St. John's Law Review

Volume 96, 2022, Number 3 Article 5

"You Don't Bring Me Flowers Anymore": President Clinton, Paula Jones, and Why Courts Should Expand the Definition of "Adverse Employment Action" Under Title VII's Anti-Retaliation Provision

Lawrence Rosenthal

"YOU DON'T BRING ME FLOWERS ANYMORE"[1]

PRESIDENT CLINTON, PAULA JONES, AND WHY COURTS SHOULD EXPAND THE DEFINITION OF "ADVERSE EMPLOYMENT ACTION"[2] UNDER TITLE VII'S ANTI-RETALIATION PROVISION

LAWRENCE ROSENTHAL[†]

I. INTRODUCTION

Anti-discrimination statutes such as Title VII of the Civil Rights Act of 1964 ("Title VII"), the Americans with Disabilities Act ("ADA"), and the Age Discrimination in Employment Act ("ADEA") prohibit discrimination based on individuals' protected characteristics.[3] In addition to prohibiting this type of status-based discrimination, these statutes also prohibit employers from

[†] Associate Dean for Academics and Professor of Legal Writing, Northern Kentucky University—Salmon P. Chase College of Law; J.D., Vanderbilt University Law School; LL.M., Georgetown University Law Center. The author would like to thank his research assistant, Ms. Sarah Benedict, for all of the assistance she provided during the writing of this Article.

[1] The title of this Article is taken from the final line of Neil Diamond and Barbara Streisand's 1978 hit song, "You Don't Bring Me Flowers." The song is relevant because during Paula Jones's lawsuit against then-President Clinton, Ms. Jones alleged one way in which she was discriminated against for rejecting then-Governor Clinton's sexual advances was by not receiving flowers on Secretary's Day. Jones v. Clinton, 990 F. Supp. 657, 665 (E.D. Ark. 1998).

[2] The term "adverse *employment* action" is somewhat of a misnomer. In *Burlington Northern & Santa Fe Railway Co. v. White*, the Supreme Court of the United States held an employer's retaliatory action does *not* have to be employment-related to be actionable. 548 U.S. 53, 63–64 (2006).

[3] *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (prohibiting discrimination based on race, color, religion, sex, and national origin); Americans with Disabilities Act, 42 U.S.C. § 12112(a) (prohibiting discrimination based on disability); Age Discrimination in Employment Act, 29 U.S.C. §§ 623(a)–(b) (prohibiting discrimination based on age).

retaliating against employees who assert their rights under the statutes or who assist others in asserting their rights.[4]

Over the past several years, retaliation charges filed with the Equal Employment Opportunity Commission ("EEOC") have made up an increasingly high percentage of all charges filed with the agency.[5] Specifically, in 2020, retaliation charges accounted for 55.8% of the charges filed with the EEOC.[6] Ten years earlier, only 36.3% of the charges alleged retaliation,[7] and ten years before that, only 27.1% of the charges alleged retaliation.[8] The Supreme Court noted this increase in retaliation charges in *University of Texas Southwestern Medical Center v. Nassar*,[9] where the Court observed the following:

> [C]laims of retaliation are being made with ever-increasing frequency. The number of these claims filed with the Equal Employment Opportunity Commission (EEOC) has nearly doubled in the past 15 years—from just over 16,000 in 1997 to over 31,000 in 2012. Indeed, the number of retaliation claims filed with the EEOC has now outstripped those for every type of status-based discrimination except race.[10]

Although the Court in *Nassar* intimated this increase might be the result of frivolous claims,[11] the numbers demonstrate that, even if there are some frivolous retaliation claims, retaliation—or at least the perception of it—is still an important issue for American workers.[12]

---

[4] *See* 42 U.S.C. § 2000e-3(a); 42 U.S.C. § 12203(a); 29 U.S.C. § 623(d). The Family and Medical Leave Act ("FMLA") contains a similar provision. *See* 29 U.S.C. § 2615.

[5] *See Charge Statistics (Charges Filed with EEOC) FY 1997 Through FY 1997 Through FY 2021*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/statistics/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2021 [https://perma.cc/3LR9-HTBM] (last visited Feb. 12, 2023).

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] 570 U.S. 338, 358 (2013).

[10] *Id.* (citation omitted). As noted earlier, claims of retaliation now outnumber claims of status-based discrimination. *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 5.

[11] 570 U.S. at 358. Specifically, the Court stated, "In addition lessening the causation standard could also contribute to the filing of frivolous claims, which would siphon resources from efforts by employer, administrative agencies, and courts to combat workplace harassment." *Id.*

[12] There is some support for the Court's concern over frivolous retaliation claims. Specifically, among the thousands of retaliation charges filed with the EEOC, in every year since 2010, the EEOC found reasonable cause in only single-digit

To establish a prima facie case of retaliation, a plaintiff must prove that (1) she engaged in "protected activity"; (2) she suffered "an adverse employment action";[13] and (3) there was "a causal connection between the protected activity and the adverse . . . action."[14] This Article will focus on the second element—the adverse action. Specifically, this Article will address how "adverse" an employer's retaliatory action must be for a plaintiff to establish this element of her prima facie case. This Article will suggest an alternative approach that courts can utilize when analyzing this issue.

In 2006, the Supreme Court addressed adverse actions under Title VII and reached two conclusions.[15] First, the Court concluded that adverse actions do *not* need to be related to the terms, conditions, or privileges of employment.[16] Second, and more relevant to this Article, the Court concluded that, when determining how adverse the employer's actions must be to be actionable, the test is an *objective* one: were the employer's actions serious enough such that they "could well dissuade a reasonable" employee in the plaintiff's position from engaging in the protected conduct?[17] If the answer was "yes," then the plaintiff could establish the adverse action element of her prima facie case; if the answer was "no," then the plaintiff could not establish this element of her prima facie case.[18]

Although objective tests similar to the one articulated in *Burlington Northern* provide consistency and protect employers from overly-sensitive employees, this objective test has resulted in numerous summary judgments in favor of employers, with district courts not even allowing a jury to determine whether a reasonable person in the plaintiff's position could well have been

---

percentages of those charges. *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 5.

[13] *See* discussion *supra* note 2. I will no longer use the term "adverse *employment* actions"; instead, I will use the term "adverse actions."

[14] *See, e.g.*, Kwan v. Andalex Grp. LLC., 737 F.3d 834, 844 (2d Cir. 2013) (quoting Jute v. Hamilton Sundstrand Corp., 420 F.3d 166, 173 (2d Cir. 2005)); Noviello v. City of Boston, 398 F.3d 76, 88 (1st Cir. 2005). Some courts list a fourth element–employer knowledge of the protected activity. *See, e.g.*, *Kwan*, 737 F.3d at 844. Although not all courts list this as a separate element, employer knowledge is critical; if an employer has no knowledge of protected activity, the employer cannot have a retaliatory motive.

[15] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 57 (2006).

[16] *Id.*

[17] *Id.*

[18] *Id.*

dissuaded from engaging in the protected activity.[19] So, while the first issue the Court decided in *Burlington Northern* has assisted some plaintiffs in pursuing retaliation claims, the second issue the Court decided in that opinion has hurt many plaintiffs and has resulted in many courts rejecting plaintiffs' claims, even when these plaintiffs have alleged adverse actions a jury could conclude were sufficiently adverse.[20] This Article proposes that courts, when deciding whether an adverse action is actionable, should use a *subjective* test at the prima facie case stage and factor the "adverseness" of the action at the *damages* stage. This approach is consistent with Title VII's language; it is consistent with Supreme Court pronouncements regarding the plaintiff's low burden for establishing a prima facie case;[21] it will not result in a landslide of retaliation plaintiff victories;[22] it furthers antiretaliation provisions' goals of eliminating employer retaliation;[23] and, in cases where the employers' retaliatory acts are relatively minor, the proposal will not financially burden employers in a significant way.[24]

Part II of this Article will address (1) Title VII's prohibitions against discrimination and retaliation, with a discussion of the difference between the two provisions' language, and (2) the burden-shifting paradigm courts use when analyzing retaliation cases.[25] Part III will analyze *Burlington Northern*, where the Court decided which types of employer actions are actionable.[26] Part IV will provide examples of appellate courts' decisions affirming lower courts' summary judgments in favor of employers and concluding that there was not even a jury question regarding whether the employers' conduct was sufficiently adverse.[27] Finally, Part V will explain why courts should utilize a subjective test—rather than objective one—when analyzing whether an employer's conduct is sufficiently adverse to be actionable.[28]

---

[19] *See infra* Part IV.
[20] *See infra* Part IV.
[21] *See infra* Section V.B.
[22] *See infra* Section V.C.
[23] *See infra* Section V.D.
[24] *See infra* Section V.E.
[25] *See infra* Part II.
[26] *See infra* Part III. This part will also briefly discuss the litigation involving former President Clinton and Paula Jones, where the district court granted the former president's motion for summary judgment. *See* Jones v. Clinton, 990 F. Supp. 657, 662 (E.D. Ark. 1998).
[27] *See infra* Part IV.
[28] *See infra* Part V.

Because statutory language is the first place to look when analyzing a statute,[29] this Article will now address Title VII's relevant language.

II. TITLE VII'S PROHIBITIONS AGAINST DISCRIMINATION AND RETALIATION AND TITLE VII'S RETALIATION BURDEN-SHIFTING PARADIGM

Title VII prohibits employment discrimination based on race, color, religion, sex, and national origin.[30] Specifically, Title VII's relevant provisions state the following:

> It shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[31]

As is clear from the language, both provisions focus on aspects of *employment*.[32] This is not the case with Title VII's antiretaliation provision, which states:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.[33]

Unlike the prohibitions against discrimination, the prohibition against retaliation does not refer to compensation or

---

[29] Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997).
[30] 42 U.S.C. § 2000e-2(a).
[31] *Id.*
[32] *See id.*
[33] 42 U.S.C. § 2000e-3(a).

to other terms, conditions, or privileges of employment; it simply prohibits employers from "discriminat[ing] against" individuals who have opposed unlawful employment practices or who have participated in the Title VII process.[34] Before *Burlington Northern*, courts struggled with this difference and reached different conclusions regarding which retaliatory actions can form the basis of a Title VII retaliation complaint.[35] As a result of these different conclusions, the Supreme Court granted certiorari in *Burlington Northern* and attempted to resolve the issue.[36] However, before fully addressing *Burlington Northern* in Part III of this Article, it is important to discuss the burden-shifting paradigm courts apply to these retaliation cases.

Title VII retaliation cases follow the *McDonnell Douglas* burden-shifting paradigm.[37] Under this paradigm, the plaintiff must first establish a prima facie case.[38] As noted earlier, to do so, the plaintiff must prove that she engaged in protected activity, she suffered an adverse action, and there was a causal connection between the protected activity and the adverse action.[39]

If the plaintiff can establish a prima facie case, then the employer must articulate a legitimate, non-retaliatory reason for the adverse action.[40] Finally, once the employer meets this burden of production, the burden switches back to the plaintiff to demonstrate that the employer's articulated reason for the adverse action is pretextual, and that the plaintiff's protected activity was the but-for cause of the adverse action.[41] As will be addressed later, many plaintiffs are unable to establish a prima facie case—even though this is not supposed to be an onerous burden[42]—because courts are applying *Burlington Northern* in a restrictive manner.[43] And, as will be argued, one solution to this problem is to allow an employee's subjective belief as to whether

---

[34] *Id.*
[35] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 60–61 (2006).
[36] *Id.*
[37] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–04 (1973).
[38] *Id.* at 802.
[39] *See supra* note 14.
[40] *McDonnell Douglas*, 411 U.S. at 802.
[41] *Id.* at 804–05; Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 362 (2013).
[42] Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 253 (1981).
[43] *See infra* Part IV.

she suffered an adverse action to be sufficient to establish that element of the prima facie case.[44]

This proposed solution is consistent with Title VII's language;[45] it is consistent with pronouncements from the Supreme Court regarding a plaintiff's relatively low burden for establishing a prima facie case;[46] it will not result in retaliation cases becoming too easy for plaintiffs to win;[47] it is consistent with Title VII's antiretaliation provision's purpose of eliminating retaliation;[48] and it will not result in substantial negative financial consequences for employers who engage in "minor" acts of retaliatory conduct.[49] As a result, and as will be discussed in Part V of this Article, the subjective test is the better approach to take when addressing whether a retaliation plaintiff can establish her prima facie case. Before addressing that proposal, however, a thorough discussion of *Burlington Northern* and subsequent case law is necessary.

III. THE SUPREME COURT'S OPINION IN *BURLINGTON NORTHERN* (BUT FIRST, A BRIEF DISCUSSION OF *JONES V. CLINTON*)[50]

Prior to *Burlington Northern*, there was uncertainty regarding what type of employer retaliatory actions were actionable.[51] Eventually, the Supreme Court decided *Burlington Northern*,[52] and in that case, the Court addressed two questions regarding adverse actions.[53] First, the Court addressed whether an employer's retaliatory action needed to be related to the terms, conditions, or privileges of employment.[54] Second, the Court addressed how adverse an employer's action must be to be actionable.[55] Before addressing the Supreme Court's conclusions in *Burlington Northern*,[56] this Article will discuss the district court's opinion granting summary judgment in the case involving

---

[44] *See infra* Part V.
[45] *See infra* Section V.A.
[46] *See infra* Section V.B.
[47] *See infra* Section V.C.
[48] *See infra* Section V.D.
[49] *See infra* Section V.E.
[50] Jones v. Clinton, 990 F. Supp. 657 (E.D. Ark. 1998).
[51] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 57 (2006).
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *See infra* Section III.B.

former President William Clinton.[57] This opinion is important because it provides some insight into which types of employer actions can support a cause of action, and which types of employer actions cannot.

A. Jones v. Clinton and Its Connection to Adverse Actions

One scandal that hovered over President Clinton during his presidency was the Paula Jones litigation; Ms. Jones alleged that the then-Governor Clinton propositioned her in a Little Rock hotel.[58] Ms. Jones also alleged that, in retaliation for her rejection of the then-governor's advances, she was the victim of quid pro quo sexual harassment.[59] One of the alleged retaliatory acts about which Ms. Jones complained was that, after the hotel "incident," she did not receive flowers on Secretary's Day, while all other female office workers received flowers.[60] As a result of the hotel incident and the subsequent "adverse actions" she

---

[57] *See infra* Section III.A.

[58] Jones v. Clinton, 990 F. Supp. 657, 663–64 (E.D. Ark. 1998). In addition to placing President Clinton in a negative light due to the salaciousness of the details of the incident involving Ms. Jones, it was this litigation that led to the revelations regarding Monica Lewinsky. *See President Clinton Impeached*, HIST. (Dec. 15, 2021), https://www.history.com/this-day-in-history/president-clinton-impeached [https://perma.cc/DQ3E-E3DN]. As a result of the Lewinsky revelations and the President's conduct in response to them, President Clinton was impeached. *Id.*

[59] *Jones*, 990 F. Supp. at 669. This opinion was written prior to the Supreme Court's opinions in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), in which the Court minimized the importance of the terminology distinction between hostile environment harassment and quid pro quo harassment. The Court's new approach focused on whether the plaintiff experienced a "tangible employment action"; if there was a tangible employment action, the employer faced automatic liability; if there was no tangible employment action, the employer was entitled to utilize a two-pronged affirmative defense. *Faragher*, 524 U.S. at 807–08; *Ellerth*, 524 U.S. at 764–65. Because the term "tangible employment action" was similar to the term "adverse employment action," many courts used the terms interchangeably and applied the same standard to both. In fact, the district court in *Jones v. Clinton* acknowledged the similarity between the two terms. 990 F. Supp. at 679 n.15. The court stated the following:

> The concept of "tangible job detriment" as used in *quid pro quo* cases and the concept of "adverse employment action" as used in retaliation cases both derive from the basic prohibition of employment discrimination set forth in [Title VII] and thus correspond to one another. Accordingly, this Court has looked to cases discussing both concepts in addressing the issues in this case.

Id. (citations omitted).

[60] *Jones*, 990 F. Supp. at 665.

experienced, Ms. Jones sued then-President Clinton under Section 1983.[61]

Eventually, the court granted then-President Clinton's motion for summary judgment.[62] Although the President and his allies claimed vindication, the court did not conclude Ms. Jones's allegations were untrue; it simply decided that the acts allegedly committed in response to Ms. Jones's rebuff of then-Governor Clinton's advances were not sufficiently adverse for Ms. Jones to pursue her claim.[63] In reaching its conclusion, the court addressed how severe the retaliatory conduct needed to be in order to be actionable under the quid pro quo theory of sex discrimination.[64] The court applied then-current Title VII principles and stated the following:

> Although it is not clear why plaintiff failed to receive flowers on Secretary's Day in 1992, such an omission does not give rise to a federal cause of action in the absence of evidence of some more tangible change in duties or working conditions that constitute a material employment disadvantage.[65]

In wrapping up this issue, Judge Webber Wright stated:

> In sum, the Court finds that a showing of a tangible job detriment or adverse employment action is an essential element of plaintiff's § 1983 *quid pro quo* sexual harassment claim and that plaintiff has not demonstrated any tangible job detriment or adverse employment action for her refusal to submit to the

---

[61] There are some differences between Ms. Jones's lawsuit and a "pure" Title VII retaliation claim. Specifically, (1) Ms. Jones brought her action under 42 U.S.C. § 1983, not under Title VII; and (2) Ms. Jones alleged that the flowers incident was part of her quid pro quo sexual harassment claim, not a specific act of retaliation under Title VII's antiretaliation provision. *See Jones*, 990 F. Supp. at 666–69, 674.

[62] *Id.* at 662.

[63] *Id.* at 674.

[64] *Id.* at 671–74.

[65] *Id.* at 674. Ms. Jones also complained she was isolated physically; she was made to sit in a location from which she was constantly watched; and she was not given work to complete. *Id.* at 673. The court rejected these claims as well, stating,

> Plaintiff may well have perceived hostility and animus on the part of her supervisors, but these perceptions are merely conclusory in nature and do not, without more, constitute a tangible job detriment. Absent evidence of some more tangible change in duties or working conditions that constitute a material employment disadvantage, of which the Court has already determined does not exist, general allegations of hostility and personal animus are not sufficient to demonstrate any adverse employment action that constitutes the sort of ultimate decision intended to be actionable under Title VII.

Id. (footnote omitted).

> Governor's alleged advances. The President is therefore entitled to summary judgment on plaintiff's claim of *quid pro quo* sexual harassment.[66]

As noted earlier, this case is not a perfect fit with this Article because it was not brought under Title VII's antiretaliation provision; nonetheless, it provides a good example of how courts have distinguished between employer actions with significant negative ramifications for the employee (which are actionable) and those with insignificant negative ramifications, which are not.[67] And several years after the Clinton case, the Supreme Court provided more clarity regarding this issue when it decided which employer actions can support a Title VII retaliation claim when it decided *Burlington Northern*.[68]

B. The Supreme Court's Opinion in Burlington Northern[69]

After courts had been reaching different conclusions regarding the "adverse action" element of a prima facie case of retaliation, the Supreme Court decided *Burlington Northern*.[70] The Court held that an employer's retaliatory action does not have to be connected to the employee's terms, conditions, or privileges of employment,[71] but the action must be sufficiently adverse such that it "could well dissuade" a reasonable employee in the plaintiff's position from engaging in protected conduct.[72]

The plaintiff in *Burlington Northern* was hired as a "track laborer" but was eventually moved to a more desirable forklift operator position.[73] Although she continued to perform track laborer duties (which were less desirable), the plaintiff's primary job was that of a forklift operator.[74] She eventually complained about sexual harassment, and soon thereafter, the employer assigned her the less desirable track laborer tasks.[75]

The plaintiff filed a charge with the EEOC, alleging gender discrimination and retaliation.[76] Part of her retaliation claim

---

[66] *Id.* at 674.
[67] *Id.* at 671–76.
[68] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006).
[69] *See id.*
[70] *Id.* at 57.
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.* at 58.
[76] *Id.*

involved allegations that the employer "placed her under surveillance and was monitoring her daily activities."[77] Then, after another dispute, the plaintiff was suspended without pay for over one month, which resulted in another allegation of retaliation.[78]

The Court addressed the following two issues: (1) whether an employer's retaliatory actions had to be work-related to be actionable, and (2) how adverse an employer's allegedly retaliatory actions must be to be actionable.[79] The Court concluded that an employer's retaliatory action did not need to be work-related, but that the action must be "materially adverse to a reasonable employee or job applicant."[80] Elaborating on the second point, the Court stated that the employer's actions "must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination."[81]

The focus of this Article will be on the second issue—how adverse the employer's retaliatory conduct must be to be actionable.[82] The Court wasted little time before reaching its answer to that question:

> We agree with the formulation set forth by the Seventh and the District of Columbia Circuits. In our view, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, "which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.' "[83]

The Court adopted this material adversity/reasonable worker standard for a few reasons.[84] First, according to the Court, Title VII was not meant to cover "trivial harms."[85] The

---

[77] *Id.*

[78] *Id.* at 58–59.

[79] *Id.* at 61.

[80] *Id.* at 57.

[81] *Id.*

[82] With respect to the first issue, the Court concluded an employer's retaliatory action does *not* need to affect the terms, conditions, or privileges of employment. *Id.* at 67. The Court reached this conclusion based upon (1) the difference in the language between Title VII's prohibition against discrimination and its prohibition against retaliation, and (2) the difference between the two provisions' purposes. *Id.* at 61–67.

[83] *Id.* at 67–68 (quoting Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).

[84] *Id.* at 68–70.

[85] *Id.* at 68.

Court relied on its often-quoted statement from *Oncale v. Sundowner Offshore Services, Inc.*[86] that Title VII was not intended to be a "general civility code for the American workplace,"[87] and that "petty slights" and "minor annoyances" do not fall within Title VII's reach.[88] Second, the Court utilized the reasonable worker standard because that standard "is judicially administrable," and it "avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings."[89]

The Court acknowledged that, because the same employer conduct could have different effects on different employees, the objective test should evaluate the circumstances of each individual plaintiff's particular case.[90] For example, the Court noted that, while a shift-change for one employee could be a very minor issue, the same action could have serious negative ramifications for a different employee.[91] Because of this, the Court clarified that, when using the objective standard, the jury must look at the adverse action from the "perspective of a reasonable person *in the plaintiff's position*."[92] Applying this standard, the Court concluded that there was sufficient evidence to support the jury's conclusion that the plaintiff's reassignment and suspension were sufficiently adverse to be actionable.[93]

After *Burlington Northern*, the following points were clear: (1) determining whether retaliatory conduct was sufficiently adverse to be actionable should be measured using an objective standard;[94] (2) such determinations are made on a case-by-case basis;[95] and (3) the standard is whether the employer's action "could well dissuade" a reasonable employee in the plaintiff's position from engaging in protected activity.[96] Although *Burlington Northern* did broaden Title VII's protections in some

---

[86] 523 U.S. 75, 80 (1997).
[87] *Burlington N.*, 548 U.S. at 68.
[88] *Id.*
[89] *Id.* at 68–69.
[90] *Id.* at 69.
[91] *Id.*
[92] *Id.* at 69–70 (emphasis added).
[93] *Id.* at 70. The Court again addressed retaliation claims in *Thompson v. North American Stainless, LP*, 562 U.S. 170, 173–75 (2011), where the Court relied on *Burlington Northern* and concluded that third-party retaliation claims under Title VII were actionable under certain circumstances.
[94] *Burlington N.*, 548 U.S. 53, 68–69.
[95] *Id.* at 69.
[96] *Id.* at 57.

ways, as noted earlier, post-*Burlington Northern*, many district courts have taken the adverse action question away from the jury and have substituted their judgment for that of the jury.[97] Unfortunately for the plaintiffs, many courts of appeals have been agreeing with the district courts and affirming those summary judgments.[98] Several of those opinions from the United States Courts of Appeals will now be addressed.

IV. UNITED STATES COURTS OF APPEALS CASES WHERE THE COURT AFFIRMED SUMMARY JUDGMENT BECAUSE THERE WAS NO SUFFICIENTLY ADVERSE EMPLOYER CONDUCT

Despite the Supreme Court's assertions that Title VII's antiretaliation provision should be interpreted broadly[99] and that the provision's goal is to provide "unfettered access" to Title VII's remedial mechanisms,[100] plaintiffs are routinely failing to establish the "adverse action" element of the prima facie case and losing their cases at summary judgment.[101] This Part will discuss cases from each United States Court of Appeals in which the court decided not only that the plaintiff did not prove an adverse action, but also that the plaintiff could not even establish a genuine issue of fact regarding that issue.[102] This Part will clarify that, despite the Supreme Court's pronouncement that

---

[97] *See infra* Part IV.

[98] *See infra* Part IV.

[99] *Burlington N.*, 548 U.S. at 67.

[100] Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997).

[101] *See infra* Sections IV.A–C.

[102] Of course, in addition to the opinions from the United States Courts of Appeals, there are numerous cases from the United States District Courts that have addressed adverse actions and have determined the plaintiff was unable to establish this element of the prima facie case. *See, e.g.*, Ballinger v. Bd. of Educ. for Prince George's Cnty., No. GJH-15-3769, 2017 WL 6759379, at *6 (D. Md. Dec. 29, 2017) (deciding that a "Letter of Determination" finding fault in the plaintiff's actions was not an adverse action); Ballard v. Donahoe, No. 2:11-cv-2576, 2014 WL 1286193, at *17–18 (E.D. Cal. Mar. 27, 2014) (concluding that a letter of warning, several "investigative interviews," a threatened suspension, delayed consultations with the union, and denials of vacation and a schedule change were not actionable); Nagle v. RMA, The Risk Mgmt. Ass'n, 513 F. Supp. 2d 383, 386–87, 392–93 (E.D. Pa. 2007) (holding that a single meeting in which plaintiff was "harassed, insulted, or threatened with the loss of employment" was insufficient to show that working conditions were so intolerable as to force resignation); Smith v. Home Depot, Inc., No. 2:05CV2188LG, 2007 WL 4292572 at *7 (S.D. Miss. Dec. 5, 2007) (deciding that "being denied vacation, shift and schedule preferences, and being subjected to harassment," were "slights and minor annoyances" not actionable under Title VII). The rest of this Article will focus solely on cases from the United States Courts of Appeals.

establishing a prima facie case should not be an "onerous" burden,[103] numerous courts have held plaintiffs who are trying to establish their prima facie case to a high standard.

A. The United States Courts of Appeals for the First, Second, and Third Circuits

The First Circuit addressed this issue in *Bhatti v. Trustees of Boston University*,[104] where the plaintiff alleged that she experienced retaliation after accusing her employer of racial discrimination.[105] The plaintiff claimed that she received written reprimands because of her discrimination complaint.[106] The court did not address the protected activity or causal connection elements of the prima facie case, but rather it started with the adverse action element.[107] Citing *Burlington Northern*, the court stated that, to satisfy the adverse action element, the plaintiff needed to prove "her employer took some objectively and materially adverse action against her because she opposed a practice forbidden by Title VII."[108] The plaintiff argued that the reprimands were actionable, but the First Circuit disagreed.[109]

Although the court acknowledged that reprimands can qualify as adverse actions in some cases,[110] the reprimands in this case did not.[111] The court distinguished actionable reprimands from the ones in this case because the ones in this case did not result in "any tangible consequences," and the plaintiff's working conditions "were never altered."[112] Thus, the court concluded that the plaintiff failed to meet the *Burlington Northern* standard.[113] The court observed that, even if the warnings were not warranted, "a criticism that carries with it no consequences is not materially adverse and therefore not

---

[103] Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 253–54 (1981).
[104] Bhatti v. Trustees of Bos. Univ., 659 F.3d 64, 64, 69–70 (1st Cir. 2011).
[105] *Id.* at 73.
[106] *Id.*
[107] *Id.*
[108] *Id.* (citing Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 59, 68 (2006)).
[109] *Id.*
[110] *Id.* (citing Billings v. Town of Grafton, 515 F.3d 39, 54–55 (1st. Cir. 2008)).
[111] *Id.*
[112] *Id.*
[113] *Id.*

actionable."[114] The court thus affirmed summary judgment in favor of the employer.[115]

The Second Circuit has ruled on several occasions that a retaliation plaintiff did not meet the *Burlington Northern* standard and could not establish an adverse action.[116] One such case was *Tepperwien v. Entergy Nuclear Operations, Inc.*,[117] where the court concluded that none of the plaintiff's *nine* allegations of retaliation was an adverse action, nor was the cumulative effect of those actions.[118] The plaintiff claimed that his employer subjected him to the following retaliatory adverse actions: (1) three "fact-finding sessions," (2) counseling, (3) two threats of termination, (4) negative comments and a "stare" at a meeting, (5) being lured into the office on his day off under false pretenses, and (6) being transferred from the day shift to the night shift.[119] The Second Circuit agreed with the district court and concluded that these actions, both individually and collectively, did not reach the *Burlington Northern* standard for an actionable adverse action.[120]

The court relied extensively on *Burlington Northern*, emphasizing that adverse actions cannot be "trivial harms" or "those petty slights or minor annoyances that often take place at work and that all employees experience."[121] Quoting from the Supreme Court's opinion in *Oncale*,[122] the court reiterated that Title VII is not "a general civility code for the American workplace," and employees are expected to endure some negative

---

[114] *Id.*

[115] *Id.* at 73–74. There are several other cases in which the First Circuit concluded that a plaintiff failed to meet *Burlington Northern*'s standard. *See* Gomez-Perez v. Potter, 452 F. App'x 3, 8–9 (1st Cir. 2011) (relying on *Burlington Northern* and concluding plaintiff's allegations of "pre-disciplinary" meetings and co-worker harassment were not actionable adverse actions); Lockridge v. Univ. of Me. Sys., 597 F.3d 464, 472–73 (1st Cir. 2010) (relying on *Burlington Northern* and concluding that although an employer's denial of an employee's request for office space can qualify as an adverse employment action in some circumstances, that was not the case here because other employees' similar requests were also denied).

[116] *See infra* note 139.

[117] Tepperwien v. Entergy Nuclear Operations, Inc., 663 F.3d 556, 568 (2d Cir. 2011).

[118] *Id.* at 568–72.

[119] *Id.* at 568.

[120] *Id.* at 569–72.

[121] *Id.* at 568 (quoting Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006)).

[122] 523 U.S. 75 (1998).

workplace conditions.[123] Finally, before addressing each of the plaintiff's allegations, the court noted that the applicable test is an objective one—one that is "based on the reactions of a reasonable employee."[124]

As noted earlier, the plaintiff alleged nine acts of retaliation.[125] First, the court concluded that the "fact-finders" were not disciplinary in nature—as they were investigative—and did not qualify as adverse actions.[126] The court acknowledged that these investigations could have led to discipline, but there was no discipline in this case.[127] The court also noted that there was "good reason" for the fact-finders,[128] and these investigations thus did not meet the *Burlington Northern* standard.[129]

The court then addressed whether the counseling that the plaintiff received was materially adverse; for several reasons, the court concluded it was not.[130] First, the counseling was rescinded.[131] Second, because the counseling was not part of a disciplinary process, it did not satisfy the *Burlington Northern* standard.[132] Third, the court noted that, even if the counseling "rose to the level of some form of criticism," criticism does not qualify as an adverse action.[133] Finally, the court noted the counseling was not materially adverse because other employees were subjected to it as well.[134]

The court grouped the remaining actions together and concluded that they fell into the category of unactionable "trivial harms" and "petty slights or minor annoyances."[135] The court determined that unfulfilled verbal threats were not actionable; a negative comment and a "stare" were not actionable; the false reason by which the employer lured the plaintiff to the office on

---

[123] *Tepperwien*, 663 F.3d at 568 (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998)).

[124] *Id.* (citing *Burlington N.*, 548 U.S. at 69–70).

[125] *Id.* at 568–72.

[126] *Id.* at 569.

[127] *Id.*

[128] *Id.*

[129] *Id.* at 569–70.

[130] *Id.* at 570–71.

[131] *Id.* at 570.

[132] *Id.*

[133] *Id.* (citing Weeks v. N.Y. State Div. of Parole, 273 F.3d 76, 86 (2d Cir. 2001), *abrogated on other grounds by* Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002)).

[134] *Id.* at 570–71.

[135] *Id.* at 571.

his day off was not actionable; and a shift-change was not actionable because the plaintiff requested it.[136]

The court then looked at all of the actions taken together and concluded that they did not satisfy *Burlington Northern*'s standard.[137] The court stated:

> Viewing all of [these] actions in the aggregate, we conclude that a reasonable employee in [the plaintiff's] situation would not have been [dissuaded] from engaging in protected activities. Indeed, while the test is an objective one, it is relevant that [the plaintiff] himself was not deterred from complaining—he complained numerous times.[138]

The court thus affirmed summary judgment in favor of the employer—and seemed to penalize the employee for complaining about possibly unlawful, retaliatory conduct.[139]

The Third Circuit has also applied *Burlington Northern* and concluded that a plaintiff did not meet that standard.[140] In *DiCampli*, an FMLA plaintiff alleged that she was "offered" a transfer to another location after she returned from FMLA leave, but she turned down that opportunity due to "financial hardship."[141] Although the pay and benefits at the new location were the same as her then-current pay and benefits, the new position required a longer commute, which would have required the plaintiff to purchase a new vehicle.[142] Despite being

---

[136] *Id.* at 571–72.

[137] *Id.* at 572.

[138] *Id.*

[139] *See id.* There are several other cases in which the Second Circuit determined a retaliation plaintiff failed to establish an adverse action. *See* Sosa v. N.Y.C. Dep't of Educ., 819 F. App'x 30, 34 (2d Cir. 2020) (applying *Burlington Northern* to an FMLA case and concluding that a negative letter and a transfer to a different location were not actionable adverse actions); Nunez v. Lima, 762 F. App'x 65, 70 (2d Cir. 2019) (deciding that attempts to undermine the plaintiff's work performance did not qualify as adverse actions because there were no negative consequences to the plaintiff's employment status); Leifer v. N.Y. State Div. of Parole, 391 F. App'x 32, 35 (2d Cir. 2010) (finding that a verbal reprimand did not meet *Burlington Northern*'s standard); Warren v. N. Shore Univ. Hosp., 268 F. App'x 95, 98 (2d Cir. 2008) (determining that a delayed transfer, a delayed training opportunity, and evening shift assignments were not adverse actions); Chang v. Safe Horizons, 254 F. App'x 838, 839 (2d Cir. 2007) (deciding that oral and written reprimands do not qualify as adverse actions); Chamberlin v. Principi, 247 F. App'x 251, 255 (2d Cir. 2007) (deciding that an employer's failure to select the plaintiff for a volunteer opportunity was not actionable).

[140] DiCampli v. Korman Cmtys., 257 F. App'x 497, 501 (3d Cir. 2007).

[141] *Id.* at 499.

[142] *Id.*

encouraged to take the position, the plaintiff refused to do so and was terminated.[143]

When the court addressed whether the plaintiff experienced an adverse action, it relied on *Burlington Northern*.[144] The plaintiff argued that, although the pay for both jobs was the same, the new position was less prestigious and had fewer opportunities for bonuses.[145] The plaintiff failed to present objective evidence regarding the difference in prestige and desirability of the two jobs.[146] The plaintiff also failed to prove the opportunity for bonuses was significantly different.[147] Finally, as previously noted, although the new position would have required a longer commute, the court decided that a longer commute was not sufficiently adverse.[148] The court observed that "the mere fact that the [other] position would have required a change in location and a longer commute is not sufficient to constitute an adverse action."[149] In conclusion, the court stated, "[W]e are unable to conclude that the proposed transfer to the [new] department was so materially adverse as to deter a reasonable employee in [the plaintiff's] position from exercising her FMLA rights."[150] The court therefore affirmed summary judgment.[151]

B. The United States Courts of Appeals for the Fourth, Fifth, and Sixth Circuits

In another FMLA case, the Fourth Circuit had to decide whether a plaintiff proved an adverse action occurred when he

---

[143] *Id.*

[144] *Id.* at 500–01.

[145] *Id.* at 501.

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] *Id.* As was previously noted, the plaintiff in *DiCampli* sued under the FMLA; however, the court decided that the same adverse-action standard applicable to Title VII cases applied to FMLA cases. *See id.* at 500.

[151] *Id.* at 501. There are several other cases in which the Third Circuit decided a retaliation plaintiff did not experience an adverse action. *See* Boykins v. SEPTA, 722 F. App'x 148, 156–60 (3d Cir. 2018) (deciding that retaliatory harassment and the denial of a training opportunity were not actionable); Kasper v. Cnty. of Bucks, 514 F. App'x 210, 216–17 (3d Cir. 2013) (concluding that the plaintiff's "Step 1" disciplinary warning "was far from onerous and as such is best classified among the 'minor annoyances' of office life that do not rise to the level of adverse employment actions." (quoting Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006))).

was transferred after returning from FMLA leave.[152] Importantly, the plaintiff's "salary, title, bonus eligibility, health care, and retirement benefits" were not affected by the change.[153] The district court held that the transfer was not actionable, and the Fourth Circuit agreed.[154]

The Fourth Circuit first noted that "finding an adverse employment action when an employer changes an employee's job focuses on metrics like the employee's salary, benefits, and opportunity for promotion."[155] Although acknowledging that *Burlington Northern expanded* the types of actionable adverse actions, the court reasoned that proving an adverse action "is still a heavy burden for the plaintiff: the alleged adverse action must be *material*."[156] Relying on *Burlington Northern*, the court concluded that the plaintiff "fail[ed] to show any material harm here—indeed, he offer[ed] only evidence of intangible alleged harms stemming from his preference for his previous position."[157] The court held that, because of this failure, summary judgment in favor of the employer was appropriate.[158]

The Fifth Circuit reached a pro-employer outcome when it applied *Burlington Northern* in *Stewart v. Mississippi Transportation Commission*,[159] where the plaintiff alleged that her employer took retaliatory actions after she reported sexual

---

[152] Csicsmann v. Sallada, 211 F. App'x 163, 166 (4th Cir. 2006).

[153] *Id.* at 165.

[154] *Id.* at 165–68.

[155] *Id.* at 168. The court relied on pre-*Burlington Northern* case law for this proposition; specifically, the court relied on *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 376 (4th Cir. 2004), *abrogated on other grounds by Burlington N.*, 548 U.S. 53.

[156] *Csicsmann*, 211 F. App'x at 168. The court stated this despite the fact that the Supreme Court has indicated that establishing a prima facie case was not intended to be an onerous burden. Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 253 (1981).

[157] *Csicsmann*, 211 F. App'x at 168.

[158] *Id.* There are several other cases in which the Fourth Circuit decided that the plaintiff failed to establish an adverse action. *See* Cooper v. Smithfield Packing Co., 724 F. App'x 197, 202 (4th Cir. 2018) (deciding that an employer's inaction—failing to investigate the plaintiff's allegations of sexual harassment—was not actionable under *Burlington Northern*); Pueschel v. Peters, 340 F. App'x 858, 861 (4th Cir. 2009) (deciding that the plaintiff was unable to demonstrate that the employer's failure to assist her in compiling necessary paperwork for " 'buy back' leave" would have deterred a reasonable person from engaging in protected activity); Parsons v. Wynne, 221 F. App'x 197, 198–99 (4th Cir. 2007) (deciding that neither the removal from an alternate work schedule nor a performance review was actionable).

[159] 586 F.3d 321, 331–33 (5th Cir. 2009).

harassment.[160] The plaintiff was put on administrative leave and was eventually assigned to a supervisor who assigned her significantly more work.[161] The plaintiff also alleged that her co-workers were told not to fraternize with her; she was not allowed to close her office door; the employer changed the locks on her door; personal items were taken from her desk; and she was not invited to social functions.[162] One issue on appeal was whether these events were actionable adverse actions.[163]

When addressing this issue, the court relied on the following propositions from *Burlington Northern*: (1) "[t]o constitute prohibited retaliation, an employment action must be 'materially adverse,' one that would 'dissuade[ ] a reasonable worker from making or supporting a charge of discrimination' ";[164] (2) "[t]he purpose of this objective standard is to 'separate significant from trivial harms' and 'filter out complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing' ";[165] and (3) "*[e]ven when an adverse action is intended by the employer as retaliation*, it must still satisfy this materiality standard."[166] The court then applied these statements to the case before it.[167]

Immediately, the court dismissed what it considered to be "petty slights, minor annoyances, and simple lack of good manners."[168] Specifically, the court reasoned that the changing of the locks, the taking of personal items, and the plaintiff's being chastised and ostracized by co-workers fell into this category of harms for which the plaintiff could not recover.[169] The court then addressed two more difficult questions—whether administrative leave and a heavier workload met *Burlington Northern*'s standard.[170]

---

[160] *Id.* at 325–26.

[161] *Id.* at 326.

[162] *Id.* at 326, 331–32.

[163] *Id.* at 331.

[164] *Id.* (alteration in original) (quoting Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006)).

[165] *Id*. (quoting *Burlington N.*, 548 U.S. at 68).

[166] *Id.* (emphasis added) (citing *Burlington N.*, 548 U.S. at 67–68). Later in its opinion, the court also quoted *Oncale* for the pro-employer statement that Title VII is not a "general civility code." *Id.* at 332 (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998)).

[167] *Id.* at 331–33.

[168] *Id.* at 332.

[169] *Id.*

[170] *Id.*

Although acknowledging that being placed on administrative leave was more than a "petty slight," and that such an action could stigmatize an employee, cause "significant emotional distress," and possibly adversely affect an employee's chances for advancement,[171] the court looked at the facts before it and reached the following pro-employer conclusion:

> The context here demonstrates that [the plaintiff] suffered no adverse impact as a result of being placed on leave. She continued to receive her salary and was not requested to use any accumulated leave time. Only three weeks later, she was reinstated with the same salary. There was no suggestion that the leave was the result of any fault on [the plaintiff's] part, such as might carry a stigma in the workplace. [The plaintiff's] administrative leave was not, under these circumstances, an adverse action.[172]

The court concluded that, because there were no significant, negative impacts on the plaintiff as a result of the leave, the leave was not actionable.[173]

The court next addressed the most significant of the alleged harms—a reassignment to a position with a much heavier workload.[174] The court acknowledged that, although the plaintiff's salary, hours, and some other conditions of employment did not change, the plaintiff's workload "increased significantly."[175] After observing that lateral moves can, in some cases, qualify as adverse actions,[176] the court decided that this case did not warrant such a conclusion.[177] The court stated,

> [The plaintiff's] reassignment affected none of her job title, grade, hours, salary, or benefits. Her duties were unchanged, and there is no evidence that she suffered a diminution in prestige or change in standing among her co-workers. Indeed, [the plaintiff] thrived under [her new supervisor], managing the workload well and receiving a promotion in 2007. Her success confirms that her transfer was not adverse in nature. The reassignment, although imposing more work, carried greater

---

[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] *Id.*
[176] *Id.* (citing Aryain v. Wal-Mart Stores Tex. LP, 534 F.3d 473, 485 (5th Cir. 2008)).
[177] *Id.* at 332–33.

> responsibility and would not dissuade a reasonable employee from charging discrimination.[178]

According to the court, because the plaintiff was successful in her new position, transferring her was not actionable.[179] So, instead of penalizing the employer for forcing the plaintiff into a more difficult position, the court penalized the plaintiff for being successful in that position.[180]

The Sixth Circuit has also decided cases in which plaintiffs' retaliation claims have failed because of a lack of an actionable adverse action.[181] One such case was *Lahar v. Oakland County*,[182] where an ADEA plaintiff alleged several adverse actions, all of which the court rejected.[183] When addressing whether the employer's retaliatory conduct was actionable, the court cited *Burlington Northern* and focused on the necessity for an objective test when analyzing adverse actions.[184] This is because of "the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings."[185]

The first adverse actions that the plaintiff raised were lowered performance evaluations and three reprimands.[186] Although the court acknowledged that, in some cases, lowered performance evaluations—and perhaps reprimands—could be actionable,[187] the plaintiff was unable to demonstrate that those

---

[178] *Id.* (footnote omitted) (citation omitted).

[179] *Id.* at 332.

[180] *See id.* at 332–33. There are several other cases in which the Fifth Circuit agreed that the plaintiff failed to establish an actionable adverse action. *See* Cabral v. Brennan, 853 F.3d 763, 766–67 (5th Cir. 2017) (agreeing that a two-day suspension was not actionable because, unlike what happened in *Burlington Northern*, the plaintiff did not prove the suspension "exacted a physical, emotional, or economic toll"); Lushute v. La. Dep't of Soc. Servs., 479 F. App'x 553, 555 (5th Cir. 2012) (deciding that a shift-change from a four-day workweek to a five-day workweek was not actionable).

[181] For additional cases from the Sixth Circuit—other than the one about to be discussed, see *infra* note 197.

[182] 304 F. App'x 354 (6th Cir. 2008).

[183] *Id.* at 357–59. Two of the three judges affirmed on different grounds, and they therefore did not address the question of whether the employer's actions were sufficiently adverse. *Id.* at 355.

[184] *Id.* at 357.

[185] *Id.* (quoting Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68–69 (2006)).

[186] *Id.*

[187] *Id.* (citing Halfacre v. Home Depot, Inc., 221 F. App'x 424, 432–33 (6th Cir. 2007)).

actions "affected her wages or prospects for advancement."[188] The court stated:

> Whatever else the county did in alleged response to this lawsuit, it did not reduce her pay or her title. Under these circumstances, it is not surprising that [the plaintiff] has failed to show that these reprimands and lowered evaluations failed to reduce, or are likely to reduce, her compensation or further advancement. She, indeed, offers no evidence to support any such possibility.[189]

The next actions about which the plaintiff complained were several events that decreased her job responsibilities.[190] Because the plaintiff was unable to demonstrate that the changes made her position less desirable or more arduous, the court held that the taking away of job duties was not enough to establish a sufficiently adverse action.[191] In highlighting the relevant inquiry from *Burlington Northern*, the court stated,

> In maintaining that she suffered "deep psychological harm" from this series of administrative slights she answers the wrong question. *The issue is not whether she was subjectively hurt by this treatment; it is whether evidence indicates that a reasonable employee in her position would react similarly if treated the same way*.[192]

The court concluded that the specific ways in which the plaintiff's job was altered did not meet *Burlington Northern*'s "reasonable worker" standard.[193]

Finally, the court was asked to consider the decrease in job responsibilities in the aggregate.[194] The court concluded that the changes in job duties, even when considered together, were not actionable.[195] The court reasoned that the events took place over a period of three years, and because of this long time period, a reasonable person would not have been dissuaded from engaging

---

[188] *Id.*

[189] *Id.*

[190] *Id.* at 357–58.

[191] *Id.* at 358.

[192] *Id.* (emphasis added) (citation omitted).

[193] *Id.* at 357–58.

[194] *Id.* at 358–59. The Court relied on cases from the Sixth and Eleventh Circuits for the proposition that plaintiffs can aggregate claims when attempting to prove a materially adverse action. *See* Howard v. Bd. of Educ. of Memphis City Schs., 70 F. App'x 272, 283 (6th Cir. 2003); *see also* Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1456 (11th Cir. 1998).

[195] *Lahar*, 304 F. App'x at 359.

in the protected activity.[196] The court therefore affirmed the district court's summary judgment.[197]

C. The United States Courts of Appeals for the Seventh, Eighth, and Ninth Circuits

The Seventh Circuit has decided many cases where employer actions did not satisfy *Burlington Northern*'s standard.[198] Some of these cases involved several allegedly adverse actions,[199] and some involved only one or two such actions.[200] One case where the plaintiff alleged only one adverse action was *Lucero v. Nettle Creek School Corp.*,[201] where the plaintiff alleged that her transfer from teaching twelfth grade to teaching seventh grade was actionable.[202] The Seventh Circuit disagreed.[203]

The lower court granted summary judgment, deciding that the plaintiff did not produce sufficient evidence regarding whether a transfer from teaching twelfth grade to teaching seventh grade was materially adverse.[204] The plaintiff presented affidavits from co-workers who stated that the plaintiff's reassignment had dissuaded other employees from engaging in protected activity; however, in an ironic twist, the court decided that, because these colleagues came forward on the plaintiff's behalf, the plaintiff's transfer could not have dissuaded—and did

---

[196] *Id.*

[197] *Id.* at 359–60. There are several other cases in which the Sixth Circuit determined a plaintiff could not establish an adverse action. *See* Hunter v. Sec'y of U.S. Army, 565 F.3d 986, 995–97 (6th Cir. 2009) (deciding that four allegedly retaliatory actions—a delay in delivering a package to the plaintiff, a transfer to another unit, a new requirement regarding leaving a note when leaving the work station, and a negative statement about the plaintiff's job—were not actionable under *Burlington Northern*); Garner v. Cuyahoga Cnty. Juv. Ct., 554 F.3d 624, 640 (6th Cir. 2009) (deciding that a transfer to another building, a prohibition regarding where the plaintiff could eat lunch, and a demand that the plaintiff return a key were not actionable); James v. Metro. Gov't of Nashville, 243 F. App'x 74, 79–80 (6th Cir. 2007) (concluding that a denial of a lateral transfer request, bad employment evaluations, and the imposition of work quotas did not meet *Burlington Northern*'s standard).

[198] For additional cases from the Seventh Circuit (other than the one about to be discussed), see *infra* note 208.

[199] *See infra* note 208.

[200] *See infra* note 208.

[201] *See* 566 F.3d 720 (7th Cir. 2009).

[202] *Id.* at 727.

[203] *Id.* at 730.

[204] *Id.* at 728.

not dissuade—others from supporting the plaintiff's charge.[205] The court then noted how little the plaintiff's job had changed, stating,

> More to the point, unlike the employee in *Burlington,* [the plaintiff] was not reassigned to a position consisting of objectively less desirable duties. She continued to teach the same academic subject in the same building and under the same conditions after her reassignment. In fact, her reassigned duties were the same teaching duties she successfully performed for all but one year of teaching for the School Corporation. She did not suffer a cut in pay, benefits, or privileges of employment when she was assigned to teach English 7 for the 2004–05 school year.[206]

The court continued to reject the plaintiff's argument when it stated the following:

> While [the plaintiff] may subjectively believe that teaching High School students is more prestigious than teaching Junior High students, her personal preference is not sufficient to establish an adverse action. As defendants point out, if personal preference alone was sufficient to establish adverse employment action, the objective requirement for such a finding would effectively be eliminated and federal employment law would become a mechanism for enforcing employee preferences rather than remedying materially adverse treatment. From an objective standpoint, [the plaintiff's] reassignment from 12th grade English teacher to 7th grade English teacher would not dissuade a reasonable teacher from bringing a discrimination charge against defendants, as required by *Burlington.* No reasonable employee would see her reassignment as materially adverse.[207]

Thus, because the court did not want personal preferences to form the basis of retaliation complaints, it affirmed summary judgment in favor of the employer.[208]

---

[205] *Id.* at 729. This, of course, puts a plaintiff in a difficult position. If she attempts to present any co-workers' testimony to support her charge, a court can hold that strategic decision against the plaintiff.

[206] *Id.*

[207] *Id.* at 730.

[208] *Id.* There are several other cases in which the Seventh Circuit decided the alleged adverse actions did not meet *Burlington Northern*'s standard. *See* Lewis v. Wilkie, 909 F.3d 858, 870 (7th Cir. 2018) (agreeing with the district court's determination that none of the plaintiff's eleven alleged adverse actions met the *Burlington Northern* standard, but not addressing whether all of the incidents, taken as a whole, could have been actionable); Koty v. DuPage Cnty., 900 F.3d 515, 521 (7th Cir. 2018) (deciding that a lateral transfer, a temporary removal from

The Eighth Circuit provided a good example of a plaintiff who alleged several acts of retaliation but was unable to convince the court that all of those acts met *Burlington Northern*'s standard.[209] In *AuBuchon*, after addressing whether a failure to promote can form the basis of a retaliation claim—and concluding that it can—the court addressed the plaintiff's other allegations of retaliation.[210] These included "reckless allegations of sexual harassment" against the plaintiff, an "acceleration of work deadlines, an increase in workload, and insufficient performance reviews."[211] The court held that none of these actions was materially adverse.[212]

Relying on *Burlington Northern* and noting that an adverse action must be material and cause "injury or harm,"[213] the court cited several cases where it had applied that standard.[214] Before reviewing those cases, the court observed,

---

active special operations duty, a requirement to submit a plan for safely storing a firearm, a required return to a position the plaintiff did not want, and an assignment to the midnight shift did not meet *Burlington Northern*'s standard); Rohler v. Rolls-Royce Corp., 523 F. App'x 418, 420–21 (7th Cir. 2013) (deciding that the plaintiff's negative performance reviews and her threat of termination were not actionable); Goodman v. NSA, Inc., 621 F.3d 651, 654–56 (7th Cir. 2010) (agreeing that the plaintiff's shift change and change in title did not meet *Burlington Northern*'s standard); Stephens v. Erickson, 569 F.3d 779, 790 (7th Cir. 2009) (agreeing with the district court that assigning menial job duties, occasionally sending the plaintiff into dangerous neighborhoods, isolating the plaintiff from colleagues, and intimidating the plaintiff did not meet *Burlington Northern*'s standard); Henry v. Milwaukee Cnty., 539 F.3d 573, 586–87 (7th Cir. 2008) (noting that incidents "such as being told not to wear sweaters or eat in front of the juveniles, unspecified 'intimidation' and door slamming by the head of shift, missing or marked up time-cards, occasional early morning phone calls, and not being assigned to work together on the same shift or in easier pods" were non-actionable petty slights); Thomas v. Potter, 202 F. App'x 118, 119 (7th Cir. 2006) (rejecting the plaintiff's argument that his shift change qualified as an adverse action).

[209] AuBuchon v. Geithner, 743 F.3d 638, 640 (8th Cir. 2014).

[210] *Id.* at 643–45.

[211] *Id.* at 643.

[212] *Id.* at 645.

[213] *Id.* at 644.

[214] *See id.*

Lisdahl, 633 F.3d at 721–22 (threats pertaining to job security, denial of vacation time, and public ridicule); *Sutherland v. Mo. Dept. of Corr.,* 580 F.3d 748, 752 (8th Cir.2009) (classification of performance from "highly successful" to "successful" not accompanied by reduction in pay, salary, benefits, or prestige); *Recio v. Creighton Univ.*, 521 F.3d 934, 939–40 (8th Cir.2008) (extended duration of employer-mandated counseling, failure to notify of job vacancy, changes in work schedule, denial of opportunity to teach certain classes, maintenance of cold temperature in office, and faculty shunning); *Gilbert*, 495 F.3d at 917–18 (demotion of provost for plagiarizing, letter directing provost to improve performance, prevention of

> [W]e have determined that commencing performance evaluations, sending critical letters that threatened discipline, falsely reporting poor performance, and failing to mentor and supervise employees did not establish a prima facie case of retaliation absent materially adverse consequences to the employee. In other post-*Burlington Northern* cases, we have determined as a matter of law that certain employer actions were not materially adverse because they did not result in sufficient "injury or harm" to the employee in question.[215]

The court then noted that it had "determined that a supervisor's warnings that 'did not threaten termination or any other employment-related harm' do not constitute material adverse employment action."[216] It then proceeded to apply *Burlington Northern* and Eighth-Circuit precedent to the plaintiff's claims.[217]

The first allegation was that the plaintiff was falsely accused of sexual harassment.[218] Although the court agreed that the action was "reckless and inconsiderate," the court determined that it did not meet *Burlington Northern*'s standard because the accusation did not result in injury or harm.[219]

The next allegations involved accelerating the plaintiff's work deadlines, assigning the plaintiff more work, and not sufficiently praising the plaintiff in his evaluations.[220] Without much analysis, the court decided that these actions, individually or collectively, were unactionable "petty slights or minor annoyances" that often occur at the workplace.[221] Because the court reasoned that the plaintiff did not experience a sufficiently adverse action, it held that summary judgment was appropriate.[222]

> selecting guest speaker, and assignment to open cubicle); *Clegg v. Ark. Dept. of Corr.*, 496 F.3d 922, 929 (8th Cir.2007) (failure to provide training and orientation, denying access to work tools, failure to reinstate to prior position, addition of negative reports and reprimands to personnel file, exclusion from meetings, and denial of training).

Id.

[215] *Id.* (citation omitted).

[216] *Id.* (quoting Hill v. City of Pine Bluff, 696 F.3d 709, 715 (8th Cir. 2012)).

[217] *Id.* at 644–45.

[218] *Id.*

[219] *Id.* at 645.

[220] *Id.*

[221] *Id.* (quoting Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006)).

[222] *Id.* There are several other cases in which the Eighth Circuit decided a plaintiff failed to establish an adverse action. *See* Sutherland v. Mo. Dep't of Corr.,

The usually "pro-employee" Ninth Circuit has also applied *Burlington Northern* in *Hellman v. Weisberg* and noted that, although *Burlington Northern* broadened Title VII's protections, Title VII is not a "general civility code for the American workplace,"[223] and plaintiffs must still experience materially adverse actions to recover under Title VII's antiretaliation provision.[224] In *Hellman*, a judicial assistant alleged she was retaliated against after participating in a former law clerk's discrimination investigation.[225] The court focused its attention on the adverse action issue, concluding that none of the alleged adverse actions met *Burlington Northern*'s standard.[226] The court quoted *Burlington Northern* for its "reasonable worker" standard and for its "general civility code" language (which came from *Oncale*),[227] and stated that "not every disagreeable workplace action constitutes retaliation; rather, retaliation must produce 'an injury or harm.' "[228] The court then addressed the plaintiff's three allegedly adverse actions.[229]

First, the court addressed the plaintiff's allegation concerning the "snubbing" by her coworkers.[230] Relying on Ninth Circuit precedent,[231] the court observed "ostracism by coworkers does not constitute an adverse employment action, at least where

580 F.3d 748, 752 (8th Cir. 2009) (deciding that a lowered performance evaluation did not meet the *Burlington Northern* standard); Weger v. City of Ladue, 500 F.3d 710, 726–28 (8th Cir. 2007) (deciding that the plaintiff's allegations of workplace isolation, "papering" of employee files, conducting performance evaluations, ostracizing employees, failing to provide compensatory time, failing to provide equitable overtime, and removing the plaintiff from a position as a training officer were either too minor to be actionable or unsupported by the evidence); Clegg v. Ark. Dep't of Corr., 496 F.3d 922, 929–30 (8th Cir. 2007) (deciding that failing to provide training, denying access to tools, failing to reinstate to a prior position, undermining authority, adding negative reports and reprimands to a file, excluding the plaintiff from meetings, and a few other actions did not meet *Burlington Northern*'s standard).

[223] 360 F. App'x 776, 778 (9th Cir. 2009) (quoting *Burlington N.*, 548 U.S. at 68).

[224] *Id.*

[225] *Id.* at 777.

[226] *Id.* at 778–79.

[227] *See id.* at 778.

[228] *Id.* (quoting *Burlington N.*, 548 U.S. at 67).

[229] *Id.* at 778–79.

[230] *Id.* at 778.

[231] The cases to which the court cited were the following: *Manatt v. Bank of Am.*, 339 F.3d 792, 803 (9th Cir. 2003), and *Brooks v. City of San Mateo*, 229 F.3d 917, 929 (9th Cir. 2000). The court cited to a case that found workplace ostracism was an adverse action because it "contributed to a material change in the terms and conditions of her employment." *Hellman*, 360 F. App'x at 778 (citing Davis v. Team Elec. Co., 520 F.3d 1080, 1090 (9th Cir. 2008)).

it does not have an effect on the employee's ability to perform her job."[232] The court also noted that the "snubbing" was "mostly social in nature," and there was "no evidence that the snubbing went so far as to interfere with [the plaintiff's] job responsibilities."[233] Thus, the court rejected this part of the plaintiff's claim.[234]

Second, the court briefly addressed the plaintiff's allegation that the plaintiff was told that one of the judges wanted to fire her and have her criminally prosecuted.[235] Because the plaintiff was not fired or prosecuted, and because "the mere threat of termination does not constitute an adverse employment action,"[236] the court rejected this claim as well.[237]

Finally, the court addressed the third allegedly adverse action, that is, a verbal reprimand from one of the judges.[238] According to the court, the "one-time verbal reprimand had no effect on [the plaintiff's] job duties and was not placed in her personnel file" and the "reprimand did not rise to the level of adverse employment action."[239] Because the plaintiff was not able to establish an adverse action, the court affirmed summary judgment in favor of the employer.[240]

D. The United States Courts of Appeals for the Tenth, Eleventh, and District of Columbia Circuits

Similar to other United States Courts of Appeals, the Tenth Circuit has also provided several examples where a plaintiff's retaliation claim failed because the plaintiff was unable to demonstrate an adverse action.[241] For example, in *Payan v. UPS*,[242] the court held that the plaintiff's placement on a

---

[232] *Id.*

[233] *Id.*

[234] *Id.* at 778–79.

[235] *Id.* at 779.

[236] *Id.* (citing Hardage v. CBS Broad., Inc., 427 F.3d 1177, 1189 (9th Cir. 2005), *amended by* 433 F.3d 672 (9th Cir. 2006), *and* 436 F.3d 1050 (9th Cir. 2006)).

[237] *Id.*

[238] *Id.*

[239] *Id.*

[240] *Id. See also* Gonzalez v. Nat'l R.R. Passenger Corp., No. C08-0093, 2009 WL 854081, at *5 (W.D. Wash. Mar. 27, 2009), *affirmed by* 376 F. App'x 744 (9th Cir. 2010) (agreeing that the statement "[h]ere we go again. You are going to call diversity" was a non-actionable petty slight).

[241] For additional cases from the Tenth Circuit (other than the one about to be discussed), see *infra* note 255.

[242] *See* 905 F.3d 1162 (10th Cir. 2018).

performance improvement plan and his transfer were not sufficiently adverse—even though the court acknowledged that "adverse employment action" should be defined liberally.[243]

When addressing the plaintiff's burden, the court, in addition to stating that the adverse action element should be interpreted liberally, stated that adverse actions are not limited to "monetary losses" and that other types of employer actions can be actionable.[244] Consistent with *Burlington Northern*, the court emphasized the need for a case-by-case approach when making this determination and stated that courts must evaluate "the unique factors relevant to the situation at hand."[245] In addition to making these pro-employee statements, the court reiterated the commonly-quoted language from *Burlington Northern* that an "employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination."[246]

The court then addressed whether placing the plaintiff on a performance improvement plan qualified as an adverse action, and relying on precedent from the Seventh Circuit,[247] the court concluded that it did not.[248] Instead, because the improvement plan required the plaintiff only to (1) attend a once-per-month meeting, (2) use a day planner, and (3) coordinate meetings with subordinates, the court considered the plan more of a "petty slight[ ] or minor annoyance[ ]."[249] The court concluded that "placement on an employee improvement plan alone does not qualify as a materially adverse action as defined by *Burlington Northern*."[250]

The court then rejected the plaintiff's contention that his transfer was actionable.[251] The court noted that the plaintiff "did not suffer any hardship" because of the transfer.[252] The plaintiff had the same level of management authority, worked at the same location, was no longer working with the employee who harassed

---

[243] *Id.* at 1172.

[244] *Id.* (quoting Hillig v. Rumsfeld, 381 F.3d 1028, 1031 (10th Cir. 2004)).

[245] *Id.* (quoting *Hillig*, 381 F.3d at 1031).

[246] *Id.* (quoting Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 57 (2006)).

[247] The case upon which the Tenth Circuit relied was *Cole v. Illinois*, 562 F.3d 812 (7th Cir. 2009).

[248] *Payan*, 905 F.3d at 1173–74.

[249] *Id.* at 1173.

[250] *Id.* at 1174.

[251] *Id.*

[252] *Id.*

him, and received a pay increase.[253] The only evidence that the plaintiff presented to support his assertion that the transfer was materially adverse was a declaration by a manager who stated that a move to the plaintiff's new department was considered a form of discipline.[254] This evidence did not satisfy the court, which concluded the plaintiff did not satisfy *Burlington Northern*'s standard and that summary judgment was appropriate.[255]

The Eleventh Circuit provided an example of where the court decided some of the plaintiff's alleged adverse actions were sufficient under *Burlington Northern*, but many of them were not.[256] In *Edwards v. National Vision, Inc.,* the plaintiff brought retaliation claims under Title VII and the FMLA.[257] When addressing the plaintiff's prima facie case, the court relied on *Burlington Northern* and echoed the applicable test by stating, "In a retaliation case, a materially adverse action is one that 'might have dissuaded a reasonable worker from making or supporting a charge of discrimination.' "[258] The court also noted that "[t]he [employer's retaliatory] acts must be significant rather than trivial."[259] The court then addressed the employer's adverse actions.[260]

Without much analysis, the court rejected six of the alleged adverse actions.[261] The court found that the following actions did not meet *Burlington Northern*'s standard: (1) assigning cleaning duties to the plaintiff, (2) assigning more patients to the plaintiff than to other employees, (3) telling co-workers not to speak with the plaintiff, (4) denying the plaintiff's request for leave,

---

[253] *Id.*

[254] *Id.*

[255] *Id.* There are several other cases in which the Tenth Circuit rejected a plaintiff's retaliation claim because of the lack of an adverse action. *See* Unal v. Los Alamos Pub. Schs., 638 F. App'x 729, 742 (10th Cir. 2016) (deciding that moving a teacher from a permanent classroom to a "portable classroom," deciding to renege on a promise to change the plaintiff's supervisor, and "barging" into the plaintiff's class and interrupting it were not actionable under *Burlington Northern*); Daniels v. UPS, 701 F.3d 620, 640 (10th Cir. 2012) (deciding that decreased communications from a supervisor, which made performing her job more difficult, and a failure to investigate an internal discrimination complaint were not actionable).

[256] *See* Edwards v. Nat'l Vision, Inc, 568 F. App'x 854 (11th Cir. 2014).

[257] *Id.* at 856–57.

[258] *Id.* at 861 (quoting Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006)).

[259] *Id.* (citing *Burlington N.*, 548 U.S. at 68).

[260] *Id.* at 862.

[261] *Id.*

(5) writing up the plaintiff, and (6) placing the plaintiff on a performance improvement plan.[262] The court concluded that these actions were not "materially adverse," as the plaintiff "did not present evidence that she was materially and adversely affected; for example, she did not indicate that she suffered a decrease in salary."[263] While the court stated that some of the actions the plaintiff experienced may have been sufficiently adverse, it then concluded that the plaintiff was unable to prove the final element of her prima facie case—a causal connection between those actions and the protected activity.[264] The court therefore affirmed summary judgment.[265]

Finally, the District of Columbia Circuit has addressed *Burlington Northern* and its application to cases where employees have alleged several adverse actions.[266] In *Durant v. D.C. Government*, the plaintiff alleged numerous adverse actions, including (1) a letter of admonition, (2) the denial of access to a government vehicle, (3) the suspension of arrest authority, and (4) the plaintiff's termination.[267] Predictably, the court held that the first three actions did not meet *Burlington Northern*'s standard, but the plaintiff's termination met the standard.[268]

First, the court addressed the letter of admonition and concluded tht a reasonable jury could not have found it was a

---

[262] *Id.*

[263] *Id.*

[264] *Id.* The court decided that the following actions could have been sufficiently adverse: receiving lower evaluation scores, which resulted in a smaller raise; being placed on a second performance improvement plan, which suspended incentives; being assigned reduced hours, which lowered the plaintiff's pay; and being asked not to return to work "until further notice," which adversely impacted the plaintiff's ability "to earn a living." *Id.*

[265] *Id.* at 864; *see also* Debe v. State Farm Mut. Auto. Ins. Co., 860 F. App'x 637, 640 (11th Cir. 2021) (agreeing with the district court that "unjustified coaching, increased scrutiny, unfounded discipline, file padding of a previously unblemished file and Coaching Tracker [a platform to store notes about employee performance], an unwanted schedule change, and a drop memorandum [a list of alleged performance deficits]" were not actionable, either individually or collectively (alterations in original)); Manley v. DeKalb Cnty., 587 F. App'x 507, 513 (11th Cir. 2014) (agreeing that two write-ups, exclusion by coworkers, denial of requests to attend some classes, and being forced to train in-state were not actionable); Shannon v. Postmaster Gen. of U.S. Postal Serv., 335 F. App'x 21, 26–27 (11th Cir. 2009) (rejecting the plaintiff's assertions that a transfer to travel detail, a short deadline to obtain medical forms, a threat to return the plaintiff to full duty, and the loss of some employment-related privileges qualified as adverse actions).

[266] *See* Durant v. D.C. Gov't, 875 F.3d 685, 697–98 (D.C. Cir. 2017).

[267] *Id.* at 696.

[268] *Id.* at 697–98.

materially adverse action.[269] The letter simply informed the plaintiff of his workplace deficiencies, leading the court to conclude, "A reprimand letter setting forth allegations of deficient work performance is not a materially adverse action absent a showing that the letter would have dissuaded a reasonable employee from engaging in protected activity."[270]

Second, the court addressed whether the employer's decision not to provide the plaintiff with a government vehicle was an adverse action.[271] The court quickly rejected the plaintiff's position, concluding that the plaintiff "did not provide any evidence, beyond his own conclusory allegations, that his inability to access a vehicle 'produce[d] an injury or harm.' "[272]

Finally, the court addressed whether the decision to suspend the plaintiff's arrest authority until he produced proper documentation was a materially adverse action.[273] The court compared this situation to one in which an employer requires an employee to provide medical documentation before taking sick leave, and the court concluded that requiring documentation of arrest authority was not actionable.[274] The court noted that the plaintiff "failed to offer evidence that he was unable to perform his workplace obligations due to [the supervisor's] demand for proof of [the plaintiff's] arrest authority."[275] Thus, the court decided many of the employer's allegedly adverse actions were not sufficiently adverse.[276]

---

[269] *Id.* at 698.

[270] *Id.* (citing Baloch v. Kempthorne, 550 F.3d 1191, 1199 (D.C. Cir. 2008); Whittaker v. N. Ill. Univ., 424 F.3d 640, 648 (7th Cir. 2005)).

[271] *Id.*

[272] *Id.* (alteration in original) (quoting Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67 (2006)).

[273] *Id.*

[274] *Id.* The case to which the court compared this case was *Baloch v. Kempthorne*, 550 F.3d 1191, 1198 (D.C. Cir. 2008).

[275] *Durant*, 875 F.3d at 698.

[276] *See id.* As noted earlier, the court agreed that the plaintiff's termination was an adverse action. *Id.* For an example of where the D.C. Circuit rejected another plaintiff's argument that she suffered an adverse action, see *Taylor v. Solis*, 571 F.3d 1313, 1320 (D.C. Cir. 2009), where the court rejected five of the six allegedly actionable adverse actions. These actions included criticizing the plaintiff's work performance, slowing down the plaintiff's work progress and requiring status reports, refusing to support the plaintiff's candidacy for a new position that was ultimately not created, and lowering the plaintiff's performance evaluations. *Id.* at 1321; *see also* Gaujacq v. EDF, Inc., 601 F.3d 565, 578 (D.C. Cir. 2010) (deciding that the chief operating officer's comment that the plaintiff's "career is dead . . . if [she] file[s] the claim" was not actionable under *Burlington Northern*); *Baloch*, 550 F.3d at 1198–99 (deciding that the imposition of sick-leave restrictions, threatened

As should be clear after reading this Part of the Article, many retaliation plaintiffs are losing their cases at summary judgment because they are unable to prove they suffered an actionable adverse action. The next Part will argue that, because it has become so difficult for plaintiffs to establish this element of a prima facie case, a subjective test for adverse actions would be more appropriate than the *Burlington Northern* objective test the courts are currently using.

V. COURTS SHOULD APPLY A SUBJECTIVE TEST WHEN DETERMINING WHAT QUALIFIES AS AN ACTIONABLE ADVERSE ACTION

The rest of this Article will argue that, when determining whether an employer's action is sufficiently adverse to support a retaliation claim, courts should apply a subjective test and ask the following question: would the adverse action have dissuaded *the plaintiff* from engaging in the protected activity?

Although this is different from *Burlington Northern*'s objective, "reasonable worker" test,[277] this proposed approach is consistent with Title VII's text;[278] it is consistent with Supreme Court pronouncements regarding the plaintiff's relatively low burden for establishing a prima facie case;[279] it does not make retaliation cases too easy for plaintiffs to win;[280] it is consistent with antiretaliation provisions' purpose of eliminating retaliation;[281] and it will not result in substantial negative financial ramifications for employers who engage in "minor" acts of retaliation.[282] Because applying a subjective standard would protect more employees who experience retaliation (and deter employers from engaging in it in the first place), this approach is a better way to analyze the large number of retaliation cases

---

suspensions, written reprimands and counseling, unsatisfactory performance evaluations, and "profanity-laden yelling" did not meet the *Burlington Northern* standard).

[277] Admittedly, this approach is also inconsistent with the EEOC's current approach, which mirrors the objective standard articulated in *Burlington Northern*. *See Questions and Answers: Enforcement Guidance on Retaliation and Related Issues*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Aug. 26, 2016), https://www.eeoc.gov/laws/guidance/questions-and-answers-enforcement-guidance-retaliation-and-related-issues [https://perma.cc/SLF2-MKPW].

[278] *See infra* Section V.A.

[279] *See infra* Section V.B.

[280] *See infra* Section V.C.

[281] *See infra* Section V.D.

[282] *See infra* Section V.E.

employees are pursuing against their current and former employers.[283]

A. Title VII's Anti-Retaliation Provision's Language Supports Utilizing a More Plaintiff-Friendly Standard

The first place courts must look when interpreting a statute is the statute's language.[284] When applying this rule of statutory interpretation to Title VII's antiretaliation provision, *Burlington Northern*'s objective standard is inconsistent with the statutory language because that language does not restrict itself to a certain level or type of harm, nor does it mention anything about a "reasonable person."[285] Specifically, the antiretaliation provision provides:

> It shall be an unlawful employment practice for an employer to *discriminate against* any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to *discriminate against* any individual, or for a labor organization to *discriminate against* any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.[286]

Unlike Title VII's antidiscrimination provisions, which specify that an employer cannot "discriminate against any individual *with respect to his compensation, terms, conditions, or*

---

[283] As was noted earlier, retaliation charges were the most common type of charge filed with the EEOC in 2020. *See Charge Statistics (Charges Filed with EEOC) FY 1997 Through FY 2021*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/data/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2021 [https://perma.cc/27DP-27X7] (last visited Feb. 12, 2023).

[284] Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002) ("As in all statutory construction cases, we begin with the language of the statute. The first step 'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.' " (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997))).

[285] 42 U.S.C. § 2000e-3(a). Although it might seem odd to analyze a statute based on language that is *not* in it, the Court has done similar things in the past. For example, in *Burlington Indutries., Inc. v. Ellerth*, 524 U.S. 742, 752 (1998), the Court minimized the importance of the terms "quid pro quo" and "hostile work environment" in the sexual harassment context because those terms did not appear in the statute's text.

[286] 42 U.S.C. § 2000e-3(a) (emphases added).

privileges of employment,"[287] the antiretaliation provision simply prohibits employers from "discriminat[ing] against" individuals who engage in protected activity.[288] There is no mention of compensation or other "terms, conditions, or privileges of employment" in the antiretaliation provision.[289] Although the Supreme Court acknowledged this difference in language in *Burlington Northern* when concluding that adverse actions do not have to be employment-related,[290] the Court took a more narrow approach to the statutory language when addressing the breadth of the word "discriminate."[291]

"Discriminate" is not specifically defined in Title VII; as a result, the term should be given its ordinary meaning.[292] Meriam Webster lists the following definitions of "discriminate": (1) "to make a distinction" and (2) "to make a difference in treatment or favor on a basis other than individual merit."[293] Similarly, the Cambridge Dictionary defines the term in the following way: "[T]o treat a person or particular group of people differently, especially in a worse way from the way in which you treat other people, because of their skin color, sex, sexuality, etc."[294] And Oxford's Learner's Dictionary defines "discriminate" in this way: "[T]o treat one person or group worse/better than another in an unfair way."[295] Finally, according to Black's Law Dictionary, "discrimination" means the following: "Differential treatment; esp., a failure to treat all persons equally when no reasonable

---

[287] 42 U.S.C. § 2000e-2(a) (emphases added).

[288] 42 U.S.C. § 2000e-3(a).

[289] *Compare* 42 U.S.C. § 2000e-2(a), *with* 42 U.S.C. § 2000e-3(a).

[290] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 61–67 (2006).

[291] *Id.* at 67–70.

[292] *See* Lamar, Archer & Cofrin, LLP v. Appling, 138 S. Ct. 1752, 1759–60 (2018) (noting that, since the Bankruptcy code did not define specific terms, it is necessary to give these terms their ordinary meaning and then look at dictionary definitions of these terms); Octane Fitness, LLC v. Icon Health & Fitness, Inc., 572 U.S. 545, 553–54 (2014) (noting that the Court must first apply the ordinary meaning of "exceptional" because the Patent Act does not define that term, and then look at dictionary definitions for the proper meaning).

[293] *Discriminate*, MERRIAM-WEBSTER ONLINE, https://www.merriam-webster.com/dictionary/discriminate [https://perma.cc/SQX5-9L3N] (last visited Feb. 12, 2023).

[294] *Discriminate*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/discriminate [https://perma.cc/SNR4-8WHB] (last visited Feb. 12, 2023).

[295] *Discriminate*, OXFORD LEARNER'S DICTIONARIES, https://www.oxfordlearnersdictionaries.com/us/definition/english/discriminate?q=discriminate [https://perma.cc/TDT8-FK4H] (last visited Feb. 12, 2023).

distinction can be found between those favored and those not favored."[296]

Although the definitions vary slightly, the critical idea is the same: to "discriminate" means to treat individuals differently—usually more negatively—without a legitimate basis for doing so. Applying these definitions to the antiretaliation provision, once an employer treats an employee differently because of the plaintiff's protected activity, the employer has "discriminated against" that employee and has done what the statute specifically prohibits. While some employer retaliatory actions can be relatively minor, "discrimination" has still taken place. Moreover, if the plaintiff can prove that this difference in treatment occurred because she engaged in protected activity, there is a violation of Title VII's language, and the plaintiff should be able to pursue her retaliation claim.[297] This is only the first of several reasons why a subjective standard is a better option to utilize when evaluating whether an employer's retaliatory actions should be able to form the basis of a successful claim.[298]

---

[296] *Discriminate*, BLACK'S LAW DICTIONARY (11th ed. 2019). If we were to look at the definition of "discriminate" at the time Title VII was passed, we need to look no further than the Supreme Court's recent opinion in *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1740 (2020), where the Court, relying on *Burlington Northern*, noted the following:

> What did "discriminate" mean in 1964? As it turns out, it meant then roughly what it means today: "To make a difference in treatment or favor (of one as compared with others)." Webster's New International Dictionary 745 (2d ed. 1954). To "discriminate against" a person, then, would seem to mean treating that individual worse than others who are similarly situated.

Id.

[297] Applying this strict definition, the plaintiff herself would not need to be deterred from engaging in protected activity; once the employer treated her differently because of her opposition or participation, there has been a violation of the statute. Nonetheless, a plaintiff would most likely not bring suit if she did not feel she was harmed by her employer.

[298] Another reason Title VII's antiretaliation provision's language supports a subjective standard is that the provision's language focuses on the individual employee, not on the hypothetical "reasonable employee." 42 U.S.C. § 2000e-3(a). Because Congress used the words "any" and "individual"—both of which are singular— in the provision, Congress focused on individual plaintiffs, and it is those individuals' beliefs that should govern whether an employer action was sufficiently adverse. *Cf.* Sutton v. United Airlines, Inc., 527 U.S. 471, 482–84 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110–325, 122 Stat. 3553.

The Court has looked at other statutes and their use of the term "individual" in other contexts. For example, the Court in *Sutton*—which was decided prior to the most recent amendments to the ADA—reasoned that, since the ADA's original

B. The Objective Standard Creates a More Onerous Burden at the Prima Facie Case Stage and Also Obstructs Unfettered Access to Title VII's Remedial Processes, Both of Which Are Inconsistent with Previous Supreme Court Statements

One thing to keep in mind throughout this inquiry is that establishing a prima facie case does not result in a victory for the plaintiff;[299] the plaintiff must still prove the employer's legitimate, non-retaliatory reason for the adverse action was pretext, and that but-for the plaintiff's protected conduct, the employer would not have taken the adverse action.[300] Because establishing a prima facie case is only the first step in the retaliation inquiry,[301] the Supreme Court has acknowledged on numerous occasions that establishing the prima facie case should

---

definition of "disability" focused on the individual, courts needed to focus on individual plaintiffs when deciding whether a plaintiff who uses mitigating measures to control her impairment has a disability. *Id.* The Court noted the following: "The definition of disability also requires that disabilities be evaluated 'with respect to an individual' and be determined based on whether an impairment substantially limits the 'major life activities of such individual.' Thus, whether a person has a disability under the ADA is an individualized inquiry." *Id.* at 483 (citation omitted). The Court further stated, "The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual." *Id.* (quoting 29 C.F.R. pt. 160, app. § 1630.2(j) (2011)).

Because Title VII's antiretaliation provision similarly focuses on the individual, retaliation claims should be evaluated on more of an individualized basis. Admittedly, the Court in *Burlington Northern*, to a certain extent, acknowledged this by stating that the inquiry should focus on whether a reasonable person in the plaintiff's position would have been deterred from engaging in protected conduct. 548 U.S. 53, 69–70 (2006). However, the plaintiff-specific inquiry should have been taken one step further—the plaintiff should be able to establish this element of her prima facie case if she can prove the adverse action would have deterred her from engaging in the protected activity.

One case that highlights how courts do not look at an individual plaintiff's reaction to the adverse action is the previously discussed case of *Lahar v. Oakland County*, 304 F. App'x 354, 358 (6th Cir. 2008). In *Lahar*, the court stated, "The issue is not whether [the plaintiff] was subjectively hurt by this treatment; it is whether evidence indicates that a reasonable employee in her position would react similarly if treated the same way." *Id.* at 358. This excerpt demonstrates that, while the statute focuses on an individual, courts focus on the hypothetical "reasonable employee." Of course, this is because *Burlington Northern* instructed courts to do so, and unless the Court re-evaluates its position, which is unlikely, courts will continue to apply the objective standard. *See* 548 U.S. at 67–69.

[299] *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506–07 (1993); Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 255–56 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 807 (1973).

[300] Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 362 (2013).

[301] *See generally St. Mary's Honor Ctr.*, 509 U.S. 502; *Burdine*, 450 U.S. 248; *McDonnell Douglas Corp.*, 411 U.S. 792.

not be difficult.[302] After *Burlington Northern*, however, courts have made this burden more difficult than it should be.[303]

Further, in addition to stating that establishing a prima facie case should not be onerous,[304] the Court has also indicated that anti-discrimination statutes' antiretaliation provisions are meant to provide employees with "unfettered access" to those statutes' remedial mechanisms.[305] However, by using the objective standard when analyzing retaliation claims, courts have made it more difficult for employees to access those remedial mechanisms.[306]

Because establishing a prima facie case was never meant to be an onerous burden, and because *Burlington Northern*'s objective test obstructs "unfettered access" to Title VII's remedial mechanism, utilizing an objective test when determining whether an employer's action is sufficiently adverse is inconsistent with prior pronouncements from the Supreme Court. As a result, a subjective test is a more appropriate test and should be utilized when analyzing retaliation claims.

1. Establishing a prima facie case was not intended to be an onerous burden

In *Texas Department of Community Affairs v. Burdine*, one of the seminal cases in which the Court addressed Title VII's burden-shifting paradigm,[307] the Court specifically stated that establishing a prima facie case was not an "onerous" burden.[308] In this case (decided seven years after *McDonnell Douglas*), the Court was asked to "address . . . the nature of the evidentiary burden placed upon the defendant in an employment discrimination suit brought under Title VII."[309] In answering this question, the Court also addressed the nature of the plaintiff's burden in establishing a prima facie case.[310]

The plaintiff in *Burdine* alleged a sex-based failure-to-promote claim and a termination claim.[311] She lost both claims at

---

[302] *See infra* Section V.B.1.
[303] *See supra* Part IV.
[304] *Burdine*, 450 U.S. at 253.
[305] *Univ. of Tex. Sw. Med. Ctr.*, 570 U.S. at 361; *see infra* Section V.B.2.
[306] *See supra* Part IV.
[307] 450 U.S. 248.
[308] *Id.* at 253.
[309] *Id.* at 249–50.
[310] *Id.* at 253.
[311] *Id.* at 251.

the district court, but the Fifth Circuit reversed the lower court's judgment regarding the termination claim.[312] The Fifth Circuit placed the burden of proof on the defendant, and the Supreme Court granted certiorari to clarify the nature of the shifting burdens under Title VII.[313]

The Court reiterated the previously-described burden-shifting paradigm from *McDonnell Douglas* and stated that the ultimate burden of persuasion remains with the plaintiff;[314] and the burden of production shifts to the employer only if the plaintiff is able to establish a prima facie case.[315] Important for this Article, however, is the statement the Court made when addressing the nature of the prima facie case. Specifically, the Court stated that "[t]he burden of establishing a prima facie case of disparate treatment is not onerous."[316]

Although *Burdine* involved a case of gender discrimination and not retaliation, the United States Courts of Appeals have applied *Burdine* to retaliation cases and have often repeated that establishing the prima facie case in a Title VII retaliation case is not an onerous burden. [317]

Oddly, however, in *Csicsmann v. Sallada*, the Fourth Circuit stated the opposite position.[318] Specifically, when addressing the plaintiff's prima facie case, the court in *Csicsmann* stated that, although adverse actions do not need to be work-related to be actionable, the plaintiff's prima facie case "is still a heavy burden for the plaintiff: the alleged adverse action must be *material*."[319] Predictably, after making this observation, the court decided against the plaintiff.[320]

Despite the Supreme Court's pro-employee statement regarding the nature of the plaintiff's "not onerous" burden of

---

[312] *Id.* at 251–52.

[313] *Id.* at 252.

[314] *Id.* at 252–53.

[315] *Id.* at 253.

[316] *Id.*

[317] *See, e.g.*, Doe v. C.A.R.S. Prot. Plus, Inc., 527 F.3d 358, 365 (3d Cir. 2008), *order clarified*, 543 F.3d 178 (3d Cir. 2008) ("[T]he *prima facie* requirement for making a Title VII claim 'is not onerous' and poses 'a burden easily met.' " (quoting *Burdine*, 450 U.S. 248, 253 (1981))); Silva v. Bowie State Univ., 172 F. App'x 476, 478 (4th Cir. 2006); Nguyen v. City of Cleveland, 229 F.3d 559, 563 (6th Cir. 2000) ("The burden of establishing a *prima facie* case in a retaliation action is not onerous, but one easily met.").

[318] 211 F. App'x 163, 168 (4th Cir. 2006).

[319] *Id.*

[320] *Id.* at 167.

establishing a prima facie case, as was demonstrated earlier, many employers are prevailing at the summary judgment stage because employees are unable to establish the adverse action element of the prima facie case.[321] The proposed subjective test for determining an adverse action would allow courts to follow the pro-plaintiff statement from *Burdine* and provide plaintiffs with a less onerous path to establishing a prima facie case.

2. An objective standard for establishing an adverse action has placed a barrier in front of plaintiffs attempting to access Title VII's remedial mechanisms

Title VII jurisprudence has often repeated several court-created pronouncements; these pronouncements are almost boilerplate language in any Title VII opinion. For example, the Supreme Court's statement in *Oncale* that Title VII was not intended to be a "general civility code"[322] is repeated in numerous sexual harassment cases deciding whether the employer's conduct was sufficiently hostile to be actionable.[323] With respect to Title VII's antiretaliation provision, one of these often-repeated statements is that the provision's purpose is to provide unfettered access to Title VII's remedial mechanisms.[324] This appears to have originated in *Robinson v. Shell Oil Co.*,[325] when the Court had to address whether Title VII's antiretaliation provision protected former employees.[326] The Court agreed with the EEOC, concluding that the statute protected former employees.[327] The Court stated, the EEOC's "arguments carry persuasive force given their coherence and their consistency with a primary purpose of antiretaliation provisions: Maintaining unfettered access to statutory remedial mechanisms."[328]

The Supreme Court has reiterated this since *Robinson*, stating in *Burlington Northern* that "[m]aintaining unfettered access to statutory remedial mechanisms" was the purpose

---

[321] *See* discussion *supra* Part IV.

[322] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998).

[323] For example, a recent Westlaw search of federal cases containing "Oncale" and "general civility code" resulted in over 2,500 hits.

[324] A recent Westlaw search of federal cases containing "unfettered access" and "remedial" and "Title VII" resulted in over 350 hits.

[325] 519 U.S. 337, 346 (1997).

[326] *Id.* at 339.

[327] *Id.* at 345–46.

[328] *Id.* at 346.

behind Title VII's antiretaliation provision.[329] Justice Thomas repeated this idea in his dissent in *Jackson v. Birmingham Board of Education*,[330] where he stated, "As we explained with regard to Title VII's retaliation prohibition, 'a primary purpose of antiretaliation provisions' is '[m]aintaining unfettered access to statutory remedial mechanisms.' "[331]

Similar to the *Oncale* language regarding a "general civility code," this "unfettered access" statement from the Court has been repeated in numerous cases from both the United States Courts of Appeals and the United States District Courts.[332] Nonetheless, adopting the stricter, objective standard for determining what constitutes an actionable employer action has blocked access to Title VII's remedial mechanisms for many victims of employer retaliation.[333] Moreover, as demonstrated earlier, not only are these victims losing their cases, but these victims are also losing their cases without even having the opportunity to have a jury determine the merits of their claims.[334] Because the objective test is hindering access to Title VII's remedial mechanisms, the subjective test is more appropriate.

C. Adopting a Subjective Standard Will Not Make It Too Easy for Plaintiffs to Win Retaliation Claims

Even if courts adopt a subjective standard for plaintiffs to prove an adverse action, there are still hurdles that retaliation plaintiffs must clear in order to prevail. Specifically, at the prima facie case stage, plaintiffs would still have to prove that the employer's action would have dissuaded them from engaging in the protected activity,[335] and that there was a causal connection between the protected activity and the adverse action.[336] After establishing a prima facie case, plaintiffs will have to prove that the employer's articulated reason for the adverse action was pretextual, and that the retaliation would not

---

[329] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 64 (2006) (alteration in original) (citing *Robinson*, 519 U.S. at 346).

[330] 544 U.S. 167, 189 (2005) (Thomas, J., dissenting) (alteration in original).

[331] *Id.* (quoting *Robinson*, 519 U.S. at 346).

[332] *See supra* note 323.

[333] *See supra* Part IV.

[334] *See supra* Part IV.

[335] Plaintiffs would also have to prove they did, in fact, engage in protected activity.

[336] *See, e.g.*, Noviello v. City of Boston, 398 F.3d 76, 88 (1st Cir. 2005).

have occurred but-for the protected activity.[337] None of these hurdles is easy to clear; thus, even if courts take a less strict approach when deciding which retaliatory actions are actionable, plaintiffs will still carry the burden of proving all elements of their cases.[338] As a result, the approach suggested by this Article will not result in a landslide of victories for retaliation plaintiffs.

1. Plaintiffs will still have to prove they would not have engaged in the protected activity had they known what the employers' response would be

This Article's suggestion would not result in a landslide of plaintiffs prevailing with meritless claims. One reason for this conclusion is that employers would still be able to challenge plaintiffs regarding whether the plaintiffs would, in fact, have been dissuaded from engaging in protected activity. Although plaintiffs will undoubtedly testify that they would have been dissuaded from engaging in the protected activity, employers' attorneys can use cross-examination and other relevant facts to attack the credibility of that testimony. If defense attorneys were able to successfully attack the credibility of the plaintiff's testimony regarding this issue, then the employer would prevail.

This has occurred in other cases, including the previously discussed case of *Tepperwien v. Entergy Nuclear Operations, Inc.*,[339] from the Second Circuit. In that case, the plaintiff alleged several retaliatory acts, but the court concluded that none of them was sufficiently adverse.[340] When addressing whether these acts met *Burlington Northern*'s objective standard, the court stated the following:

> Viewing all of the actions in the aggregate, we conclude that a reasonable employee in [the plaintiff's] situation would not have been deterred from engaging in protected activities. Indeed, while the test is an objective one, it is relevant that [the plaintiff] himself was not deterred from complaining—he complained numerous times. Moreover, [the plaintiff] acknowledged, after all the incidents and when it was clear that he was leaving [the defendant], that he would consider working

---

[337] Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 362 (2013).
[338] *Id.*
[339] 663 F.3d 556, 572 (2d Cir. 2011).
[340] *Id.*

> for [the defendant] again and that overall he was satisfied with his job at [with the defendant].[341]

In this case, and in similar cases, the plaintiff would most likely have been unable to pass the proposed subjective test; thus, this case provides an example of how adopting such a test will not allow every retaliation plaintiff to easily establish the adverse action element of the prima facie case.

This type of subjective test also applies in hostile environment cases; a plaintiff in such a case also has to prove that she, subjectively, felt the conduct was sufficiently severe or pervasive such that it affected a term, condition, or privilege of employment.[342] In such a case, there would be no Title VII violation. As the Court noted in *Faragher*, "in order to be actionable under [Title VII], a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, *and one that the victim in fact did perceive to be so*."[343] And just as they are able to do with claims of sexual harassment, employers' attorneys will be able to attack the credibility of retaliation plaintiffs' alleged subjective feelings. Because of the ability to cross-examine the plaintiff on whether she would have been dissuaded from engaging in protected activity, and because other evidence might also cast doubt on the plaintiff's alleged feelings, employers will still be able to defend against this element of a prima facie case under the proposed subjective test.

2. Plaintiffs will still have to prove a causal connection between their protected activity and the adverse actions

As noted earlier, a plaintiff has to prove three elements to establish a prima facie case,[344] and even if the plaintiff can establish that she would have been dissuaded from engaging in

---

[341] *Id.*

[342] *See* Faragher v. City of Boca Raton, 524 U.S. 775, 787 (1998) (stating that a harassment victim must satisfy both an objective and a subjective test to establish a cause of action (citing Harris v. Forklift Sys. Inc., 510 U.S. 17, 21–22 (1993))).

[343] 524 U.S. at 787 (emphasis added) (citing *Harris*, 510 U.S. at 21–22). Admittedly, there is an objective component to this test as well.

[344] *See, e.g.*, Noviello v. City of Boston, 398 F.3d 76, 88 (1st Cir. 2005). Some courts list a fourth element—the employer's knowledge of the protected activity. *See, e.g.*, Kwan v. Andalex Grp. L.L.C., 737 F.3d 834, 844 (2d Cir. 2013). Although not all courts specifically list this element, the employer's knowledge is critical; if an employer has no knowledge of a protected activity, then the employer cannot have a retaliatory motive.

the protected activity, she would still have to prove the rest of her prima facie case. Specifically, the plaintiff would also have to prove that she had engaged in the protected activity and that there was a causal connection between the protected activity and the adverse action.[345] In many cases, whether a plaintiff engaged in protected activity is not strenuously contested.[346] Similarly, because many retaliation cases involve situations in which there has been a concrete effect on the plaintiff's employment status, establishing an adverse action is not always complicated—despite what the plaintiffs mentioned in this Article have experienced. Many retaliation plaintiffs' claims fail at the third element of the prima facie case—the causal connection between the protected activity and the adverse action.[347] Because the requirement to prove this element will still exist under this Article's proposal, the proposal would not result in easy victories for retaliation plaintiffs.

The United States Courts of Appeals have differed somewhat with respect to the plaintiff's burden when establishing this causal connection. Although just about all courts look at the timing between the protected activity—or the employer's knowledge of it—and the adverse action as evidence of a retaliatory motive, not all courts agree on whether or when timing alone is sufficient to establish the causal connection element of the prima facie case.[348] Regardless of how lenient the court is with analyzing the plaintiff's burden of establishing the causal connection element, many plaintiffs' claims fail on this element. Moreover, regardless of how strict courts are with respect to how adverse an employer's action must be to be

---

[345] *See supra* Part I.

[346] Occasionally, the employer does contest whether the employee engaged in protected activity, arguing that the employee did not hold a reasonable, good-faith belief that the employer's conduct violated Title VII. *See* Lawrence D. Rosenthal, *Reading Too Much into What the Court* Doesn't *Write: How Some Federal Courts Have Limited Title VII's Participation Clause After* Clark County School District v. Breeden, 83 WASH. L. REV. 345 (2008); Lawrence D. Rosenthal, *To Report or Not to Report: The Case for Eliminating the Objectively Reasonable Requirement for Opposition Activities Under Title VII's Anti-Retaliation Provision*, 39 ARIZ. ST. L.J. 1127 (2007).

[347] *See generally* Lawrence D. Rosenthal, *Timing Isn't Everything: Establishing a Title VII Retaliation Prima Facie Case after* University of Texas Southwestern Medical Center v. Nassar, 69 SMU L. REV. 143 (2016) (discussing the elements of the prima facie case for retaliation claims).

[348] For a thorough discussion regarding timing and the establishing of a causal connection between the adverse action and the protected activity, see Rosenthal, *supra* note 347.

actionable, this causal connection requirement will still serve as a filter against frivolous claims, preventing the proposed subjective test from making it too easy for retaliation plaintiffs to prevail.

3. Retaliation Plaintiffs will still have to prove pretext and but-for causation

Even if the plaintiff is able to establish her prima facie case, she is not entitled to defeat the employer's motion for summary judgment.[349] Specifically, she must still prove—or at least present evidence at the summary judgment stage—that the employer's articulated reason for the adverse action was not the real reason for the action, and that the real but-for reason for the adverse action was retaliation.[350] Because retaliation plaintiffs must prove but-for causation—unlike discrimination plaintiffs, who need to prove only that discrimination was a motivating factor for the employment action—this is often not an easy task. Thus, this is another reason why employers often prevail at summary judgment in these types of claims, and why a subjective test for adverse actions would not result in an easy path to victory for retaliation plaintiffs.

In the previously-discussed cases of *McDonnell Douglas*[351] and *Burdine*,[352] the Court articulated and clarified the plaintiff's burden when there is no direct evidence of discrimination or retaliation.[353] The Court also addressed this burden-shifting paradigm in *St. Mary's Honor Center v. Hicks*.[354] The one thing that is clear in all three cases is that, even if the plaintiff establishes a prima facie case, she must still demonstrate that the employer's articulated reason for the adverse action was pretextual.[355] If there is insufficient evidence of pretext in

---

[349] *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 508–11 (1993); Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 254–56 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 807 (1973).

[350] Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 362–63 (2013).

[351] 411 U.S. 792.

[352] 450 U.S. 248.

[353] *McDonnell Douglas Corp.*, 411 U.S. at 802–03; *Burdine*, 450 U.S. at 252–53.

[354] 509 U.S. at 506–07.

[355] *See id.* at 516; *Burdine*, 450 U.S. at 253; *McDonnell Douglas Corp.*, 411 U.S. at 804.

response to the employer's motion for summary judgment, courts will grant summary judgment in favor of the employer.[356]

In *McDonnell Douglas*, the Court stated the following with respect to the plaintiff's burden after the employer articulates its reason for the adverse employment decision:

> [Employer's] reason for rejection thus suffices to meet the prima facie case, but the inquiry must not end here. While Title VII does not, without more, compel rehiring of [the plaintiff], neither does it permit [the employer] to use [the plaintiff's] conduct as a pretext for the sort of discrimination prohibited by s 703(a)(1). On remand, [the plaintiff] must, as the Court of Appeals recognized, be afforded a fair opportunity to show that [the employer's] stated reason for [the plaintiff's] rejection was in fact pretext. . . . In short, on the retrial [the plaintiff] must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision.[357]

It was therefore clear that, even if a plaintiff establishes a prima facie case, she still carries the burden of proving that the employer's stated reason for its decision was a pretext for discrimination or retaliation.[358]

Next, in *Burdine*, after some courts were exhibiting uncertainty with respect to the shifting burdens under Title VII, the Court clarified *McDonnell Douglas* and stated, "[S]hould the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination."[359] More importantly, the Court stated, "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff *remains at all times with the plaintiff*."[360] In concluding its discussion of the shifting burdens under this paradigm, the Court stated,

> The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This

---

[356] *St. Mary's Honor Ctr.*, 509 U.S. at 516–17; *Burdine*, 450 U.S. at 253; *McDonnell Douglas*, 411 U.S. at 804.

[357] 411 U.S. at 804–05.

[358] *Id.* at 804.

[359] 450 U.S. at 253 (citing *McDonnell Douglas*, 411 U.S. at 804).

[360] *Id.* (emphasis added) (citing Bd. of Trs. of Keene State Coll. v. Sweeney, 439 U.S. 24, 25 (1978)).

> burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.[361]

Thus, it is clear that the burden of proof remains with the plaintiff.[362] Although this seems to be relatively clear, the Court eventually had to once again emphasize the plaintiff's burden under the *McDonnell Douglas* paradigm, and it did so in *St. Mary's Honor Center v. Hicks*.[363]

In *Hicks*, a Title VII discrimination case, the Court addressed whether the fact-finder's rejection of the employer's articulated reason for its decision mandated a judgment for the plaintiff.[364] The Court held that it did not, emphasizing the nature of the plaintiff's burden.[365] The Court often referred to *McDonnell Douglas* and *Burdine*[366]; when it addressed the ultimate burden of proof, the Court stated the following from *Burdine*: "It is important to note, however, that although the *McDonnell Douglas* presumption shifts the burden of *production* to the defendant, '[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.' "[367] Finally, when it concluded that the rejection of the employer's reason may allow for a pro-plaintiff verdict—but does not require one—the Court reiterated that the ultimate burden of proof in Title VII cases rests with the plaintiff, stating,

> But the Court of Appeals' holding that rejection of the defendant's proffered reasons *compels* judgment for the plaintiff disregards the fundamental principle of Rule 301 that a presumption does not shift the burden of proof, and ignores our repeated admonition that *the Title VII plaintiff at all times bears the "ultimate burden of persuasion*."[368]

---

[361] *Id.* at 256 (citing *McDonnell Douglas*, 411 U.S. at 804–05).

[362] *Id.*

[363] 509 U.S. 502, 507–08 (1993).

[364] *Id.* at 504.

[365] *Id.* at 511.

[366] *See id.*

[367] *Id.* at 507 (alteration in original) (quoting Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 253 (1981)).

[368] *Id.* at 511 (second emphasis added). After *Hicks*, the Court again addressed a plaintiff's burden under the *McDonnell Douglas* paradigm—in *Reeves v. Sanderson Plumbing Products, Inc.*, which involved an ADEA discrimination claim, the Court

Thus, after the *McDonnell Douglas*, *Burdine*, and *Hicks* trilogy, it is clear that Title VII plaintiffs still bear the ultimate burden of proof. As a result, loosening the requirements for establishing a prima facie case will not result in a flood of plaintiff victories in retaliation cases.

Finally, and perhaps even more importantly, the Court has most recently decided that a plaintiff's burden of proof in a retaliation case is higher than it is in a discrimination case.[369] In *Nassar*, the Court held that the more plaintiff-friendly "motivating factor" standard that applies to status-based discrimination cases[370] does not apply to retaliation cases, and that retaliation plaintiffs must meet the higher "but-for" standard for causation.[371]

After focusing on how Congress did not address retaliation claims in the pro-plaintiff Civil Rights Act of 1991—which allowed Title VII plaintiffs to prevail in status-based discrimination cases if they were able to demonstrate discrimination was a motivating factor behind the employment action—,[372] the Court in *Nassar* reached the following conclusion regarding retaliation claims: "Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test stated in § 2000e–2(m). This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions

---

concluded that disbelief of the employer's proffered reason for the challenged employment action could, in some cases, be sufficient to permit a plaintiff to prevail. 530 U.S. 133, 147–48 (2000). While issuing this pro-plaintiff statement, the Court also reiterated that the ultimate burden of proof rests with the plaintiff. *Id.* at 143 (quoting *Burdine*, 450 U.S. at 253).

[369] Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 362 (2013).

[370] Specifically, when Congress passed the Civil Rights Act of 1991, Congress added the following section, titled "Impermissible consideration of race, color, religion, sex, or national origin in employment practices":

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-2(m). As a result of this legislation, plaintiffs can prevail in Title VII discrimination claims if they are able to prove that status-based discrimination was a "motivating factor" in the employment decision. *Id.* As was pointed out in *Nassar*, however, Congress did not mention "retaliation" when it created this "motivating factor" provision, which led the Court to conclude that plaintiffs in retaliation claims must meet the more rigorous but-for causation standard. 570 U.S. at 362.

[371] *Nassar*, 570 U.S. at 362.

[372] *Id.* at 353.

of the employer."[373] As a result, retaliation claims are more difficult to prove than discrimination claims, and allowing a lower standard for establishing a prima facie case will not result in a windfall for plaintiffs, as they will still carry the ultimate burden of persuading fact-finders that retaliation was the but-for reason for the adverse action.

Thus, even if courts apply a subjective test when determining whether an employer's response to protected activity is sufficiently adverse to be actionable, there are still significant hurdles plaintiffs must clear before prevailing. Specifically, at the prima facie case stage, a plaintiff will still have to prove that she engaged in protected activity, that she would have been dissuaded from engaging in the protected activity, and that there was a causal connection between the protected activity and the adverse action.[374] Moreover, even if the plaintiff clears these hurdles, she will still have to prove pretext and but-for causation. As a result of these significant hurdles, the standard proposed in this Article will not result in a flood of victorious retaliation plaintiffs.

D. The Objective Standard Frustrates Title VII's Goals

One goal of antiretaliation provisions is ensuring that employees are free to (1) report perceived unlawful conduct—either internally to the employer or externally to the appropriate government agency—and (2) participate in the EEO process.[375] *Burlington Northern*'s standard frustrates these goals, as it allows employers to retaliate against employees up to a point that makes the work environment unwelcoming, but not unwelcoming enough that it would dissuade the so-called "reasonable worker" from opposing an unlawful employment practice or participating in the EEO process.

As was evident from the cases discussed earlier in this Article, employers have been able to engage in numerous retaliatory acts, but because those acts were "not bad enough," the employers were able to retaliate with impunity.[376] These

---

[373] *Id.* at 360.

[374] As noted before, they will also have to prove they engaged in protected activity. *See supra* Part I.

[375] *See Enforcement Guidance on Retaliation and Related Issues*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Aug. 25, 2016), https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues [https://perma.cc/Y48E-R9QA].

[376] *See supra* Part IV.

unactionable employer actions included, among other things, written and verbal reprimands,[377] unfounded accusations of sexual harassment,[378] threats of termination,[379] job transfers, [380] administrative leave,[381] increased scrutiny of job performance,[382] ostracism by colleagues,[383] and increased work responsibilities.[384]

By applying the *Burlington Northern* objective standard, courts are allowing employers to take the above-mentioned retaliatory adverse actions—and others—without any ramifications.[385] In fact, the court in *Stewart v. Mississippi Transportation Commission*[386] acknowledged this when it relied on *Burlington Northern* and stated, "*Even when an adverse action is intended by the employer as retaliation*, it must still satisfy this materiality standard."[387] This acknowledges that employers have the right to retaliate with impunity so long as they do not cross a line that a district court judge decides to create and a court of appeals decides to enforce.

On the other hand, applying the proposed subjective standard would hold employers more accountable for engaging in these retaliatory actions and, as will be discussed later in this Article, juries can determine to what financial extent, if any, employers should be held responsible for these actions, including "minor" retaliatory actions.[388] Knowing that they will be held liable to some extent for these allegedly minor workplace inconveniences or annoyances, employers would be less likely to

---

[377] Bhatti v. Trustees of Bos. Univ., 659 F.3d 64, 68 (1st Cir. 2011); Hellman v. Weisberg, 360 F. App'x 776, 778–79 (9th Cir. 2009); Lahar v. Oakland Cnty., 304 F. App'x 354, 355 (6th Cir. 2008).

[378] AuBuchon v. Geithner, 743 F.3d 638, 643 (8th Cir. 2014).

[379] Tepperwien v. Entergy Nuclear Operations, Inc., 663 F.3d 556, 568 (2d Cir. 2011); *Hellman*, 360 F. App'x at 779.

[380] Payan v. UPS, 905 F.3d 1162, 1167 (10th Cir. 2018); Lucero v. Nettle Creek Sch. Corp., 566 F.3d 720, 727 (7th Cir. 2009); DiCampli v. Korman Cmtys., 257 F. App'x 497 (3d Cir. 2007); Csicsmann v. Sallada, 211 F. App'x 163, 168 (4th Cir. 2006) (citing Boone v. Goldin, 178 F.3d 253, 255–57 (4th Cir. 1999)).

[381] Stewart v. Miss. Transp. Comm'n, 586 F.3d 321, 332 (5th Cir. 2009).

[382] Edwards v. Nat'l Vision, Inc., 568 F. App'x 854, 862 (11th Cir. 2014).

[383] *Id.*; *Stewart*, 586 F.3d at 331–32; Hellman v. Weisberg, 360 F. App'x 776, 778 (9th Cir. 2009).

[384] AuBuchon v. Geithner, 743 F.3d 638, 645 (8th Cir. 2014); *Edwards*, 568 F. App'x at 862; *Stewart*, 586 F.3d at 332–33.

[385] *See supra* Part IV.

[386] 586 F.3d 321.

[387] *Id.* at 331 (emphasis added) (citing Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67–68 (2006)).

[388] *See infra* Section V.E.

engage in these retaliatory acts, and the antiretaliation provisions' goals of allowing employees to freely oppose unlawful employer actions and fully participate in the EEO process would be realized.[389]

E. A Subjective Standard Will Not Cripple Employers Because Jurors Can Award Either No or Only Nominal Damages in Cases of Overly-Sensitive Employees

Another reason why the approach argued for in this Article would not result in a windfall for retaliation plaintiffs is that, even if a plaintiff can establish a prima facie case and show that the employer's articulated reason for the adverse action was a pretext for retaliation, juries can decide to award no or only nominal damages to plaintiffs who experience minor adverse actions. Thus, in cases where the retaliatory act was relatively minor—for example, Paula Jones's claim that she did not receive flowers on Secretary's Day—employers would face only limited financial exposure, but they would still be held accountable for engaging in this retaliatory conduct. This result would vindicate the victim of the retaliation and not financially cripple the employer. As a result, applying a subjective standard as to what qualifies as an actionable adverse action would not have serious financial ramifications for employers who engage in "minor" acts of retaliation.[390]

---

[389] Additionally, knowing that they could be held liable for these retaliatory acts would perhaps encourage settlement in situations where the employers did take some type of negative, retaliatory action against the person who engaged in protected activity.

[390] Admittedly, employers in cases where the jury awards a small damage amount might still be liable for the plaintiffs' attorney fees, which could be significant. *See* 42 U.S.C. § 2000e-5(k). This part of the Code states the following:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

Id. For a full discussion of whether plaintiffs are entitled to attorney fees in cases where the jury awards either no or only nominal damages, see my previous article, Lawrence D. Rosenthal, *Adding Insult to No Injury: The Denial of Attorney's Fees to "Victorious" Employment Discrimination and Other Civil Rights Plaintiffs*, 37 FLA. ST. U. L. REV. 49 (2009).

VI. CONCLUSION

Charges of employer retaliation now make up more than half of the charges filed with the EEOC.[391] This means that retaliation claims are now more common than claims alleging discrimination based on race, color, religion, sex, national origin, age, and disability.[392] Regardless of whether these claims of retaliation are ultimately found to have merit, one thing is clear: retaliation—or at least the perception of it—is real in the American workplace.

In *Burlington Northern*, the Supreme Court expanded which types of retaliatory acts are actionable, concluding that an employer's non-workplace-related actions can form the basis of a plaintiff's complaint.[393] Although this part of *Burlington Northern* certainly helped retaliation plaintiffs, the second part of *Burlington Northern* has placed a barrier in front of many plaintiffs. Specifically, by adopting the objective, reasonable-employee standard when evaluating whether the employer's actions were "adverse enough," the Court has given district courts and courts of appeals the power to defeat a plaintiff's claim if those courts find that a reasonable employee in the plaintiff's position would not have been deterred from engaging in protected activity.

Instead of utilizing this objective, reasonable-employee standard, courts should ask a different question: "would the plaintiff have been dissuaded from engaging in the protected activity?" If the answer is "yes," then the plaintiff suffered an actionable adverse action; if the answer is "no," then the plaintiff did not experience an actionable adverse action.[394] This approach is consistent with Title VII's antiretaliation provision's language

---

[391] *See Charge Statistics (Charges Filed with EEOC) FY 1997 Through FY 2021*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/statistics/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2021 [https://perma.cc/27DP-27X7] (last visited Feb. 12, 2023).

[392] *Id.*

[393] 548 U.S. at 57.

[394] One other possible alternative to using *Burlington Northern*'s objective test would be to adopt a "frivolous" threshold for determining whether an action is sufficiently adverse to be actionable. So, in a situation where the alleged adverse action is so trivial as to fall in the "frivolous" standard—for example, Paula Jones's flowers issue—the plaintiff would not be able to establish the adverse action element of her prima facie case. Of course, this standard—just like the *Burlington Northern* Standard—also gives the district court the authority to summarily dismiss plaintiffs' claims if the court believes the retaliatory action was not sufficiently adverse to meet the "frivolous" floor.

and purpose, is consistent with Supreme Court pronouncements regarding the nature of the plaintiff's burden at the prima facie case stage, will not make retaliation cases too easy for plaintiffs to win, and will not have significant financial ramifications for employers.

Therefore, although it is unlikely that the Court will revisit *Burlington Northern*, the approach suggested in this Article will more effectively deter employer retaliation and will encourage more plaintiffs to come forward when they are penalized—regardless of how seriously—when they attempt to assert their statutory rights or the statutory rights of their co-workers.