Labor and Employment Law

Title VII Retaliation Claims after *White*: The Struggle to Define Materially Adverse Conduct in the Context of the Reasonable Employee Standard

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On June 22, 2006, the U.S. Supreme Court issued its opinion in *Burlington Northern & Santa Fe Railway Co. v. White*[1] and resolved a split among the circuit courts regarding the correct interpretation of the anti-retaliation provision contained in Title VII of the Civil Rights Act of 1964, as amended ("Title VII").[2]

Title VII was enacted in an effort to end workplace discrimination.[3] To accomplish this goal, section 703 of Title VII made it unlawful for an employer to discriminate against an employee with regard to his or her "compensation, terms, conditions, or privileges of employment" because of the individual's "race, color, religion, sex, or national origin."[4] To augment the protections provided in section 703, Congress also adopted the anti-retaliation provision in section 704(a) of the Act.[5] The anti-retaliation provision generally prohibits employers from penalizing employees who have raised opposition to actions that violate Title VII or have participated in proceedings to vindicate the rights guaranteed by the Act.[6] Unlike section 703 that specifically limits its application to employment decisions that impact an employee's terms, conditions, or privileges of employment, the plain language of section 704(a) states that it is unlawful for an employer "to discriminate" against an employee who had engaged in a protected activity.[7] For this reason, the circuit courts of appeal split on the issue of what employment actions were sufficiently severe and therefore actionable under the "to discriminate" language of the anti-retaliation provision.[8]

Prior to the Supreme Court's decision in *White*, the Sixth, Fourth, and Third Circuit Courts had held that the "to discriminate" language of section 704(a) established the same standard as the anti-discrimination statute for determining if an adverse employment decision was unlawful.[9] Accordingly, an employee could not prevail on a retaliation claim in these circuits unless the employee could show that the alleged act of retaliation had a materially adverse effect on the terms, conditions, or benefits' of employment. The Fifth and Eighth Circuits, on the other hand, adopted a more restrictive approach, holding that an employee must show that the action taken by the employer qualified as an "ultimate employment decision," which is a decision regarding "hiring, granting leave, discharging, promoting, and compensating."[10]

The Seventh Circuit and the District of Columbia Circuit adopted a less restrictive interpretation of the anti-retaliation statute than the circuits above discussed, holding that an employee need not prove that the adverse action negatively impacted the terms or conditions of employment.[11] Instead, these courts of appeal held that an employee needed to show that the adverse action at issue would be considered "material to a reasonable employee," meaning that the challenged action would need to be one that was likely to "dissuade a reasonable worker from making or supporting a charge of discrimination."[12] Lastly, the Equal Employment Opportunity Commission's (EEOC) approach, adopted by the Ninth Circuit, required a plaintiff to show adverse treatment based on a retaliatory motive.[13] This last approach, however, still required the plaintiff to prove that the conduct at issue was likely to deter the plaintiff or others from engaging in protected conduct.

The Supreme Court granted certiorari in *White* to interpret the anti-retaliation statute contained in Title VII, and specifically to delineate what types of harm a plaintiff must allege and prove to establish an actionable claim of retaliation under Title VII.[14] The plaintiff in *White* worked primarily as a forklift operator in the Maintenance of Way Department of Burlington Northern and Santa Fe Railway ("BNSF"), and she was the only female employee in this department.[15] The plaintiff later filed an internal complaint against her direct supervisor, claiming that in addition to other inappropriate comments made in front of her co-workers, he had told her that females should not be working in the department.[16] Her supervisor was eventually suspended for 10 days and required to attend a sexual harassment training session.[17] A short time after making her complaint, the plaintiff was told by another member of management that she was being removed from her job as a forklift operator and reassigned to perform only standard laborer duties.[18] The employer told the plaintiff that the decision was made because co-workers had complained that a "more senior man" should have the "less arduous and cleaner job" of forklift operator.[19]

The plaintiff filed a charge with the EEOC alleging that her employer's decision to assign her different responsibilities was sexual discrimination and retaliation for her having filed a complaint against her supervisor.[20] The plaintiff subsequently filed a second charge with the EEOC, alleging that management had placed her under surveillance and was monitoring her daily activities in retaliation for her initial charge.[21] Several days after BNSF received notice of this second charge, the plaintiff and her supervisor had a disagreement regarding what truck should transport her from one job site to another.[22] BNSF immediately suspended the plaintiff without pay for her alleged insubordination, and she filed an internal grievance with her employer to challenge the discipline imposed.[23] BNSF ultimately determined that the plaintiff had not been insubordinate.[24] Accordingly, BNSF reinstated the plaintiff to her position and awarded her backpay for the 37 days she had been suspended.[25]

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The plaintiff subsequently filed a third charge with the EEOC alleging retaliation based on the suspension.[26] The case proceeded to trial on the plaintiff's allegations that BNSF had violated Title VII by changing her job duties and by suspending her without pay in retaliation for her decision to report her supervisor's inappropriate behavior.[27] A jury returned a verdict in favor of the plaintiff on both of these claims and awarded her $43,500 in compensatory damages.[28] The district court denied BNSF's post-trial motion for judgment as a matter of law.[29] BNSF appealed the judgment, and a divided Sixth Circuit panel reversed the district court, finding in favor of BNSF on the retaliation claims.[30] The Sixth Circuit, sitting en banc, vacated the decision and affirmed the judgment entered by the district court in White's favor on both retaliation claims.[31]

The Supreme Court framed the questions presented for review as follows: (1) "whether Title VII's anti-retaliation provision forbids only those employer actions and resulting harms that are related to employment or the workplace;" and (2) how harmful an act of retaliatory discrimination must be to fall within the scope" of Title VII anti-retaliation provision.[32]

In addressing the first question, the Court analyzed and compared the language contained in the anti-discrimination statute, section 703, with the language of the anti-retaliation statute, section 704.[33] The Court rejected the Sixth Circuit's standard, which required a link between the allegedly retaliatory conduct and the employees "compensation, terms, conditions, or privileges of employment," explaining that section 704 did not contain language limiting retaliatory conduct to the workplace or to actions that affected employment.[34] The Court further reasoned that its interpretation of the law was consistent with the purpose behind the anti-retaliation provision, which the Court noted serves a different purpose than the section of the act dealing with discrimination.[35] The Court concluded its analysis by explaining that a court should determine if a given harm is sufficiently material to qualify as retaliation by assessing whether "a reasonable employee would have found the challenged action materially adverse."[36] The Court provided additional guidance by noting that, in this context, the standard articulated requires a plaintiff to show that the alleged act of retaliation "might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[37]

In adopting this standard, the Court stressed the importance of separating non-actionable "trivial harms" from the type of harm that could subject an employer to liability, noting that Title VII "does not set forth a general civility code for the American workplace."[38] The opinion emphasizes that the Court intended its objective reasonable person standard to distinguish materially adverse employment actions from trivial harms that are not actionable as retaliation.[39] The Court further explained that it chose to define retaliation in general terms because "the significance of any given act of retaliation will often depend upon the particular circumstances."[40] The Court stated,

> By focusing on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff's position, we believe this standard will screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination.[41]

In applying the new retaliation standard, the Court found that a jury could reasonably have concluded that the adverse actions alleged by the plaintiff were likely to dissuade a reasonable employee from making or supporting a charge of discrimination, meaning the harms alleged were sufficiently material to be actionable; therefore, the Court affirmed the judgment of the Court of Appeals.[42]

The Court's decision in *White* provoked much commentary while lower courts began grappling with the new standard in the context of actual disputes.[43] Some commentators argued that the Court's new standard was difficult to apply by interjecting a subjective fact-specific analysis, thus leading to more litigation and less summary dismissals of lawsuits.[44] This article will review a representative number of court of appeals decisions to illustrate how the new standard has been applied to evaluate the overall impact of *White*.

I. Illustrative Appellate Decisions Applying the Standard Adopted by the Supreme Court

As noted above, the Court in *White* chose to adopt a relatively less restrictive standard for Title VII retaliation cases. Accordingly, some plaintiffs have successfully opposed motions for summary judgment in cases that likely would have been dismissed in favor of the employer had one of the more restrictive standards been adopted by the Court. For example, in *Hawkins v. Anheuser-Busch, Inc.*, the issue before the court of appeals was whether an employer could be held liable for acts of retaliation initiated by a co-worker.[45] The plaintiff in *Hawkins* began working on a new assembly line in January of 2000.[46] One of her new co-workers was a male employee named Robinson.[47] She alleged that Robinson began sexually harassing her in November 2000.[48] The plaintiff reported Robinson's harassment to her supervisor and requested a transfer.[49] The company's Human Resources Department learned of the complaint and made an investigation into the allegations.[50] Interviews were conducted, and the company learned that another female employee, Cunningham, also felt Robinson had sexually harassed her by touching her inappropriately and making offensive sexual comments.[51] These allegations of harassment were consistent with those made by the plaintiff.[52] The company, however, determined that it did not have sufficient evidence of harassment to take any disciplinary action against Robinson.[53]

In addition to alleging sexual harassment, the plaintiff claimed that Robinson retaliated against her once he learned that she had reported him for sexual harassment.[54] A few weeks after she reported Robinson to her employer, someone set fire to her car while it was parked outside of her home.[55] The plaintiff believed that Robinson was responsible, and she gave this information to fire investigators, her direct supervisors, and members of senior management.[56]

One of the supervisors to whom the plaintiff reported this incident confirmed that after the fire, he was having a conversation with Robinson when Robinson implied that he was in fact responsible for the act of vandalism.[57] This same supervisor acknowledged that he knew Robinson was violent based on his past conduct.[58] The Sixth Circuit's opinion also points out that the supervisor had refused to participate

in the criminal prosecution of Robinson because he feared that Robinson would retaliate against him.[59] In addition to this evidence, another member of senior management, who investigated the allegations of sexual harassment, also admitted that he had heard rumors that Robinson had burned the plaintiff's car.[60] This individual had furthermore learned that Robinson had informed two other female employees, whom he also allegedly harassed, that he had burned the plaintiff's car.[61]

The company moved for summary judgment.[62] The district court granted the motion and dismissed the retaliation claim, holding that the Sixth Circuit had not recognized employer liability for co-worker retaliation.[63] The district court explained that the plaintiff had failed to allege any act of retaliation that could be attributed to the employer that would qualify as an "adverse employment action" under the anti-retaliation statute.[64] The district court noted that the plaintiff did not present any evidence that her employer had "condoned or encouraged" Robinson to retaliate against her.[65] The plaintiff appealed the decision and the Sixth Circuit reversed, since it found that the district court had not correctly applied the Supreme Court's opinion in *White*.[66]

This case is significant to this discussion because the Sixth Circuit incorporated the *White* standard into its analysis of whether the plaintiff had properly asserted a claim of co-worker retaliation.[67] The Sixth Circuit held that an employer could be held liable for retaliation initiated by a co-worker if the employer's response "manifests indifference or unreasonableness in light of the facts the employer knew or should have known."[68] Accordingly, the Sixth Circuit in *Hawkins* integrated the reasonable person standard of *White* with the standard it adopted to assess whether a claim of co-worker retaliation was actionable.[69] On this point the court of appeals stated:

> an employer will be liable for the coworker's actions if:
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> (1) the coworker's retaliatory conduct is sufficiently severe so as to dissuade a reasonable worker from making or supporting a charge of discrimination,
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> (2) supervisors or... management have actual or constructive knowledge of the coworker's retaliatory behavior, and
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> (3) supervisors or... management have condoned, tolerated, or encouraged the acts of retaliation, or have responded to the plaintiff's complaints so inadequately that the response manifests indifference or unreasonableness under the circumstances.[70]

Applying this standard, the court of appeals held that the plaintiff had presented sufficient evidence from which a reasonable jury could find that the employer responded to the plaintiff's complaints with indifference.[71] Thus, the plaintiff established a prima facie case of retaliation because Robinson's retaliatory acts were such that a jury could find that they were likely to dissuade a reasonable employee from filing or supporting a charge of discrimination.[72] It is noteworthy that prior to the Court's decision in *White*, it is likely that the court of appeals would have affirmed the order of summary judgment in favor of the employer in this case because Robinson's act of vandalism would not qualify as causing an adverse impact on the employee's terms, conditions, or privileges of employment under the former standard.[73]

A number of other post-*White* decisions support the view that the new standard has made it more difficult for employers to prevail on motions for summary judgment.[74] In *Billings v. Town of Grafton*, the district court dismissed the plaintiff's retaliation claim after finding that her transfer, from one secretarial position to another, did not qualify as a "materially adverse" action.[75] The court of appeals, however, reversed because it found that the plaintiff had presented sufficient objective evidence that her new position was less prestigious, making summary judgment inappropriate.[76] The court of appeals further explained that, unlike her original job, the new position to which plaintiff was transferred was governed by a collective bargaining agreement, forcing the plaintiff to pay union dues and abide by union rules.[77] The First Circuit found that this change could "well dissuade a reasonable worker from making or supporting a charge of discrimination."[78]

In *Williams v. W.D. Sports N.M.Inc.*, the Tenth Circuit addressed the issue of whether a plaintiff could establish a prima facie case of retaliation where she alleged the employer opposed her request for unemployment benefits in retaliation for a sexual harassment charge she filed against the company.[79] The employer argued that its opposition to the plaintiff's unemployment claim was not materially adverse because the plaintiff did not present any evidence to prove that, as a result of its opposition, her unemployment benefits were actually suspended or denied.[80] The district court accepted this argument and dismissed the plaintiff's retaliation claim on the defendant's motion for directed verdict.[81]

The court of appeals reversed the district court, holding that *White* does not require a plaintiff to prove that he or she suffered actual harm to establish a prima facie case of retaliation.[82] Instead, the court held that a plaintiff must merely "show that a jury could conclude that a reasonable employee in [the plaintiff's] shoes would have found the defendant's conduct sufficiently adverse that he or she well might have been dissuaded from making or supporting a charge of discrimination."[83] The court of appeals found that the plaintiff had met this burden by presenting evidence that her employer threatened to destroy her marriage by spreading rumors regarding sexual misconduct if she opposed their decision to terminate her employment.[84] Accordingly, the court of appeals found that the circumstances were such that a jury could reasonably find that the employer's decision to oppose her request for unemployment benefits was retaliation.[85]

Halfacre v. Home Depot, U.S.A., Inc. also serves as a good example of how *White* has been applied to sustain a claim of retaliation where the outcome would likely have been different under the former standard.[86] In *Halfacre*, the plaintiff filed a charge of discrimination against Home Depot, alleging that the company had refused to promote him because of his race.[87] After filing this charge, the plaintiff received a performance evaluation from his supervisor that was the least favorable review he had received while employed by Home Depot.[88] The plaintiff subsequently filed a second charge to allege that he received a lower review in retaliation for filing his charge of discrimination.[89] The plaintiff subsequently filed a lawsuit alleging retaliation and the defendant moved for summary judgment.[90] The district court granted the defendant's motion

for summary judgment as to the retaliation claim, holding that a lower performance review did not qualify as a materially adverse employment decision since it did not alter the terms, conditions, or privileges of his employment.[91] One should note that the district court rendered its decision a short time before the Supreme Court published its decision in *White*.[92]

The Sixth Circuit reassessed whether the plaintiff's allegation that the lower performance review qualified as retaliation in light of *White*.[93] The court of appeals determined that the lower performance evaluation could qualify as actionable retaliation under the new standard and reversed the decision of the lower court.[94] According to the court of appeals, a lower performance evaluation could qualify as an adverse employment action that "could-in certain circumstances-dissuade a reasonable worker from making or supporting a charge of discrimination."[95] It reached this decision because it found that "markedly lower performance-evaluation scores" could "significantly impact an employee's wages or professional advancement."[96] It is noteworthy that prior to *White* the court of appeals would likely have affirmed the district court's decision since a single bad performance evaluation had previously been insufficient to qualify as a materially adverse action in the Sixth Circuit.[97]

By contrast, in *Higgins v. Gonzales*, the Eighth Circuit considered an employee's claim of retaliation involving an alleged lack of supervision and mentoring and a "transfer" to a similar position in another city.[98] The plaintiff was an Assistant United States Attorney ("AUSA") who was assigned to a project that had a two-year duration.[99] At the end of the two-year period, the plaintiff was provided with a similar position in another city.[100] Plaintiff alleged that "floundering should be recognized as an adverse employment action" and argued that her case was comparable to a supervisor that excludes an employee from "networking lunches."[101] The Eighth Circuit rejected her claim, noting that the record on appeal did not reflect that the plaintiff "was actually left to 'flounder' or that she was negatively impacted by the lack of supervision or mentoring."[102] As to the retaliation claim involving the alleged transfer, the Eighth Circuit reasoned that the plaintiff had failed to establish that the employment action was in fact a transfer or that it was a materially adverse action under the facts.[103] For example, the new position in Pierre was offered after the plaintiff's two-year appointment to the position in Rapid City ended by its own terms.[104] In addition, the plaintiff did not allege that the new position was "qualitatively more difficult or less desirable than the one she held in Rapid City."[105] The court of appeals further rejected the plaintiff's argument that the change was materially adverse because she essentially had to "start all over with [sic] with different cases and move to a new school setting with her family."[106] In rejecting this argument, the court of appeals noted that such arguments had been rejected in pre-*White* cases, since otherwise "*any* move would qualify as a materially adverse action because it would force an employee to start over in a new city."[107] Therefore, the Eighth Circuit affirmed the district court's order granting the defendant's motion for summary judgment.[108]

Later, affirming summary judgment in favor of the defendant, the Eighth Circuit in *Clegg v. Arkansas Department of Correction* rejected the retaliation claims of the plaintiff based on allegations of a negative evaluation, failure to provide tools, notices of new department policies and exclusion from meetings, among others, finding these were "trivial harms" under the facts presented.[109] In addressing the allegations of harm related to the evaluation, the court of appeals found that the plaintiff had received a satisfactory evaluation and that training was provided to help the plaintiff improve in the areas where he scored lower than in previous evaluations.[110] With regard to the allegations related to a failure to provide tools, notices of new policies, and exclusion from meetings, the court of appeals found that these matters were immediately remedied after the plaintiff brought these "failures" to the attention of his supervisor or asked to be included in certain meetings[111] Finally, the Eighth Circuit noted that plaintiff's complaints, related to his "contentious" relations with co-workers, were "trivial harms" and not actionable under Title VII.[112]

CONCLUSION

The decisions from the courts of appeals above discussed illustrate that *White* has generally made it easier for plaintiffs to meet the burden of establishing a prima facie case to avoid summary judgment since a broader range of employer conduct now falls within the scope of section 704. Accordingly, it is not surprising that the number of retaliation charges filed with the EEOC has increased significantly since the *White* decision.[113] Despite this expansion of employer liability in retaliation cases, the courts of appeals, particularly the Eighth Circuit, have generally rejected retaliation claims and found "trivial harm" where the allegations relate to basic disputes with co-workers and certain employer conduct, such as a failure to include in meetings, where the complained of action was promptly remedied.[114] One should note, however, that these post-*White* decisions demonstrate that the "objective standard" adopted by the Supreme Court is not nearly as objective and easy to apply as the Court appeared to suggest it would be. The decisions demonstrate the potential for new circuit splits as the courts of appeals struggle to define the requisite level of materiality across a multitude of fact situations involving challenged employer conduct.[115] One practical difficulty for trial courts in applying the *White* standard to dispositive motions is that the judge must determine whether a reasonable jury could find the action taken by the employer was likely to dissuade a reasonable employee from making or supporting a charge of discrimination. This inquiry would in fact be objective if the trial judge was to make this determination by viewing each alleged retaliatory act in isolation without reference to the plaintiff's unique circumstances. The Court in *White*, however, specifically explained that the context within which the employer took the adverse action is a necessary part of the analysis. This subjective component will vary from case-to-case based on the employee's circumstances and the nature of the workplace.[116] For example, the *White* opinion notes that under one set of facts an employer's decision to assign a plaintiff to a different shift could qualify as a materially adverse decision, while under a different set of circumstances this very same act would be a non-actionable

trivial harm.[117] Simply put, the objective "reasonable person" component of the *White* standard appears less predictive of the outcome in a given case since the actual circumstances that the plaintiff is able to prove will dictate how a reasonable person would or would not react to a given employment action.

Endnotes

1 548 U.S. 53 (2006).

2 42 U.S.C. § 2000e-3(a).

3 McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) (explaining that Congress adopted the law "to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority groups").

4 42. U.S.C. § 2000e-2(a).

5 Carrington Baker, *A Choice of Rules in Title VII Retaliation Claims for Negative Employer References*, 55 Duke L. J. 153, 158 (2005) (noting that the anti-retaliation provision was enacted because "without such a provision protecting employees who bring claims against their employer, the threat of retaliation could chill potential claims and undermine the effectiveness of Title VII").

6 42 U.S.C. § 2000e-3(a). *See also* Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee, 555 U.S. __(2009)(interpreting the "opposition clause" of section 704).

7 *Compare* 42. U.S.C. § 2000e-2(a) (explaining in specific terms the adverse actions that are actionable under the ant-discrimination statute) *and* 42 U.S.C. § 2000e-3(a) (noting that it is unlawful for an employer "to discriminate" against an employee as retaliation but not providing any additional guidance regarding what types of adverse decisions satisfy the "to discriminate" requirement.

8 Ashley R. Wright, *An Ambiguous Clarification: How Burlington Northern & Santa Fe Railway Co. v. White's Resolution of a Circuit Split Creates Uncertainty in the Eighth Circuit*, 61 Ark. L. Rev. 161, 161-62 (2008) ("explaining that the federal circuit courts of appeals had come to different conclusions about how far-reaching the phrase "discriminate against" was within the context of the anti-retaliation provision).

9 White v. Burlington Northern & Santa Fe Railway Co., 364 F.3d 789, 796 (6th. Cir. 2004)(en banc); Von Gunten v. Maryland, 243 F.3d 858, 866 (4th Cir. 2001); Robinson v. Pittsburgh, 120 F. 3d 1286, 1300 (3rd Cir. 1997).

10 Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997); *See also* Manning v. Metropolitan Life Ins. Co., 127 F.3d 686, 692 (8th Cir. 1997).

11 Washington v. Illinois Dept. of Revenue, 420 F.3d 658, 662 (7th Cir. 2005); Rochon v. Gonzales, 438 F.3d 1211, 1217-18 (DC Cir. 2006).

12 *Washington,* 420 F.3d at 662; *Rochon*, 438 F.3d at 1217-18.

13 *White*, 548 U.S. at 60-61 (quoting Ray v. Henderson, 217 F. 3d 1234, 1242-43 (9th Cir. 2000)).

14 *White*, 548 U.S. at 60-61.

15 *White*, 548 U.S. at 57. The plaintiff also performed some "track laborer" duties for her employer which included "removing and replacing track components, transporting track material, cutting brush, and clearing litter and cargo spillage from the right-of-way." *Id*.

16 *Id*. at 58.

17 *Id.*

18 *Id*.

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id*. at 58-59.

26 *Id*. at 59.

27 *Id*.

28 *Id.*

29 *Id*.

30 White v. Burlington N. & Santa Fe Ry. Co., 310 F.3d 443, 449 (6th Cir. 2002).

31 *White*, 364 F.3d at 795-800 (6th Cir. 2004) (en banc). All members of the Sixth Circuit en banc voted to uphold the District Court's judgment; however, they differed as to the proper standard to apply. *Id*.

32 *White*, 548 U.S. at 61. The anti-retaliation provision of Title VII, Section 704(a), states as follows:

> 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. 42 U.S.C. § 2000e-3.

33 *White*, 548 U.S. at 61-64. Section 703 of Title VII reads as follows:

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." 42 U.S.C.§ 2000e-3(a).

34 *White*, 548 U.S. at 61-62. The Court noted that according to the rules of statutory construction it had to assume that Congress did not use the same language in section 703 and section 704 because it intended the two statutes to cover different activities. *Id*. at 62-63 (citing and quoting Russell v. United States, 464 U.S. 16, 23 (1983) ("'Congress acts intentionally and purposely in the disparate inclusion or exclusion.'").

35 *White*, 548 U.S. at 63. According to the Court, the anti-discrimination provision was aimed at preventing injury to persons based on their status while the anti-retaliation provision "seeks to prevent harm to individuals based on what they do, i.e., their conduct." *Id*.

36 *Id.* 67-68.

37 *Id.* at 67-68 (quoting *Rochon*, 438 F. 3d, at 1219); *Id.* (quoting *Washington*, 420 F. 3d, at 662)). The Court adopted the standard that had been previously adopted by the Seventh Circuit and District of Columbia Circuit as the proper test to determine whether an alleged act of retaliation was actionable under Section 704 of Title VII.

38 *White*, 548 U.S. at 68 (quoting Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 80 (1998)). The Court noted that the courts must "filter out complaints attacking 'the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing' " *Id.* (quoting Faragher v. City of Boca Raton, 524 U.S. 775, 788 (2006).

39 *Id.* The opinion states, "[w]e speak of *material* adversity because we believe it is important to separate significant from trivial harms. An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience." *Id.* The Supreme Court noted that the purpose of the anti-retaliation statute would not be furthered by allowing

employees to bring claims based on "petty slights, minor annoyances, and simple lack of good manners." *Id.*

40 *Id.* The Court expanded on this concept by noting,

> Context matters. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children. *Id*.

41 *Id*. at 69-70.

42 *Id*. at 70-73.

43 *See*, *e.g*, Note, "*Employers Beware: Burlington Northern v. White and the New Title VII Anti-Retaliation Standard*," 41 Ind. L. Rev. 479 (2008); Note, *"Runaway Train—The Retaliation Scene After Burlington Northern v. White,"* 68 La. L. Rev. 1025 (Spring 2008); Rachael Alexander,*"Taking the Detour Around Defending Protected Activity: How Burlington Northern & Santa Fe Railroad Co. v. White Unnecessarily Complicates Litigation of Retaliation Claims,"* 27 Rev. Litig. 333 (Spring 2008); Note, *"Expanding the Scope of the Expansive Approach: The Burlington Northern Standard as a Per Se Approach to Federal Anti-Retaliation Law,"* 49 Ariz. L. Rev. 745 (Fall 2007); *See* Wright, *supra* note 8.

44 Notes, *"Walking on Eggshells: The Effect of the United States Supreme Court's Ruling in Burlington Northern & Santa Fe Railroad Co. v. White,"* 41 Loy. L.A. L. Rev. 683, 697-99 (Winter 2008). The author opined that "the 'particular circumstances' component establishes an intricate and arduous standard, which makes it virtually impossible to enforce a uniform and fair standard across the country." *Id*. at 697. The author further opined that under the new standard "a single circumstance can transform a trivial matter into a materially adverse action." *Id.* at 698. In the author's opinion, the new standard will make trial courts less likely to dismiss cases on summary judgment which will create a greater burden on the courts and impose more costs on employers. *Id*. at 698-99. The EEOC's Charge statistics reflect that retaliation charges filed under Title VII increased from 19,560 in Fiscal Year (FY) 2006 to 23,371 in FY 2007. *See* http://www.eeoc.gov/stats/charges.html. In its Fiscal Year 2008 Performance and Accountability Report, the EEOC noted that total charges increased 15.2% in Fiscal Year 2008. *See* http://www.eeoc.gov/abouteeoc/plan/par/2008/par2008.pdf at p. 7.

45 Hawkins v. Anheuser-Busch, Inc., 517 F.3d 321, 347 (6th Cir. 2008). Four female plaintiffs initiated the lawsuit, but the retaliation claim brought by Ms. Cherri Hill is the one most relevant to the topic raised in this article. Therefore, the discussion will refer to Ms. Hill as the plaintiff.

46 *Id.* at 328.

47 *Id.*

48 *Id.*

49 *Id.* at 329.

50 *Id.*

51 *Id.* Cunningham subsequently denied that Robinson had harassed her when re-interviewed by a different member of management. *Id.* at 330. She subsequently explained that she denied the harassment on this occasion because she feared retaliation from Robinson. *Id.* Cunningham had previously told the plaintiff that Robinson had harassed her, and she even said that Robinson had followed her home on several different occasions. *Id.*

52 *Id.* at 328-30.

53 *Id.* at 329.

54 *Id.* at 344.

55 *Id.*

56 *Id.* at 348.

57 *Id.*

58 *Id.*

59 *Id.*

60 *Id.*

61 *Id.*

62 *Id.* at 347-48.

63 *Id.* at 327.

64 *Id.*

65 *Id.* at 345.

66 *Id.* at 326.

67 *Id.* at 347.

68 *Id.*

69 *Id.*

70 *Id.*

71 *Id.* at 347-48.

72 *Id.* at 349.

73 *White*, 364 F. 3d 789, 796 (6th. Cir. 2005)(en banc).

74 Billings v. Town of Grafton, 515 F.3d 39 (1st Cir. 2008); Williams v. W.D. Sports, N.M., Inc., 497 F.3d 1079 (10th Cir. 2007); Darveau v. Detecon, Inc., 515 F.3d 334 (4th Cir. 2008).

75 *Billings*, 515 F.3d at 46-47.

76 *Id.* at 54. It is important for one to note that a plaintiff's subjective belief that a new position is less prestigious is not sufficient evidence to show that the transfer was "materially adverse." *Id.* at 53-54. Instead, a plaintiff must present objective evidence to show that the position to which he or she was transferred was in fact less prestigious. *Id.*

77 *Id.*

78 *Id.* The court listed a number of other differences between the positions and other factors that bolstered its conclusion that the district court had not correctly applied the standard articulated by the Supreme Court in *White*. *Id.* at 42-55. The plaintiff secretary brought her sexual harassment charge against her immediate supervisor. *Id.* at 41. She was eventually transferred to a new department to separate the plaintiff from said supervisor and banned from entering the office in which her former supervisor worked. *Id.* at 55. The court of appeals explained that banning the plaintiff from the office would likely qualify as a non-actionable petty slight; yet it found that under the circumstances this decision also qualified as materially adverse under the standard set forth in *White*. *Id.* The opinion emphasizes that because of the ban the plaintiff was not able to attend a training session that all of her colleagues attended because it took place in the office of her former supervisor. *Id.* The Supreme Court in *White* noted that the act of not asking an employee to attend lunch was not actionable retaliation absent proof that the lunches were instructional or for training purposes and that attendance was a factor relevant to professional advancement. *Id.* (quoting *White*, 548 U.S. at 69).

79 *Williams*, 497 F.3d at 1088-89.

80 *Id.* at 1088. One key issue in dispute was whether a plaintiff had to show that he or she suffered some form of "tangible economic or psychological harm" to establish a prima facie case of retaliation. *Id.* The court of appeals acknowledged that the Supreme Court had held that Title VII does not protect an employee from "all retaliation." *Id.* Instead, it merely protects them from actions that a reasonable employee would find materially adverse. *Id.* Hence, the Tenth Circuit had to determine whether a plaintiff had to show that he or she suffered some form of tangible harm in order to show that the action taken by the employer could have dissuaded a reasonable worker from making or supporting a charge of discrimination. *Id.*

81 *Id.* at 1084.

82 *Id.* at 1089-90.

83 *Id.* at 1090.

84 *Id.* at 1084.

85 *Id.* at 1090-91. Shortly after plaintiff filed a charge against her employer, she received notice that her employment was terminated. *Id.* at 1084. Her supervisor explained that if she decided to fight the decision the company would make the rumors about her sexual activity public regardless of whether these allegations were true. *Id.* He also threatened to ruin her marriage and reminded her that she had her children to think about. *Id.* Plaintiff continued to pursue her claim, and her employer subsequently submitted a written statement to the unemployment office claiming that it fired plaintiff for cause.

Id. This letter also accused her of sexual misconduct with other employees, theft of company property, and other wrongs. *Id.* The court also noted that the attorney for the company told plaintiff that if she dropped her charge that the company would drop its opposition to her request for unemployment benefits. *Id.* Applying *White*, the Tenth Circuit found that even if the defendant's opposition to her request for benefits did not ultimately cause her to suffer any tangible harm, the facts were still sufficiently adverse for her retaliation claim to be decided by the jury. *Id.* at 1090. The court specifically stated, "we do not doubt that a reasonable employee could well find such a combination of threats and actions taken with the design of imposing both economic and psychological harm sufficient to dissuade him or her from making or supporting a charge of discrimination." *Id.* The opinion emphasizes that "material tangible economic or psychological damages is certainly sufficient but not necessary to satisfy *White's* requisites. *Id.* at 1091.

86 221 Fed. Appx. 424 (6th Cir. 2007).

87 *Id.* at 426.

88 *Id.* at 426-27.

89 *Id.*

90 *Id.* at 427.

91 *Halfacre*, 221 Fed. Appx. at 427; The district court stated that "a performance evaluation that is lower than an employee feels is warranted is not an adverse employment action sufficient to state a claim of discrimination." Halfacre v. Home Depot U.S.A., Inc. No. 04-2483 MA P., 2005 WL 2114060 at *7 (W.D. Tenn. Aug. 26, 2005).

92 *Halfacre*, 221 Fed. Appx. at 431.

93 *Id.* The Eleventh Circuit has also ruled that a negative performance review can qualify as a materially adverse employment decision according to the Supreme Court's decision in *White*. Crawford v. Carroll, 529 F.3d 961 (11th Cir. 2008).

94 *Halfacre*, 221 Fed. Appx. At 431-32.

95 *Id.* at 432. *But see* Baloch v. Kempthorne, 550 F. 3d 1191 (D.C. Cir. 2008)("not achieved" performance evaluation with no impact on position, pay, grade level or promotional opportunities was not materially adverse action).

96 *Id.* at 430-32. The court noted that plaintiff's performance evaluation scores changed significantly after he filed his EEOC discrimination charge. *Id.* at 432. It then explained that if excluding an employee from a training lunch could qualify as materially adverse when it could "significantly impact an employee's wages or professional advancement," then a lower performance evaluation would likewise qualify for the same reasons. *Id.* at 432-33.

97 *Id*. at 430-32. *See* Primes v. Reno, 190 F. 3d 765, 767 (6th Cir. 1999) (an unfavorable performance evaluation without an accompanying adverse employment action, such as a lower wage, is not actionable as a Title VII retaliation claim.); *See, also,* Steele v Schafer, 535 F. 3d 689, 695-97 (D.C. Cir. 2008) (court of appeals reversed and remanded the district court's grant of summary judgment in order for the district court to evaluate the plaintiff's claims under the new standard in *White*, where the plaintiff alleged as retaliatory conduct "the denial of the Y2K award, the issuance of the lowest performance rating of her career combined with the lowest performance bonus in her branch, the denial of the special act award, and the false report to the D.C. Office of Unemployment Compensation contesting her unemployment benefits").

98 481 F.3d 578, 590 (8th Cir. 2007).

99 *Id*. at 581

100 *Id*. at 584. The plaintiff was originally based in Rapid City, South Dakota. *Id*. at 581. She later received and accepted a transfer to Pierre, South Dakota. *Id*. at 584.

101 *Id*. at 590.

102 *Id*. The court of appeals noted that the record reflected a "personality conflict" between the plaintiff and the Deputy USA, but there was nothing in the record to suggest that the situation was so "unbearable or bleak" to deter a reasonable employee from complaining about discrimination. *Id.* The court of appeals acknowledged, however, that plaintiff might be able to establish a claim of retaliation had the plaintiff "actually been left to 'flounder' or was negatively impacted by the lack of supervision or mentoring." *Id*.

103 *Id.*

104 *Id.*

105 *Id.* The court of appeals noted that there was evidence in the record to suggest that plaintiff's job performance improved after she went to Pierre. *Id.*

106 *Id*. at 591.

107 *Id.* (emphasis in original) (*citing* Turner v. Gonzales, 421 F. 3d 688, 697 (8th Cir. 2005)("[the] normal inconveniences associated with any transfer, such as establishing one's professional connections in a new community, are [in]sufficient, without more, to demonstrate a significant change in working conditions").

108 481 F.3d at 591.

109 496 F.3d 922, 929 (8th Cir. 2007).

110 *Id*.

111 *Id*.

112 *Id*. (citing Carpenter v. Con-Way Central Express, Inc., 481 F. 3d 611, 619 (8th Cir. 2007)).

113 *See supra*, note 44. One should note that it is far too early to assume that a causal relationship exists between the decision in *White* and the increasing number of retaliation charges filed with the EEOC. Nonetheless, it is reasonable for one to assume that *White* will be a factor that will help ensure that this trend will continue.

114 *Clegg*, 496 F. 3d 922; *Higgins*, 481 F. 3d 578. *See also* Henry v. Milwaukee County, 539 F. 3d 573, 586-87 (7th Cir. 2008). In *Henry*, the Seventh Circuit found that alleged employer conduct 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 trivial harms and not actionable under Title VII. *Id.*

115 Note, *"Employer Liability under Title VII: Creating an Employer Affirmative Defense for Retaliation Claims,"* 29 Cardoza L. Rev. 1319, 1333-34, footnotes 116 & 117 (January 2008). "The lower courts, however, have acknowledged that the Supreme Court's mandate is unclear, and are awaiting further guidance and clarification. In the meantime, courts as well as employers are struggling to determine *White's* ultimate impact." *Id*.

116 *See White*, 548 U.S. at 69. The Court used schedule changes and event invitations as examples of conduct that may or may not be materially adverse based on the employee's particular circumstances. *Id*. Further, job reassignments may be materially adverse changes if the position to which the employee is reassigned is perceived to be a less prestigious or more demanding position in the workplace. *Id*. at 71.

117 *Id*. at 69.