup>116</sup> *McDonnell Douglas Corp.*, 411 U.S. at 802.

<sup>117</sup> *Id.* at 804.

<sup>118</sup> 42 U.S.C. § 2000e-3(a) (2006).

<sup>119</sup> *Id.*

unlawful activity has taken place.<sup>120</sup> Lower courts vary in their interpretations of the opposition standard.

For example, lower courts disagree on whether the plaintiff must prove that unlawful activity actually occurred. The Supreme Court grappled with this issue in *Clark County v. Breeden*,<sup>121</sup> but declined to resolve it. In *Breeden*, the plaintiff met with her supervisor and a co-worker to discuss the results of several job applicants' psychological examinations.<sup>122</sup> One applicant's examination declared that he made the following statement to his co-worker: "I hear making love to you is like making love to the Grand Canyon."<sup>123</sup> The supervisor remarked that he did not understand the statement and the plaintiff's co-worker jokingly replied that he would explain it later.<sup>124</sup> Both men laughed. The plaintiff perceived this conduct as sexual harassment and filed charges against her employer.<sup>125</sup> Subsequently, the plaintiff was transferred to a position she did not like, so she brought the suit for retaliation.<sup>126</sup>

The Ninth Circuit held that she was protected from retaliation even though her complaint was not based on unlawful conduct because all she had to prove was a good faith, reasonable belief that her supervisor's and co-worker's laughs were unlawful.<sup>127</sup> The Supreme Court reversed the decision.<sup>128</sup> The Court declined to resolve the circuit split, but held that no person could "reasonably believe that the incident recounted above violated Title VII's standard."<sup>129</sup> Since this decision, many lower courts have held that the plaintiff does not need to prove that unlawful activity occurred so long as she reasonably and in good faith believed that it did.<sup>130</sup> This reasonable belief standard is problematic for employers, because it is vague and courts vary widely in its interpretation.<sup>131</sup>

Circuit courts are also split regarding what kind of opposition activity section 704(a) protects.<sup>132</sup> Opposition activity may include refusing to follow unlawful orders or filing informal complaints, internal

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<sup>120</sup> PATRICIA WISE, UNDERSTANDING AND PREVENTING WORKPLACE RETALIATION 14 (2000).

<sup>121</sup> 532 U.S. 268 (2001).

<sup>122</sup> *Id.* at 269.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 271.

<sup>126</sup> *See id.* at 271-72.

<sup>127</sup> *Breeden v. Clark County Sch. Dist.*, 232 F.3d 893 (9th Cir. 2000) (unpublished opinion), *rev'd*, 532 U.S. 268 (2001).

<sup>128</sup> *Breeden*, 532 U.S. at 271.

<sup>129</sup> *Id.* at 270.

<sup>130</sup> WISE, *supra* note 120, at 17-18.

<sup>131</sup> *Id.* at 17.

<sup>132</sup> *Id.* at 18-19.



complaints, and even vague complaints.<sup>133</sup> Courts concur that opposition activity is protected so long as it is reasonable, but disagree on what “reasonable” means.<sup>134</sup> As per the EEOC regulations, courts consider opposition unreasonable if it unduly disrupts the employer’s business or interferes with the employee’s job performance.<sup>135</sup> For example, in *Douglas v. DynMcDermott Petroleum Operations Co.*, the plaintiff, an in-house attorney, sent letters to company outsiders that described the company’s allegedly unlawful employment practices and disclosed confidential information protected by the attorney-client privilege.<sup>136</sup> The company terminated her and she brought suit.<sup>137</sup> The plaintiff alleged that her letters were opposition activity and that the company retaliated against her because she sent them.<sup>138</sup> The Fifth Circuit held that the plaintiff’s opposition activity was not protected because it was “detrimental to the position of responsibility held by [her].”<sup>139</sup>

However, some courts interpret the “unreasonableness” requirement narrowly for fear of chilling employee activism.<sup>140</sup> For example, some courts have held that employees’ letters to their employers’ customers containing damaging information constituted protected opposition, even where the letters were not based on accurate information and unduly disrupted the employer’s business.<sup>141</sup> In *EEOC v. Crown Zellerbach Corp.*, Crown’s employees wrote a letter to one of the company’s most important customers stating that Crown engages in racist employment practices.<sup>142</sup> Crown terminated the employees who signed the letter on the grounds that they were disloyal.<sup>143</sup> The Ninth Circuit agreed that the

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<sup>133</sup> *Id.* at 15.

<sup>134</sup> *Id.* at 17-18.

<sup>135</sup> *Id.* at 18. Wise also explains that courts do not protect unlawful activity, such as violence or vandalism. *Id.*

<sup>136</sup> Cude & Steger, *supra* note 24, at 379 n.31 (citing *Douglas v. DynMcDermott Petroleum Operations Co.*, 144 F.3d 364, 366-67 (5th Cir. 1998)).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* (quoting *Douglas*, 144 F.3d at 374).

<sup>140</sup> *Id.*

<sup>141</sup> WISE, *supra* note 120, at 19. Wise cites to the EEOC Compliance Manual § 8-II(B)(3)(a); *Sumner v. U.S. Postal Serv.*, 899 F.2d 203 (2d Cir. 1990); and *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008 (9th Cir. 1983), as proponents of this approach. *Id.* Because most courts do not require the employer to actually engage in unlawful conduct, so long as the employee reasonably and in good faith believes she is opposing an unlawful practice, Wise explains that the opposition letters can be protected even if based on faulty allegations. *Id.*

<sup>142</sup> 720 F.2d 1008, 1011(9th Cir. 1983).

<sup>143</sup> *Id.*

letter was disloyal, but noted that it was protected opposition nevertheless.<sup>144</sup> The Ninth Circuit opined:

Almost every form of “opposition to an unlawful employment practice” is in some sense “disloyal” to the employer, since it entails a disagreement with the employer’s views and a challenge to the employer’s policies. . . . If discharge or other disciplinary sanctions may be imposed based simply on “disloyal” conduct, it is difficult to see what opposition would remain protected.<sup>145</sup>

## 2. Third Prong—Causation

Courts agree that the causal link between a protected activity and an adverse employment decision could be established through direct or circumstantial evidence.<sup>146</sup> However, courts are split on what degree of proof establishes causation.<sup>147</sup> For example, the Fifth Circuit requires the protected conduct to be the “but for cause” of the employment action.<sup>148</sup> But other circuits require only that the “protected activity and the negative employment action are not completely unrelated.”<sup>149</sup>

Temporal proximity between the protected conduct and the adverse action may be used as circumstantial evidence to prove or disprove causation.<sup>150</sup> The Supreme Court held in *Clark County School Dist. v. Breeden* that temporal proximity may be used as the sole evidence of causation if the period between the protected activity and the adverse action is “very close.”<sup>151</sup> This standard does not provide courts with much guidance because the “very close” requirement is inherently subjective. Consequently, lower courts often disagree about how much

<sup>144</sup> *Id.* at 1014.

<sup>145</sup> *Id.*; see also WISE, *supra* note 120, at 19. In discussing the *Crown* decision, Wise criticizes the Ninth Circuit’s approach as being particularly unfair to employers. *Id.* Wise writes: “[N]egative customer communications could be completely devastating to an employer’s business. An employer cannot prohibit employees from engaging in this type of communication nor can it punish employees from doing so, but it must somehow counteract any negative public relations impact caused by the communication.” *Id.*

<sup>146</sup> Cude & Steger, *supra* note 24, at 379-80; see also WISE, *supra* note 120, at 28-29. Wise explains that direct evidence may consist of any oral or written declaration demonstrating that the employer took the adverse action as a result of the employee’s protected activity. *Id.* However, circumstantial evidence “does not come directly from an eyewitness or observer, or from actual documentation,” but rather requires the fact finder to infer that a proposition is true from indirect evidence. *Id.* at 29.

<sup>147</sup> Cude & Steger, *supra* note 24, at 380.

<sup>148</sup> *Id.* at 380 n.37 (quoting *Long v. Eastfield College*, 88 F.3d 300, 305 n.4 (5th Cir. 1996)).

<sup>149</sup> *Id.* (quoting *EEOC v. Reichhold Chem., Inc.*, 988 F.2d 1564, 1571-72 (11th Cir. 1993)).

<sup>150</sup> *Id.* at 380.

<sup>151</sup> 532 U.S. 268, 273-74 (2001).

temporal proximity or distance is sufficient.<sup>152</sup> For example, the Third Circuit has held that “temporal proximity between the protected activity and the termination is sufficient to establish a causal link.”<sup>153</sup> Yet the Eighth Circuit maintains that temporal proximity, by itself, does not establish causation.<sup>154</sup> In addition, this form of evidence is so subjective that judges within the same circuit render conflicting decisions.<sup>155</sup> For example, one Fifth Circuit decision held that “a fourteen-month gap between the filing of an initial bias charge with the EEOC and the employee’s discharge did not disprove her retaliation claim.”<sup>156</sup> But three years later, the Fifth Circuit held that “a [fifteen-sixteen] month gap between the filing of a workers’ compensation claim and discharge ‘mitigates against’ a finding of retaliation.”<sup>157</sup>

### 3. Second Prong—Adverse Employment Action

Prior to *Burlington Northern*, courts followed either the narrow-view, broad-view or moderate-view definition of “adverse employment action.”<sup>158</sup> In *Burlington Northern*, the Supreme Court adopted the broad-view definition. Consequently, narrow-view circuits that relied on their definition of an adverse employment action in declining to recognize retaliatory harassment must now recognize this claim.

#### *i. The Narrow View*

According to the narrow view, an adverse employment action consists of an ultimate employment decision that produces a “tangible change in duties or working conditions” and results in a “material employment disadvantage.”<sup>159</sup> The Fifth and Eighth Circuits followed this approach.<sup>160</sup> According to these circuits, an ultimate employment

<sup>152</sup> Cude & Steger, *supra* note 24, at 380 (pointing out that uncertainty resulting from courts’ conflicting decisions renders causation among the most litigated issues in retaliation cases).

<sup>153</sup> *Id.* (quoting *Woodson v. Scott Paper Co.*, 109 F.3d 913, 920 (3d Cir. 1997)).

<sup>154</sup> *Id.* (quoting *Feltmann v. Seiben*, 108 F.3d 970, 977 (8th Cir. 1997)).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* (quoting *Shirley v. Chrysler First, Inc.*, 970 F.2d 39, 43 (5th Cir. 1992)).

<sup>157</sup> *Id.* (quoting *Burfield v. Brown, More & Flint, Inc.*, 51 F.3d 583, 589 (5th Cir. 1995)).

<sup>158</sup> Currie, *supra* note 7, at 1333.

<sup>159</sup> *Manning v. Metro. Life Ins. Co.*, 127 F.3d 686, 692 (8th Cir. 1997).

<sup>160</sup> *See, e.g., Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 708 (5th Cir. 1997) (“[T]he verbal threat of being fired, the reprimand for not being at [the employee’s] assigned station, a missed pay increase, and being placed on ‘final warning’ do not constitute ‘adverse employment actions’ . . . .”); *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994) (finding no adverse employment action when a secretary was transferred to a new, more stressful position with the same title, salary or employment benefits, because it did not result in an economic disadvantage).

action includes hiring, discharging, promoting, demoting, and granting or denying compensation or reassignment.<sup>161</sup> By contrast, an adverse employment action does not include an interlocutory decision that may tangentially effect an ultimate employment decision, such as a lateral transfer,<sup>162</sup> poor treatment by supervisors or co-workers,<sup>163</sup> a verbal reprimand and a missed pay raise.<sup>164</sup>

Narrow-view circuits relied on two main rationales to justify their decisions. First, according to the policy rationale, allowing actions short of ultimate employment decisions to predicate retaliation liability would render the employer liable for any decision that “*might* jeopardize [the plaintiff’s] employment in the future.”<sup>165</sup> This could result in employer liability for a wide variety of routine administrative actions that produce no current material disadvantage.<sup>166</sup> Second, The Fifth Circuit in *Mattern v. Eastman Kodak Co.*, explained the statutory-construction rationale.<sup>167</sup> The *Mattern* court relied on the main discrimination provision for help in interpreting the retaliation provision.<sup>168</sup> The court compared subsections (a)(1) and (a)(2) of the main discrimination provision, noting that (a)(1) proscribes a definite set of harms, while (a)(2) is more vague and, consequently, more broad.<sup>169</sup> Specifically, the court noted that (a)(1) makes it illegal for an employer to “fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment.”<sup>170</sup> However, the court pointed out that (a)(2) prohibits an employer from limiting an employee in ways “which deprive or ‘would tend to deprive’ the employee of ‘opportunities’ or ‘adversely affect his status’”<sup>171</sup> The *Mattern* court concluded that because the retaliation provision only mentions “discrimination,” as does subpart (a)(1), and does not discuss the vague misconduct described in (a)(2), it must not include the vague proscriptions of (a)(2).<sup>172</sup> Thus, reading the retaliation

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<sup>161</sup> See cases cited *supra* note 160.

<sup>162</sup> *Harlston*, 37 F. 3d at 382.

<sup>163</sup> *Landgraf v. USI Film Prods.*, 968 F.2d 427, 431 (5th Cir. 1992), *aff’d* 511 U.S. 244 (1994) (holding that co-workers’ hostility toward plaintiff and theft of her tools, which gave the plaintiff anxiety, did not by itself constitute an adverse employment action); see also *Manning*, 127 F.3d at 692-93.

<sup>164</sup> *Mattern*, 104 F.3d at 708.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*; see also *Harlston*, 37 F.3d at 382.

<sup>167</sup> *Mattern*, 104 F.3d at 708-09.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 708 (quoting 42 U.S.C. § 2000e-2(a)(1)).

<sup>171</sup> *Id.* at 709 (quoting 42 U.S.C. § 2000e-2(a)(1)-(2)).

<sup>172</sup> *Id.*; see also *Cude & Steger*, *supra* note 24, at 399. *Cude* and *Steger* note that the Supreme Court has interpreted the language of § 2000e-2(a)(1) to include actions other

provision consistently with subpart (a)(1), the court held that the retaliation provision only applies to discrimination based on terms, conditions or privileges of employment and other tangible harms.<sup>173</sup>

*ii. The Broad View*

Unlike the narrow view, this approach was promulgated by the EEOC in 1998 in an attempt to clarify the scope of the retaliation statute.<sup>174</sup> According to the EEOC guidelines, an adverse employment decision is any adverse action reasonably likely to discourage an employee from participating in protected activity.<sup>175</sup> The First, Seventh, Ninth, Tenth, Eleventh and D.C. Circuits subscribe to this approach.<sup>176</sup>

These courts maintain that adverse employment actions can include interlocutory decisions that do not immediately change the terms and conditions of the plaintiff's employment.<sup>177</sup> Examples of adverse employment actions under this approach include bad references, poor performance evaluations and negative remarks about an employee.<sup>178</sup> This approach even includes actions that do not result in adverse economic consequences, such as transferring an employee to a lateral

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than ultimate employment decisions. *Id.* For example, in *Meritor Savings Bank v. Vinson*, the Court rejected the view that "terms, conditions, or privileges of employment" are limited to tangible harms. 477 U.S. 57, 64 (1986). However, Cude and Steger argue that § 2000e-2(a)(1) lends itself to a more expansive interpretation because it is modified by the broad mandates of § 2000e-2(a)(2). Cude & Steger, *supra* note 24, at 396-99.

<sup>173</sup> *Mattern*, 104 F.3d at 708-09.

<sup>174</sup> EQUAL EMPLOYMENT OPPORTUNITY COMMISSION COMPLIANCE MANUAL 8-13 to 8-15 (1998), available at <http://www.eeoc.gov/policy/docs/retal.pdf> [hereinafter EEOC COMPLIANCE MANUAL].

<sup>175</sup> *Id.*

<sup>176</sup> *Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir. 2000) (holding adverse employment actions can include transfers of job responsibilities, undeserved performance ratings, "lateral transfers, unfavorable job references, and changes in work schedule"); *Gunnel v. Utah Valley State Coll.*, 152 F.3d 1253, 1264 (10th Cir. 1998) (holding adverse employment actions must be defined liberally and on a case-by-case basis); *Widerman v. Wal-Mart Stores*, 141 F.3d 1453, 1456-67 (11th Cir. 1998) (holding adverse employment actions include making employee work through his lunch break, assigning one-day suspension, changing employee's schedule without notifying him and expressing negative remarks about employee); *Paquin v. Fed. Nat'l Mortgage Assoc.*, 119 F.3d 23, 32 (D.C. Cir. 1997) (holding adverse employment action could include withdrawal of a discretionary benefit, e.g., a severance package); *Knox v. Indiana*, 93 F.3d 1327, 1334 (7th Cir. 1996) (holding adverse employment actions include "moving the person from a spacious, brightly lit office to a dingy closet, depriving the person of previously available support services . . . or cutting off challenging assignments."); *Wyatt v. City of Boston*, 35 F.3d 13, 15-16 (1st Cir. 1994) (adopting EEOC definition of adverse employment action and construing it to include "disadvantageous transfers and assignments, refusals to promote," bad references and refusals to allow the choice of class curriculum).

<sup>177</sup> See cases cited *supra* note 176.

<sup>178</sup> See cases cited *supra* note 176.

position, cutting off challenging assignments, relocating the employee from a nice office to a dingy closet and changing the work schedule.<sup>179</sup>

The EEOC and the aforementioned circuits rationalize this standard through policy and statutory construction. As a policy matter, these courts feel that by focusing on the deterrent effects of an employment action, this standard furthers the retaliation provision's remedial purpose.<sup>180</sup> With respect to statutory construction, these courts maintain that section 704(a)'s language "does not limit what type of discrimination is covered, nor does it prescribe a minimum level of severity for actionable discrimination."<sup>181</sup>

### *iii. The Moderate View*

Courts following the moderate view held that an adverse employment action could be an ultimate employment decision or a decision materially affecting employment privileges, conditions, terms or compensation.<sup>182</sup> The Second, Third, Fourth and Sixth Circuits followed this approach.<sup>183</sup> These circuits maintained that a reduction in job responsibilities or professional status, a poor performance review, a denial of salary and benefits, and other interlocutory employment decisions could constitute adverse employment actions.<sup>184</sup> Circuit courts relying on this approach justified it as a compromise between two opposite positions and argued that it was consistent with the main discrimination provision's language.<sup>185</sup> In adopting this approach, the

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<sup>179</sup> See cases cited *supra* note 176.

<sup>180</sup> See, e.g., *Widerman*, 141 F.3d at 1456 ("Permitting employers to discriminate against an employee who files a charge of discrimination so long as the retaliatory discrimination does not constitute an ultimate employment action, could stifle employees' willingness to file charges of discrimination.").

<sup>181</sup> *Ray*, 217 F.3d at 1243.

<sup>182</sup> *Richardson v. N.Y. State Dep't of Corr. Serv.*, 180 F.3d 426, 446 (2d Cir. 1999).

<sup>183</sup> *Von Gunten v. Maryland*, 243 F.3d 858, 865 (4th Cir. 2001) (explaining that limiting an employee's job responsibilities, refusing to give him "a performance review and annual salary and benefit increases" and giving references based on false information can constitute adverse employment actions); *Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 792 (6th Cir. 2000) (modifying second prong of retaliation claim standard to include adverse employment actions or "severe or pervasive retaliatory harassment by a supervisor"); *Richardson*, 180 F.3d at 444 (holding that prison employee's reassignment to a different position that caused her to have contact with prisoners and changed her job responsibilities qualified as adverse employment action even though she requested the reassignment and "voluntarily accepted . . . the only position available at that time"); *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300-01 (3d Cir. 1997).

<sup>184</sup> See cases cited *supra* note 183.

<sup>185</sup> *Von Gunten*, 243 F.3d at 866 ("[E]vidence that the terms, conditions or benefits of employment were adversely effected' is the *cine qua non* of an 'adverse employment action.'" (quoting *Von Gunten v. Md. Dep't of Env't*, 68 F. Supp. 2d 654, 662 (D. Md. 1999)).

Fourth Circuit criticized the broad-view courts for contravening legislative intent by interpreting the retaliation provision so broadly that it provides more protection than the main discrimination provision.<sup>186</sup>

#### 4. *Burlington Northern & Santa Fe Railway Co. v. White*

In *Burlington Northern*, the Supreme Court sided with the broad-view circuits, holding that discrimination includes “materially adverse” actions that “might have ‘dissuaded a reasonable worker from making or supporting a charge of discrimination.’”<sup>187</sup> The Court rejected the broad and moderate-view circuits’ position that the adverse action must relate to employment privileges, conditions, terms or compensation.<sup>188</sup> The Court, while extensively quoting the EEOC, reasoned that the retaliation provision’s main purpose is to ensure that employees are not penalized for engaging in protected activity.<sup>189</sup> Ultimately, the Court explained that employers could penalize employees through employment and non-employment related actions; therefore, the latter are also prohibited under the retaliation provision.<sup>190</sup>

### V. TREATMENT OF RETALIATORY HARASSMENT UNDER THE THREE VIEWS

Retaliatory harassment occurs when a supervisor or a co-worker retaliates against an employee, who engaged in protected expression, by creating a HWE. Much like HWE harassment under the main discrimination provision, retaliatory harassment consists of actions that do not produce tangible or economic harm. Retaliatory harassment can take the form of name-calling, poor performance evaluations, pranks or encouraging co-worker ostracism. Prior to *Burlington Northern*, various broad-view and moderate-view circuits began to recognize retaliatory harassment claims. These courts applied the legal standards developed for HWE harassment under section 703(a) to this section 704(a) claim.

#### A. *The Narrow View*

Prior to *Burlington Northern*, the narrow-view circuits did not recognize HWE harassment as an adverse employment action under the

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<sup>186</sup> *Id.* at 863 n.1 (“Congress has not expressed a stronger preference for preventing retaliation under § 2000e-3 than for preventing actual discrimination under § 2000e-2’ . . . .” (quoting *Ross v. Commc’n Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985)).

<sup>187</sup> *Burlington N. & Santa Fe Ry. v. White*, 126 S. Ct. 2405, 2415 (2006).

<sup>188</sup> *Id.* at 2414.

<sup>189</sup> *Id.* at 2413-14.

<sup>190</sup> *Id.*

retaliation provision.<sup>191</sup> These circuits did not differentiate between supervisor and co-worker harassment.<sup>192</sup> The Fifth Circuit addressed retaliatory harassment for the first time in *Mattern*.<sup>193</sup> There, the plaintiff was a student in a mechanic's apprenticeship program.<sup>194</sup> She filed an EEOC charge, claiming her supervisors created a HWE for her through sexual harassment.<sup>195</sup>

The employer took corrective action by "allowing" one alleged harasser to retire early and transferring the plaintiff to another crew.<sup>196</sup> The plaintiff subsequently encountered the following difficulties at work: (1) she told her supervisor that she needed to go home due to a work-related sickness, he instructed her to report to the company medical office, she refused and went home, so he came to her house to tell her to report to the medical office; (2) she was disciplined for leaving her designated work station; (3) she experienced hostility from co-workers, who refused to say "hello" and allegedly stole tools from her locker; (4) her doctor called her employer to discuss her work-related anxiety, but the employer never returned her doctor's phone call; and (5) she was unable to complete an assignment and twice failed her Major Skills Tests, which caused her supervisors to give her negative performance evaluations and pass her over for a pay increase.<sup>197</sup> The jury found against the plaintiff on her HWE claim, because the employer satisfied the affirmative defense by taking prompt corrective action.<sup>198</sup> However, the jury awarded her \$50,000 in damages on her retaliation claim.<sup>199</sup> The Fifth Circuit reversed the jury's verdict on the retaliation claim.<sup>200</sup> The court held that supervisor or co-worker harassment constitutes an interlocutory employment decision that may have a "mere tangential effect on a possible future ultimate employment decision."<sup>201</sup> Thus, the court concluded that such harassment was not actionable under section 704(a) as an adverse employment action.<sup>202</sup>

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<sup>191</sup> *Manning v. Metro. Life. Ins. Co.*, 127 F.3d 686, 692-93 (8th Cir. 1997) (holding supervisor's disrespectful treatment and ostracism did not constitute adverse employment action).

<sup>192</sup> *Id.*; see also *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997) (refusing to recognize co-worker harassment as an adverse employment action).

<sup>193</sup> *Mattern*, 104 F.3d at 702.

<sup>194</sup> *Id.* at 703.

<sup>195</sup> *Id.* at 704.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 705-06.

<sup>198</sup> *Id.* at 704.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 710.

<sup>201</sup> *Id.* at 707-08.

<sup>202</sup> *Id.*



*B. The Broad View*

Most broad-view circuits have expressly held that supervisor and co-worker harassment can predicate liability under the retaliation provision.<sup>203</sup> The Seventh Circuit was among the first to recognize co-worker harassment in *Knox v. State of Indiana*.<sup>204</sup> The plaintiff in *Knox* was a corrections officer who filed sexual harassment charges against her captain.<sup>205</sup> She alleged that her captain emailed her with various sexual proposals and called her house to ask her out on a date.<sup>206</sup> In response to the plaintiff's complaint, her employer demoted the captain.<sup>207</sup> The plaintiff alleged that because she caused the captain's demotion, her co-workers subjected her to a HWE by gossiping about her to inmates and other institutional workers.<sup>208</sup>

The plaintiff reported her co-workers' conduct to an affirmative action officer.<sup>209</sup> However, the officer responded that she could not act on the plaintiff's complaint until the plaintiff provided her with specific names of co-workers who were making the negative remarks.<sup>210</sup> Subsequently, the plaintiff found out who the gossipers were and reported them.<sup>211</sup> In response, the affirmative action officer counseled all four of them and recommended one for further disciplinary action.<sup>212</sup> Nevertheless, the plaintiff filed suit against her employer for HWE harassment and retaliatory harassment.<sup>213</sup>

The jury found in the employer's favor on the HWE claim, but in the plaintiff's favor on the retaliation claim, awarding her \$40,000.<sup>214</sup> On appeal, the Seventh Circuit affirmed the jury verdict.<sup>215</sup> The court held

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<sup>203</sup> *Noviello v. City of Boston*, 398 F.3d 76, 92-93 (1st Cir. 2005) (holding co-workers' ostracism and name-calling in retaliation for plaintiff's filing a sexual harassment complaint against their supervisor, which got him fired, was actionable retaliation); *Ray v. Henderson*, 217 F.3d 1234, 1245 (9th Cir. 2000) (holding supervisor's yelling at a male employee and taking away some of his privileges in response to his complaints about treatment of female co-workers was actionable retaliation); *Gunnell v. Utah Valley State Coll.*, 152 F.3d 1253 (10th Cir. 1998) (holding co-worker hostility constituted an adverse employment action); *Knox v. State of Indiana*, 93 F.3d 1327 (7th Cir. 1996) (holding co-worker's gossip about an employee who got her supervisor demoted by filing sexual harassment charge was actionable retaliation).

<sup>204</sup> 93 F.3d 1327 (7th Cir. 1996).

<sup>205</sup> *Id.* at 1330.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 1331.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 1331-32.

<sup>214</sup> *Id.* at 1332.

<sup>215</sup> *Id.* at 1335-36.

that co-worker gossip that is not directly addressed to the plaintiff could constitute actionable retaliatory harassment.<sup>216</sup> Additionally, the court held that an employer is liable for co-worker retaliatory harassment “if the employer had actual or constructive knowledge of the harassment and failed to address the problem adequately.”<sup>217</sup> In this case, the court recognized that the employer took corrective action in response to the plaintiff’s retaliation complaint.<sup>218</sup> However, the court also deferred to the jury’s finding that the employer’s corrective action was inadequate.<sup>219</sup> The Seventh Circuit jumped through hoops to justify the jury’s reasoning, stating that perhaps the affirmative action officer’s initial request for the gossipers’ names was a “brush-off, motivated by the trouble [the plaintiff’s] complaints had caused for the institution.”<sup>220</sup>

The Tenth Circuit was first to toy with the notion of applying the HWE framework to retaliatory harassment claims. In *Gunnell v. Utah Valley State College*, the Tenth Circuit held that co-worker harassment is actionable retaliation only if it is sufficiently severe and pervasive.<sup>221</sup> The *Gunnell* court also held that employers could be liable for forms (2) and (3) of co-worker harassment.<sup>222</sup> Thereafter, the First and Ninth Circuits expressly held that HWE law governs retaliatory harassment claims.<sup>223</sup>

### C. The Moderate View

The Fourth and Sixth Circuits, the moderate-view circuits, held that supervisor harassment constitutes an adverse employment action.<sup>224</sup> These circuits maintained that supervisor harassment is actionable only if

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<sup>216</sup> *Id.* at 1334-35.

<sup>217</sup> *Id.* at 1334.

<sup>218</sup> *Id.* at 1335.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> 152 F.3d 1253, 1264 (10th Cir. 1998). Despite adopting this standard, the *Gunnell* court did not analogize retaliatory harassment claims to HWE claims or expressly adopt the HWE framework.

<sup>222</sup> *Id.* at 1265 (“[A]n employer can only be liable for co-workers’ retaliatory harassment where its supervisory or management personnel either (1) orchestrate the harassment or (2) know about the harassment and acquiesce in it in such a manner as to condone and encourage the co-workers’ actions.”).

<sup>223</sup> *Noviello v. City of Boston*, 398 F.3d 76, 92 (1st Cir. 2005) (“[HWE] framework is readily transferable to the retaliatory harassment context.”); *Ray v. Henderson*, 217 F.3d 1234, 1245 (9th Cir. 2000) (applying *Harris* and *Faragher* to determine whether harassment is “sufficiently severe or pervasive”).

<sup>224</sup> *Von Gunten v. Maryland*, 243 F.3d 858, 869-870 (4th Cir. 2001) (“Retaliatory harassment can constitute an adverse employment action, but only if such harassment adversely affects the ‘terms, conditions, or benefits of . . . employment.’” (citations omitted)); *Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 792 (6th Cir. 2000) (modifying the second prong of retaliation standard to include adverse employment actions or “severe or pervasive retaliatory harassment by a supervisor”).

it adversely affects the “terms, conditions, or benefits” of the plaintiff’s employment.<sup>225</sup> These circuits applied HWE harassment law to retaliatory harassment claims.<sup>226</sup> The Second Circuit recognized co-worker harassment as actionable retaliation in *Richardson v. New York State Dep’t of Correctional Services*.<sup>227</sup> The Second Circuit also held that HWE law governs co-worker retaliatory harassment claims.<sup>228</sup>

#### D. The Effect of Burlington Northern

While *Burlington Northern* did not specifically mention retaliatory harassment, its broad definition of adverse employment action encompasses this claim.<sup>229</sup> All courts must now recognize retaliatory harassment. However, *Burlington Northern* did not address whether HWE harassment standards apply to retaliation claims. Consequently, employers remain unguided on their liability for retaliatory harassment.

### VI. USING HWE HARASSMENT LAW TO ADJUDICATE RETALIATORY HARASSMENT CLAIMS MAKES IT VIRTUALLY IMPOSSIBLE FOR EMPLOYERS TO PREVENT LIABILITY—A NEW APPROACH IS NEEDED

Courts addressing the retaliatory harassment claim have not addressed the practical consequences it imposes on American employers. This comment argues that the application of HWE harassment principles to retaliatory harassment claims creates confusion for employers seeking to prevent liability. In addition, this approach allows litigants with weak HWE harassment claims to bypass HWE harassment requirements. Therefore, lower courts should develop a new standard for adjudicating retaliatory harassment claims.

#### A. Applying HWE Law to Retaliatory Harassment Claims Confuses Employers About Their Liability Under Title VII

The affirmative defense established in *Ellerth* and *Faragher* requires employers to exercise “reasonable care to prevent and correct” harassment.<sup>230</sup> However, the employer cannot exercise reasonable care until it discerns for which conduct it will be liable. Even without the retaliatory harassment cause of action, an employer has a difficult time measuring the bounds of its liability because of Title VII’s vague

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<sup>225</sup> See cases cited *supra* note 224.

<sup>226</sup> See cases cited *supra* note 224.

<sup>227</sup> 180 F.3d 426 (2d Cir. 1999).

<sup>228</sup> *Id.*

<sup>229</sup> *Burlington N. & Santa Fe Ry. v. White*, 126 S. Ct. 2405, 2415 (2006).

<sup>230</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

language, the lack of guidance from the Supreme Court and the consequent circuit splits on the HWE and retaliation standards. Since a large employer cannot necessarily predict the state in which a plaintiff will bring a Title VII claim against it, the employer must somehow harmonize the circuits' divergent Title VII standards and attempt to prevent liability under all of them.

With respect to HWE harassment under section 703(a), an employer does not receive clear guidance on what kind of conduct constitutes sufficiently severe and pervasive hostility; whether it should analyze such conduct from the viewpoint of a woman or a minority; and whether it is relevant that its work culture is blue collar, as opposed to white collar.<sup>231</sup> With respect to retaliation under section 704(a), an employer is left wondering whether an employee is protected for reporting conduct that is perfectly lawful; whether it can punish a disloyal employee who disrupts its business while claiming to oppose unlawful action; and whether it can have retaliatory animus imputed to it simply because it takes an adverse employment action against an employee "shortly" after she engages in protected activity.<sup>232</sup> By applying HWE law to retaliatory harassment claims, courts combine the circuit splits from both provisions into one cause of action, making it more difficult than ever for an employer to assess and prevent Title VII liability. Such decisions leave the employer confused about how to spot protected conduct and what kind of supervisor or employee responses to the protected conduct it must regulate.

To play it safe, an employer must regard any participation or opposition activity as protected conduct, even where the employee opposes an action that is perfectly lawful or conducts the opposition in a disruptive manner.<sup>233</sup> Once an employee engages in protected conduct, the retaliatory harassment cause of action forces the employer to monitor and regulate any subsequent offensive treatment that employee encounters. Specifically, when HWE law is applied under the main discrimination provision, an employer at least knows that it has to ferret out offensive behavior that is sexually, racially, nationally or religiously themed.<sup>234</sup> Such behavior is not too difficult to spot. For example, sex-based HWE harassment may involve unwelcome remarks about a

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<sup>231</sup> See *supra* Part III.B.

<sup>232</sup> See *supra* Part IV.A.1-2.

<sup>233</sup> See *supra* Part IV.A.1.

<sup>234</sup> See *supra* notes 16-17 and accompanying text (explaining that section 703(a) only applies to discriminatory practices that are based on protected characteristics); see also *supra* notes 59-60 and accompanying text (explaining the Supreme Court's decision in *Oncale*, which held section 703(a)'s "because of" requirement safeguards against courts' use of this section to impose a "general civility code").

plaintiff's anatomy, sexually explicit jokes and photographs, or sexist comments.<sup>235</sup> Likewise race-based harassment may involve making negative statements about a particular race or giving one race preferential treatment.<sup>236</sup>

However, when HWE law is applied in the retaliation context, an employer is liable for offensive conduct that may or may not involve a retaliatory theme.<sup>237</sup> For example, an employee may bring a retaliatory harassment claim if her employer transfers her from a "brightly lit office to a dingy closet," gives her a bad reference or performance review, or denies her a raise after she has engaged in protected expression.<sup>238</sup> In such a case, the employer's conduct does not reference the plaintiff's protected expression and could be based on legitimate business reasons. Further, according to *Burlington Northern*, the retaliatory harassment does not even need to be employment related.<sup>239</sup> Thus, in holding that an adverse employment action is motivated by retaliation, courts often rely on inferences.

The First Circuit acknowledged this point in *Noviello v. City of Boston*.<sup>240</sup> The court stated that finding retaliatory intent in retaliatory harassment claims involves a "more nuanced" analysis than finding discrimination based on protected characteristics in HWE harassment claims.<sup>241</sup> The court explained: "When dealing with discriminatory harassment . . . there is seldom, if ever, a defensible purpose behind the injurious actions. The only question is whether the bad acts, taken in the aggregate, are sufficiently severe or pervasive to constitute actionable harassment."<sup>242</sup> By contrast, the First Circuit noted that actions perceived as retaliatory harassment can have numerous defensible purposes, such as co-workers' desires to defend the accused harasser.<sup>243</sup> Having to monitor any offensive behavior occurring after an employee engages in protected expression is particularly troublesome for the blue-collar

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<sup>235</sup> See, e.g., *supra* Part III (discussing various sexual harassment cases).

<sup>236</sup> See, e.g., *supra* Part III (discussing various race-based harassment cases).

<sup>237</sup> See *supra* Part VI.B.

<sup>238</sup> See *supra* notes 176-79 and accompanying text.

<sup>239</sup> *Burlington N. & Santa Fe Ry. v. White*, 126 S. Ct. 2405, 2414 (2006).

<sup>240</sup> 398 F.3d 76, 92-93 (1st Cir. 2005).

<sup>241</sup> *Id.* at 93.

<sup>242</sup> *Id.* at 92-93.

<sup>243</sup> *Id.* at 93. Unfortunately, the court's solution to this ambiguity was to delineate an ever more ambiguous list of factors that are supposed to inform the process of separating permissible responses to the plaintiff's protected activity from impermissible harassment. See *id.* The factors include "the relative ubiquity of the retaliatory conduct, its severity, its natural tendency to humiliate and, on occasion, physically threaten a reasonable person, and its capacity to interfere with the plaintiff's work performance." *Id.*

employer, whose workplace is permeated with vulgar expression.<sup>244</sup> Under the HWE standard, a blue-collar employer may not be able to use the nature of its work environment to prove that offensive expression following protected activity was typical rather than retaliatory.

Another ambiguity presented by the retaliatory harassment claim is whether an employer must judge sexually, racially or nationally themed retaliation from the viewpoint of a woman or minority rather than a reasonable person. This issue has not been addressed by the courts. In *Burlington Northern*, the Supreme Court stated that retaliation must be judged from the viewpoint of a “reasonable employee.” However, as Justice Alito pointed out in his concurring opinion, “[t]he majority’s conception of a reasonable worker is unclear. Although the majority first states that its test is whether a ‘reasonable worker’ might well be dissuaded, it later suggests that at least some individual characteristics of the actual retaliation victim must be taken into account.”<sup>245</sup>

Even if an employer spots conduct that looks like retaliation, it has to wonder whether the conduct is sufficiently severe and pervasive. Courts vary widely in their interpretations of this requirement under section 703(a), and it is not clear that decisions based on section 703(a) harassment are relevant in the section 704(a) context. It seems unreasonable to equate the effects of sexist or racist expression on particular employees to the effects of offensive expression on employees who previously complained about “unlawful conduct.” For example, in *Ray v. Henderson* the plaintiff’s supervisors called him “a ‘liar,’ a ‘troublemaker,’ and a ‘rabble rouser,’ and told him to ‘shut up’” after he complained about their treatment of female employees.<sup>246</sup> In applying the HWE harassment case law to determine whether the plaintiff’s supervisors engaged in sufficiently severe retaliatory harassment, the Ninth Circuit noted that “[r]epeated derogatory or humiliating statements

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<sup>244</sup> *Gross v. Burggraff*, 53 F.3d 1531, 1537-38 (10th Cir. 1995).

<sup>245</sup> *Burlington*, 126 S. Ct. at 2421 (Alito, J., concurring). Justice Alito further explains:

The majority comments that “the significance of any given act of retaliation will often depend upon the particular circumstances,” and provides the following illustration: “A schedule change in an employee’s work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children.”

This illustration suggests that the majority’s test is not whether an act of retaliation well might dissuade the average reasonable worker, putting aside all individual characteristics of the actual victim. The majority’s illustration introduces three individual characteristics: age, gender, and family responsibilities. How many more individual characteristics a court or jury may or must consider is unclear.

*Id.*<sup>246</sup> 217 F.3d 1234, 1245 (9th Cir. 2000).

. . . can constitute a [HWE].”<sup>247</sup> To support that proposition, the Court cited to a section 703(a) decision that found a HWE where “one supervisor ‘repeatedly engaged in vulgarities, made sexual remarks, and requested sexual favors’ while another supervisor ‘frequently witnessed, laughed at, or herself made these types of comments.’”<sup>248</sup> The court analogized the sexually vulgar remarks to the name-calling experienced by the plaintiff in *Ray*, concluding that both types of derogatory statements could constitute sufficiently severe harassment.<sup>249</sup> The court then reversed the lower court’s summary judgment order in the defendant’s favor.<sup>250</sup>

The Ninth Circuit assumed that sexual vulgarities are analogous to name-calling, such that both are subject to the same threshold of “severity.” However, this assumption contradicts Title VII’s main purpose, which lies in the recognition that a limited group of minorities require extra protection from workplace discrimination.<sup>251</sup> Title VII acknowledges that such minorities have historically experienced adverse treatment based on their characteristics that has made them sensitive to certain conduct.<sup>252</sup> The supervisor’s sexually vulgar comments were severe to that plaintiff because, as a woman, she has a “greater physical and social vulnerability to sexual coercion . . . [that can make her] wary of sexual encounters.”<sup>253</sup> However, the plaintiff in *Ray* was offended by his supervisor’s comments simply because they were rude, not because they reinforced a historical bias that he suffered through. The plaintiff in *Ray* was not particularly sensitive to his supervisor’s name-calling, so it is incorrect to posit that the names affected him in the same way that the sexual vulgarities affected the woman.

#### *B. Retaliatory Harassment Claims Allow Plaintiffs to Bypass HWE Requirements*

The retaliatory harassment claim makes it possible for a plaintiff with a weak HWE claim to bypass the HWE harassment affirmative defense, causation requirement, and “severe and pervasive” harassment threshold. Once a plaintiff files suit under section 704(a), she attains the status of “protected employee.”<sup>254</sup> She can then bring a retaliatory harassment claim against her employer for subsequent, offensive

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<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* at 1246.

<sup>251</sup> *See supra* Part II.

<sup>252</sup> *See supra* note 16 and accompanying text.

<sup>253</sup> *Ellison v. Brady*, 924 F.2d 872, 879 n.9 (9th Cir. 1991).

<sup>254</sup> *See supra* Part IV.A.1.

treatment she experiences from her supervisor or co-workers. The employer may not be able to assert the *Ellerth/Faragher* defense in response to a retaliatory harassment claim because some courts recognizing retaliatory harassment do not discuss the availability of the affirmative defense.<sup>255</sup> Even if the defense is available, the First Amendment may restrict an employer from regulating retaliatory expression that is not facially discriminatory.<sup>256</sup>

Also, even if the employer successfully pleads the affirmative defense proving that it exercised reasonable measures to prevent or correct the HWE, the employee may still recover damages by showing that the employer failed to prevent and correct subsequent negative treatment that may be regarded as retaliation. For example, in *Nye v. Roberts*, the plaintiff, a school psychologist, complained to the school board that the principal had sexually harassed her.<sup>257</sup> The school board investigated her complaint, transferred her to a different school district at her request, and ordered the principal to take a sexual harassment seminar.<sup>258</sup> Nevertheless, the plaintiff filed a HWE harassment claim against her employer based on the principal's alleged conduct and she also notified the EEOC that the principal had allegedly harassed her co-worker.<sup>259</sup> The plaintiff's co-worker denied she was ever harassed and expressed her anger with the plaintiff in an affidavit.<sup>260</sup> Consequently, the plaintiff's supervisor wrote her a letter of reprimand, criticizing her for filing a fraudulent complaint on behalf of a co-worker who denied all allegations asserted therein and for treating other co-workers poorly.<sup>261</sup>

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<sup>255</sup> See, e.g., *Von Gunten v. Maryland*, 243 F.3d 858, 865 (4th Cir. 2001) (applying various aspects of HWE law to retaliatory harassment claim but omitting the affirmative defense); see also *Ray v. Henderson*, 217 F.3d 1234, 1245 (9th Cir. 2000). But see *Noviello v. City of Boston*, 398 F.3d 76, 94-95 (1st Cir. 2005) (holding that employer may raise the *Ellerth* affirmative defense in supervisor retaliatory harassment claims); *Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 792 (6th Cir. 2000).

<sup>256</sup> See generally Bernstein, *supra* note 72; Volokh, *supra* note 83; Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict*, 85 GEO. L.J. 627, 627-33 (1997). Professors Bernstein and Volokh provide compelling analyses of the conflict between HWE harassment law and the First Amendment. They argue that HWE law is often unconstitutional, as applied, because it restricts protected workplace expression. Although these articles discuss HWE law, they provide analyses that are easily transferable to, and even more compelling in, the retaliatory harassment context. A retaliatory harassment claim is a bigger threat to an employee's First Amendment liberty than a HWE claim, because the former prohibits an unrestricted spectrum of expression.

<sup>257</sup> 145 F. App'x 1, 2 (4th Cir. 2005).

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at 3.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*



The plaintiff responded by filing a retaliation claim against her employer based on her supervisor's letter.<sup>262</sup> The Fourth Circuit upheld a summary judgment in the defendant's favor on the plaintiff's HWE claim, because the principal did not possess enough authority over the plaintiff to impute his actions to the employer and the employer acted reasonably to prevent and correct the alleged harassment.<sup>263</sup> However, the Fourth Circuit held that the employer could be liable for the supervisor's letter of reprimand and that the letter arguably contains direct evidence of retaliatory animus, because it criticizes the plaintiff for filing a fraudulent HWE harassment complaint on behalf of a co-worker.<sup>264</sup> Accordingly, the court reversed the lower court's summary judgment order on the plaintiff's retaliation claim, allowing it to go to trial.<sup>265</sup>

The retaliatory harassment claim may also allow an employee to bypass the "because of" and "severe and pervasive" requirements. For example, in *Clark County v. Breeden*, the plaintiff brought a meritless sexual harassment complaint against her employer based on her co-workers' sexually themed discussion that was not directed at her or intended to derogate any woman.<sup>266</sup> Even though the court dismissed her claim, she subsequently sued her employer for retaliation when she was transferred to a position she did not like.<sup>267</sup> The Ninth Circuit held that even though her HWE claim lacked merit, she had a cognizable retaliation claim.<sup>268</sup> Ultimately, the Supreme Court overruled that decision.<sup>269</sup>

As explained in subsection (a), a retaliatory harassment claim is not limited by a "because of" requirement that narrows the scope of actionable expression.<sup>270</sup> Therefore, the fact finder is free to scrutinize any and all offensive behavior the plaintiff encounters after engaging in protected activity. Even behavior that is not related to the plaintiff's employment is subject to scrutiny. The larger volume of evidence makes a finding of "severe and pervasive" harassment more likely.<sup>271</sup> Also,

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<sup>262</sup> *Id.* at 4.

<sup>263</sup> *Id.* at 5.

<sup>264</sup> *Id.* at 6-7.

<sup>265</sup> *Id.* at 7.

<sup>266</sup> 532 U.S. 268, 269 (2001).

<sup>267</sup> *Breeden v. Clark County Sch. Dist.*, No. 97-365, 1999 U.S. Dist. LEXIS 22975, at \*3-5 (D. Nev. Feb. 10, 1999).

<sup>268</sup> *Breeden v. Clark County Sch. Dist.*, No. 99-15522, 2000 U.S. App. LEXIS 17564, at \*10 (9th Cir. July 19, 2000), *rev'd*, 532 U.S. 268 (2001).

<sup>269</sup> *Breeden*, 532 U.S. at 270-71.

<sup>270</sup> *See supra* Part VI.A.

<sup>271</sup> Courts examine the totality of circumstances in deciding whether the alleged HWE or retaliatory harassment meets the "severe and pervasive" threshold. *See, e.g., Von*

broad-view courts apply HWE law's "sufficiently severe and pervasive" threshold in the context of a general policy that any adverse employment decision is actionable retaliation if it is likely to discourage an employee from participating in protected activity.<sup>272</sup>

Recently, the Supreme Court adopted this policy in *Burlington Northern*. Neither the Supreme Court nor the broad-view courts have clarified the relationship between these two standards. At least one commentator argues that the "severe and pervasive" requirement must be interpreted with greater laxity in the retaliatory harassment context, because offensive behavior does not have to be so severe as to discourage an employee from engaging in protected activity.<sup>273</sup> To the extent that courts allow this view to color their decisions, a litigant can utilize a retaliatory harassment claim to bypass HWE law's more stringent "severe and pervasive" harassment threshold.

*C. Courts Must Adopt a Clearer Standard for Adjudicating Retaliatory Harassment Claims to Ease Employer Confusion*

The practice of importing HWE harassment law into the retaliatory harassment claim makes it virtually impossible for employers to assess and prevent liability. This practice piles circuit splits on top of circuit splits. Courts should enable employers to assert the *Ellerth/Faragher* affirmative defense to retaliatory harassment claims by providing clear guidance on what constitutes protected conduct, an adverse employment action and sufficient causation between the two. Narrow-view circuits that must now recognize retaliatory harassment claims should formulate a clearer retaliatory harassment standard rather than adopt the broad-view and moderate-view circuits' approach.

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*Gunten v. Maryland*, 243 F.3d 858, 870 (4th Cir. 2001) (applying HWE standard to retaliatory harassment claim and analyzing the totality of offensive behavior thereunder). Also, Wise explains that retaliatory harassment claims are easier to prove than HWE claims because the fact finder is more likely to believe that an employer punished its employee for filing a complaint against it than that an employer discriminated against its employee because of her sex, race, religion or national origin. See WISE, *supra* note 120, at 27.

<sup>272</sup> See *supra* Parts IV.A.3.ii, V.B.

<sup>273</sup> Joel A. Kravetz, *Deterrence v. Material Harm: Finding the Appropriate Standard to Define an "Adverse Action" in Retaliation Claims Brought Under the Applicable Equal Employment Opportunity Statutes*, 4 U. PA. J. LAB. & EMP. L. 315, 369-71 (2002).