EMPLOYER LIABILITY UNDER TITLE VII:
CREATING AN EMPLOYER AFFIRMATIVE
DEFENSE FOR RETALIATION CLAIMS

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INTRODUCTION

Congress passed Title VII of the Civil Rights Act of 1964 (the Act) attempting to end the insidious discrimination that was permeating the workplace and denying advancement opportunities for women and minorities. Section 703 of the Act prohibits employers from discriminating against an employee based on specific individual characteristics such as race, sex, or religion. Section 704 contains the Act’s anti-retaliation provision, which prohibits discrimination against employees who have attempted to enforce their rights under the Act or participated in any procedure attempting to enforce the rights guaranteed by the Act. A strong anti-retaliation clause is essential to

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2 See, e.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) (“The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.”); Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971) (noting that the goal of Title VII is to achieve “equality of employment opportunities and removing barriers that have operated in the past to favor an identifiable group of white employees over other employees.”).
3 Section 703, codified as 42 U.S.C. § 2000e-2(a), states:
   It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of . . . race, color, religion, sex, or national origin . . . .
4 Section 704, codified as 42 U.S.C. § 2000e-3(a), states:
   It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice . . . or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.
5 Section 703 is commonly referred to as Title VII’s “core substantive clause” and § 704 is
the enforcement of the substantive provisions of Title VII. To prove a discrimination or retaliation claim under Title VII, one of the elements an employee must show is that his employer took some type of adverse action against him. This is often accomplished by using the burden shifting mechanism established by the Court in McDonnell Douglas v. Green.

In Burlington Northern and Santa Fe Railway Company v. White, the Supreme Court, in 2006, resolved a long standing and often confusing circuit split, by defining an adverse employment action as an element of a plaintiff’s prima facie case for a claim under Section 704.

—commonly referred to as Title VII’s “anti-retaliation clause.” While § 703 protects only those individuals who are members of a protected class, § 704 protects anyone who opposes action that violated § 703.


7 See generally Sanders v. N.Y. City Human Res. Admin., 361 F.3d 749, 755 (2d Cir. 2004) (stating that an “adverse employment action” is required to establish a prima facie case of retaliation or discrimination); Brian A. Riddell & Richard A. Bales, Adverse Employment Action in Retaliation Cases, 34 U. BALTIMORE L. REV. 313, 315 (2005) (noting that the burden shifting framework has been universally accepted by the circuit courts for analyzing retaliation claims).

8 411 U.S. 792, 802-04 (1973) (“The complainant . . . carr[ies] the initial burden . . . of establishing a prima facie case of . . . discrimination. . . . The burden then . . . shift[s] to the employer to articulate some legitimate, nondiscriminatory reason for the employee’s rejection. . . . [Finally, the complainant must] be afforded a fair opportunity to show that [employer’s] stated reason for [the employee’s] rejection was in fact [a pretext].”).

Although McDonnell Douglas dealt with a violation of § 703, the courts have routinely applied its burden shifting analysis to § 704 claims. See Tex. Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 257 (1981). To prove a prima facie case of retaliation, an employee must establish that: (1) he was engaged in an activity protected under Title VII; (2) the employer was aware of plaintiff’s participation in the protected activity; (3) the employer took adverse action against plaintiff based upon his activity; and (4) a causal connection existed between the plaintiff’s protected activity and the adverse action taken by the employer. Cosgrove v. Sears, Roebuck & Co., 9 F.3d 1033, 1038-39 (2d Cir. 1993). The employer then has the opportunity to present evidence showing that there was a legitimate business purpose for the action. Id. Finally, for the employee to prevail he must show that the employer’s purported reason was mere pretext for the retaliatory action. Id. In Reeves v. Sanderson Plumbing, 530 U.S. 133, 147 (2000), the Supreme Court held that when a plaintiff can establish a prima facie case of discrimination and there is sufficient evidence for a reasonable fact finder to discredit the defendant’s proffered nondiscriminatory explanation for the action, this may be enough to sustain a finding of discrimination.


10 See infra Part I.B. for a discussion of the old circuit split. The issue of how to define an
Prior to *White*, determining the appropriate standard for an adverse employment action in retaliation cases was the subject of significant debate. Rejecting a limited definition of adverse employment action, the Court in *White* stated that the anti-retaliation provision of Title VII covered employer action that “would have been materially adverse to a reasonable employee or job applicant.” The Justices defined “materially adverse” as employer actions that are “harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.”

Viewed by many as a victory for employees, *White* has been praised by employee advocates and criticized by those who represent management. Some management-side attorneys believe that *White* adverse employment action had become so confused and convoluted that the circuit courts themselves could not agree on how to define the split which had arisen. See Petition for a Writ of Certiorari, Burlington Northern and Santa Fe Railway Company v. White, No. 05-259, 2005 WL 2055901 at *9-11 (“The federal courts of appeals are badly divided over the proper standard for determining when an employer has engaged in retaliatory discrimination against an employee for purposes of Title VII . . . . The chaos is such that courts and commentators even disagree about how to characterize the various courts of appeals’ positions within the circuit split.”).

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12 *White*, 126 S. Ct. at 2410-12.

13 *Id.* at 2409, 2415 (stating that this decision would resolve the circuit split by adopting the definition used by the Seventh and District of Columbia Circuits).

14 *Id.* at 2415.

15 See E. J. Graff, Striking Back; The Supreme Court Recently Handed Workers a 9-0 Victory in a Pivotal Workplace Discrimination Case. But Will the Lower Courts Turn Victory Into Defeat?, BOSTON GLOBE, Aug. 31, 2006, at D1; Linda Greenhouse, Supreme Court Gives Employees Broader Protection Against Retaliation in the Workplace, N.Y. TIMES, June 22, 2006, at A22; Charles Lane, Court Expands Right to Sue Over Retaliation on the Job, WASHINGTON POST, Jun. 23, 2006, at A16.

16 See, e.g., Graff, * supra* note 15, at D1 (“This is a great standard, said Joan Ehrlich, an Equal Employment Opportunity Commission lawyer based in San Francisco. It certainly broadens what the lower courts were trying to restrict.”) (internal quotation marks omitted); Lane, * supra* note 15, at A16 (“All people protected against job discrimination benefit from this decision . . . , said Marcia D. Greenberger, co-president of the National Women’s Law Center, which filed a friend of the court brief supporting White on behalf of more than 30 organizations.”) (internal quotation marks omitted).

17 See, e.g., Graff, * supra* note 15, at D1 (“The problem with the decision is that the standard they’ve selected is so unclear that the employer . . . will have a very difficult time deciding when it is at risk.”); Barbra L. Jones, Retaliation Claims Have More Teeth Now, MINN. LAW., Sept. 7, 2006 at 2 (stating that now matters that cannot be measured in dollars and cents will be able to
will greatly increase the number of retaliation claims filed but will not adequately clarify what is actionable under Section 704. The standard adopted by the Court in *White* expands the range of actions that are colorable under Section 704, but does not provide employers with additional guidance on how to comply with the statute and limit their liability.

The number of retaliation claims filed under Title VII has nearly doubled since 1992. Claims under Section 704 comprise an increasingly large percentage of all Title VII claims, and take up a sizeable part of the federal docket. Even before the *White* decision, retaliation cases had become more prevalent. Plaintiffs were prevailing on their retaliation claims even when their underlying discrimination claims were dismissed.

Due to the vague standard established in *White*, employers will now be unable to predict and take the preventative measures needed to limit their liability. They will be hesitant to take unrelated but lawful disciplinary action against an employee who has filed an Equal Employment Opportunity Commission (EEOC) complaint, because they will be unsure if the new action will qualify as adverse. Since the standard is subjective, and liability can depend on the individual characteristics and situation of an employee, employers will be unable to effectively educate their managers on how to properly deal with an
employee who has previously engaged in protected activity. 27 Employers will have difficulty complying with the new standard since there is considerable uncertainty about the types of actions that lead to liability. 28 While Title VII represents an expansion of the government’s role in regulating the workplace, Congress and the courts have also indicated that the intrusion into an employer’s right to run his business as he sees fit should not be any greater than is absolutely necessary to effectuate Title VII’s goals. 29

To limit the unintended consequences 30 of White and further the ultimate congressional objectives of Title VII, 31 the Supreme Court and lower courts should allow employers to use an affirmative defense to certain alleged acts of retaliation similar to the defense applied to claims of sexual harassment. 32 For certain less severe forms of sexual harassment, employers can avoid liability if they prove that they: (1) have appropriate policies to prevent and quickly correct any harassing behavior and (2) the complaining employee unreasonably fails to take advantage of these preventative or corrective opportunities. 33 This solution will limit some of the unintended consequences of White, while respecting the Court’s prerogative to broadly define adverse employment actions under Section 704. 34 This will encourage employers to take preemptive action to prevent violations of Title VII’s retaliation provision. It will also allow employers to avoid liability for actions that are not very severe but may now unintentionally qualify as adverse employment actions under White. 35

Part I of this Note will discuss the earlier confusion over the proper

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27 See Savage, supra note 24, at A11.
28 Id.
29 See, e.g., Price Waterhouse v. Hopkins, 490 U.S. 228, 242 (1989) (“The statute’s maintenance of employer prerogatives is evident from the statute itself and from its history, both in Congress and in this Court.”); United Steelworkers v. Weber, 443 U.S. 193, 207 (1979) (noting that the legislative history of Title VII shows Congress’s desire to avoid unnecessary federal regulation of private business).
30 See Part III infra for a discussion of the unintended consequences of the new standard, such as an increase in the number of retaliation claims filed.
31 See Part III.B infra for a discussion Congressional objectives of Title VII.
32 Contrary to White’s assertion that the standard it has selected will prevent such claims from being actionable, this Note argues that the new standard laid out by the Court in White will enable an employee who has previously filed a charge of discrimination to claim that any small, though unrelated, adverse treatment received after the claim was filed was the result of retaliation.
33 See Part IV.A infra for an explanation of the Court’s jurisprudence in the area of sexual harassment claims under Title VII and why it is appropriate to apply it to retaliation claims.
34 Although this Note argues that the Court did not apply the correct standard to define an adverse employment action under § 704, it does not advocate for a change in the standard. The standard approved by the Court was supported by eight of the Justices, and, therefore, it would be futile to argue for an alternative definition. Instead, by advocating the use of an affirmative defense, this Note’s solution limits employer liability in a manner the Court has previously approved, while respecting its clear intent to broadly interpret § 704.
35 See Part III. infra for a discussion of the impact of the Court’s new standard.
I. PRIOR CONFUSION OVER SECTION 704

A. Uncertainty in Interpreting Section 704

The difficulty in interpreting the scope of Section 704 derives from the text itself. Section 703, the core substantive provision of the Act, prohibits an employer from “discriminat[ing] 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.” Section 704, the anti-retaliation provision, makes it illegal “for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this title or, because he has . . . participated in any manner in an investigation, proceeding, or hearing under this title.” While Section 703 specifically outlines the type of actions that will violate Title VII, Section 704 only states that it shall be illegal to discriminate against employees who engage in activity protected under the Act.

Courts and commentators have struggled to define the scope of Section 704. Some circuits held that since Section 704 does not contain a list of prohibited actions as enumerated in Section 703, it covers less severe employer actions. Other circuits held that the two sections should be read together, with the limiting terms of Section 703 applied to Section 704 as well. The ambiguity and uncertainty that plagued the courts in attempting to apply Section 704 was fueled by the limited attention Section 704 received in committee reports and floor discussions.

37 Id. § 2000e-3(a) (emphasis added).
38 See supra, notes 10 and 11, for a discussion about how courts and commentators even disagree on how many different positions there are and which circuits follow which approach.
40 See infra Part I.B.1.
debate in both houses of Congress.41

B. The Previous Circuit Split According to the Supreme Court

The different language in sections 703 and 704,42 along with the lack of information regarding congressional intent led to different approaches for interpreting Section 704.43 A variety of lower courts and commentators have attempted to classify the various positions regarding the proper definition of an adverse employment action under Section 704.44 In White, the Court summarized the four approaches used by the different circuits to define an adverse employment action.45

1. Ultimate Employment Decision Standard

The Fifth and the Eighth Circuits applied the narrowest definition of an adverse employment action.46 They interpreted Sections 703 and 704 together, arguing that Section 703’s limitations should apply equally to Section 704.47 Therefore, these two circuits applied an

41 See Hochstadt v. Worcester Found. for Experimental Biology, 545 F.2d 222, 230 (1st Cir. 1976) (“Neither in its wording nor legislative history does section 704(a) make plain how far Congress meant to immunize . . . employee activity [under Section 704] . . . . The statute says no more, and the committee reports on the Civil Rights Act of 1964 and the Equal Employment Opportunity Act of 1963, which later became Title VII of the Civil Rights Act, repeat the language of 704(a) without any explanation. The proceedings and floor debates over Title VII are similarly unrevealing.”) (citations omitted); Savage, supra note 11, at 220 (“[T]he House Judiciary Committee’s report to Congress, which accompanied the Civil Rights Act of 1964, contained commentary on section 704(a) that was almost the precise wording of the section itself.”).
42 See supra Part I.A.
44 See supra, notes 10-11. Since the Supreme Court has spoken on the issue this Note uses their classification of the circuit split to describe the various positions taken. Most courts and commentators have regarded the definition of adverse employment action used in the Fifth and Eighth Circuits as the most restrictive. See Savage, supra note 11, at 231. At the other end of the spectrum, the standard used by the Ninth Circuit is considered the most liberal approach, allowing almost any type of harmful action to qualify as an adverse employment action. See id. at 238. The other nine circuits advocate middle positions with varying standards to determine what qualifies as an adverse employment action. See id. at 232-35 (stating that the Second, Third, Fourth and Sixth Circuits follow a “materially adverse standard” and that the First, Seventh, Tenth, Eleventh and District of Columbia Circuits follow a “broad case-by-case approach”).
45 126 S. Ct. at 2410-11. The Court did not discuss cases from the First, Second, Tenth or Eleventh Circuits in its discussion of the split. Most commentators would characterize the positions taken by these circuits as falling at various points within the material adversity standard. See infra notes 52-55, for cases defining the standard used in these circuits.
47 See Savage, supra note 11, at 231-32.
“ultimate employment decision”\textsuperscript{48} standard, which limited an adverse action to employer conduct related to “hiring, granting leave, discharging, promoting, and compensating.”\textsuperscript{49}

2. Material Adversity

The Third, Fourth, and Sixth Circuits defined an adverse employment action as a materially adverse change in the terms and conditions of employment.\textsuperscript{50} This standard, while not as limiting as the ultimate employment decision standard, attempted to objectively define the actions that qualified as adverse employment actions without looking at the subjective factors of each individual case.\textsuperscript{51} These three circuits, along with the First,\textsuperscript{52} Second,\textsuperscript{53} Tenth,\textsuperscript{54} and Eleventh

\textsuperscript{48} \textit{White}, 126 S. Ct. at 2410.
\textsuperscript{49} \textit{Mattern}, 104 F.3d at 707. The Fifth Circuit explained its basis for applying this standard:

Title VII’s anti-retaliation provision refers to ultimate employment decisions, and not to an “interlocutory or mediate” decision which can lead to an ultimate decision. Obviously, this reading is grounded in the language of Title VII. . . . [T]he anti-retaliation provision states that employers shall not “discriminate” against employees for taking action protected by Title VII. 42 U.S.C. § 2000e-3. In defining this term, we look, of course, to other Title VII sections for guidance; in this case, the preceding section is helpful.

That section states, in part, that it is unlawful 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[.]”\textsuperscript{55} 42 U.S.C. § 2000e-2(a)(1) . . . .

The anti-retaliation provision speaks only of “discrimination”; there is no mention of the vague harms contemplated in § 2000e-2(a)(2). Therefore, this provision can only be read to exclude such vague harms, and to include only ultimate employment decisions.

\textit{Id.} at 708-09.

\textsuperscript{50} \textit{White}, 126 S. Ct. at 2410; see \textit{White} v. Burlington N. & Santa Fe Ry. Co., 364 F.3d 789, 795 (6th Cir. 2004); \textit{Von Gunten} v. Maryland, 243 F.3d 858, 866 (4th Cir. 2001); \textit{Robinson} v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997).

\textsuperscript{51} See \textit{Von Gunten}, 243 F.3d at 864 (“[A]lthough the majority of circuits have either implicitly or explicitly rejected the ‘ultimate employment decision’ standard in § 2000e-3 cases, they have nonetheless recognized that ‘there is some threshold level of substantiality that must be met for unlawful discrimination to be cognizable under the anti-retaliation clause.’” (quoting \textit{Wideman} v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1456 (11th Cir. 1998))).

\textsuperscript{52} See \textit{Marrero} v. Goya of P.R., Inc., 304 F.3d 7, 23 (1st Cir. 2002) (“Whether an employment action is adverse . . . is gauged by an objective standard. . . . [T]he mere fact that an employee is displeased by an employer’s act or omission does not elevate that act or omission to the level of a materially adverse employment action.”” (quoting \textit{Blackie} v. Maine, 75 F.3d 716, 725 (1st Cir. 1996))).

\textsuperscript{53} See \textit{Fairbrother} v. Morrison, 412 F.3d 39, 56 (2d Cir. 2004) (“An adverse employment action is a ‘materially adverse change in the terms and conditions of employment.’” (quoting \textit{Sanders} v. N.Y. City Human Res. Admin., 361 F.3d 749, 755 (2d Cir. 2004))). According to the Second Circuit an adverse employment action must be “‘more disruptive than a mere inconvenience or an alteration of job responsibilities.’” \textit{Terry} v. Ashcroft, 336 F.3d 128, 138 (2d Cir. 2003) (quoting \textit{Galabya} v. N.Y. City Bd. of Educ., 202 F.3d 636, 640 (2d Cir. 2000)).

\textsuperscript{54} See \textit{Duncan} v. Manager, Dep’t of Safety, City and County of Denver, 397 F.3d 1300,1304
Circuits,\textsuperscript{55} required some degree of “material adversity.”\textsuperscript{56} While each circuit defined “materially adverse” differently,\textsuperscript{57} the use of a material adversity requirement ensured that their interpretations of Section 704 did not turn Title VII into a “general civility code for the American workplace.”\textsuperscript{58} These circuits were attempting to prevent trivial harms\textsuperscript{59} from being actionable without using a standard as restrictive as the one used in the Fifth and Eighth Circuits.\textsuperscript{60}

3. Case By Case Approach

The Seventh and D.C. Circuits adopted a standard requiring that an employee must show that the employer’s alleged retaliatory action would have been “material to a reasonable employee.”\textsuperscript{61} These circuits defined this as any action that is likely to “dissuade[] a reasonable worker from making or supporting a charge of discrimination.”\textsuperscript{62} While this standard considered retaliation claims on more of a case-by-case basis,\textsuperscript{63} it still attempted to limit frivolous claims by applying some form of a materiality requirement.\textsuperscript{64}

4. EEOC Deterrence Approach

The Ninth Circuit applied a deterrence approach, based on EEOC guidelines,\textsuperscript{65} that did not limit an adverse employment action because of

\begin{footnotesize}
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\item See supra notes 50-55.
\item See supra note 51.
\item Washington v. Ill. Dep’t of Revenue, 420 F.3d 658, 662 (7th Cir. 2005); see Rochon v. Gonzales, 438 F.3d 1211, 1217-18 (D.C. Cir. 2006).
\item Washington, 420 F.3d at 662.
\item Id.
\item See generally Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1456 (11th Cir. 1998) (“[T]here is some threshold level of substantiality that must be met for unlawful discrimination to be cognizable under the anti-retaliation clause.”).
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the severity of the employer’s act. 66 Under this approach, any act of retaliation would be an adverse employment action as long as it was “reasonably likely to deter” the complaining employee from engaging in a protected activity. 67 This standard interpreted the lack of limiting language in Section 704 as an expression of Congress’s intention to protect retaliation victims from a wider range of actions than employees claiming discrimination under Section 703. 68

II. ANALYSIS OF WHITE AND THE NEW STANDARD

A. Shelia White

As confusion over the appropriate standard continued to grow, the Supreme Court granted certiorari to determine the appropriate standard. 69 The facts leading up to this case were straightforward and undisputed. Shelia White, an employee of Burlington Northern, was the only female employee working in the Maintenance of Way Department at Burlington’s Tennessee Yard. 71 Bill Joiner, White’s supervisor, told her that women should not be working in that Department and made inappropriate comments to her in front of other employees. 72 In

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66 Ray v. Henderson, 217 F.3d 1234, 1243 (9th Cir. 2000) (“[T]he severity of an action’s ultimate impact (such as loss of pay or status) ‘goes to the issue of damages, not liability.’”) (quoting Hashimoto v. Dalton, 118 F.3d 671, 676 (9th Cir. 1997)).
67 Id. at 1242-43.
68 Id. at 1243 (“Instead of focusing on the ultimate effects of each employment action, the EEOC test focuses on the deterrent effects. In so doing, it effectuates the letter and the purpose of Title VII.”).
70 One commentator argues that problems with the standard adopted by the Court stem from the fact that the Court selected this case solely to resolve the circuit split rather than to resolve Shelia White’s appeal. See The Supreme Court, 2005 Term—Leading Cases, 120 HARV. L. REV. 312, 322 (2006). Although the en banc hearing produced two separate opinions defining the appropriate definition of an adverse employment action, both opinions upheld the verdict in favor of White using their own proposed standard. Compare White, 364 F.3d at 795-800 (upholding a jury verdict in favor of White by defining adverse employment action as a materially adverse change based on the terms or conditions of employment) with id. at 809 (Clay, J., concurring) (upholding the jury verdict in favor of White by defining an adverse employment action as one that will likely deter a plaintiff from filing a complaint). Further, Justice Alito in his concurrence upheld the verdict in favor of White despite applying a much narrower standard than the controlling opinion. See Burlington N & Santa Fe Ry. Co v. White, 126 S. Ct. 2405, 2421-22 (2006) (Alito, J., concurring). Some argue that complicated and unclear decisions such as the one the Court arrived at in White are more likely when the Court tries to resolve circuit splits rather than decide individual cases and controversies. See The Supreme Court, 2005 Term—Leading Cases, supra, at 322.
71 White, 126 S. Ct. at 2409.
72 Id. See White, 364 F.3d at 792 (“According to Joiner, several other Burlington Northern employees also expressed the belief that women should not work on a railroad. Another
response to Joiner’s harassment, White complained to Burlington officials. As a result of her complaint, Joiner was suspended for ten days and ordered to attend sexual harassment training. When Marvin Brown, a roadmaster at Burlington Northern, told White of Joiner’s suspension, he also informed her that she would no longer operate a forklift, assigning her to standard track laborer tasks. Brown told White that the job of forklift operator was being given to a “more senior man.”

White subsequently filed a charge of retaliation with the EEOC, claiming that her reassignment was illegal. A few days after Brown received the EEOC charge, White had an altercation with her supervisor and was suspended without pay for thirty-seven days for insubordination. After an internal hearing found that White had not been insubordinate, she was reinstated with full back pay. White then filed an additional charge of retaliation with the EEOC based on her suspension. A jury found in White’s favor on both counts of retaliation and awarded her $43,500. Although the full Sixth Circuit affirmed White’s judgment, the judges could not agree on the proper standard for defining an adverse employment action.

B. The Supreme Court’s Decision in White

1. The Differing Language in Sections 703 and 704 Is Intentional

The Supreme Court began its analysis by finding that Section 704, the anti-retaliation provision of the Civil Rights Act, should be read more broadly than Section 703. Comparing the two sections, Justice

Burlington Northern employee agreed at trial that there was ‘a general anti-woman feeling’ among Burlington Northern employees at the Tennessee Yard.”).

73 White, 126 S. Ct. at 2409.
74 Id.
75 Id.
76 Id.
77 Id.
78 Id. (“The specific facts of the disagreement are in dispute, but the upshot is that Sharkey told Brown later that afternoon that White had been insubordinate. Brown immediately suspended White without pay.”).
79 Id.
80 Id.
81 Id. at 2410. This amount was for compensatory damages for both counts of retaliation and included $3,250 for medical expenses. Id. After a divided Sixth Circuit panel reversed White’s judgment, the full Court of Appeals vacated the panel’s decision and heard the matter en banc. Id.
82 Id.; see supra note 70 (discussing the two competing standards applied by the Sixth Circuit).
83 White, 126 S. Ct. at 2414-15.
Breyer, in his majority opinion, concluded that the two provisions have important differences.\textsuperscript{84} The majority rejected Burlington Northern’s argument that Sections 703 and 704 should be read \textit{in pari materia}.\textsuperscript{85} Arguing that the linguistic differences between the two sections matter, Justice Breyer wrote that when language differs it is normally presumed that “Congress act[ed] intentionally and purposely in the disparate inclusion or exclusion.”\textsuperscript{86} Therefore, as a matter of statutory interpretation, the Court assumed that Sections 703 and 704 were meant to have different meanings.\textsuperscript{87}

The “substantive provision seeks to prevent injury to individuals based on . . . their status” while the “anti-retaliation provision seeks to prevent harm to individuals based on . . . their conduct.”\textsuperscript{88} While the goal of Section 703 is to create “a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status”\textsuperscript{89} the “primary purpose” of Section 704 is to maintain “unfettered access to statutory remedial mechanisms.”\textsuperscript{90} Unlike the substantive provision, the anti-retaliation provision is not limited to discriminatory actions that affect the terms and conditions of employment.\textsuperscript{91} The majority disagreed with Burlington Northern’s argument that it is inconsistent to give more protection to victims of retaliation than to victims of gender or race based discrimination.\textsuperscript{92} According to the majority, there is precedent for construing the retaliation provision more broadly, based on the Court’s decision regarding the anti-retaliation provision\textsuperscript{93} of the National Labor Relations Act.\textsuperscript{94} White, however, noted that it does not protect any individual

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\textsuperscript{84} Id. at 2411; see supra notes 36-37 for an analysis of the different language in §§ 703 and 704.
\textsuperscript{85} White, 126 S. Ct. at 2411. In pari materia is defined as “on the same subject; relating to the same matter.” BLACK’S LAW DICTIONARY 807 (8th ed.2004). Burlington’s principal argument was that the limiting language of § 703 should be read into § 704.
\textsuperscript{86} White, 126 S. Ct. at 2412 (quoting Rusello v. United States, 464 U.S. 16, 23 (1983)). The Court held that there were strong policy reasons to believe that Congress intended for employers to be held liable if an act was the result of retaliation, even if the same act would not be actionable under § 703. Id. To secure the objective of the substantive provision of Title VII Congress did not need “to prohibit anything other than employment-related discrimination.” Id. The purpose of the anti-retaliation provision is to “secure that primary objective by preventing an employer from interfering (through retaliation) with an employee’s efforts to secure or advance enforcement of the Act’s basic guarantees.” Id.
\textsuperscript{87} Id.
\textsuperscript{88} Id.
\textsuperscript{89} Id.
\textsuperscript{90} Id. (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997)).
\textsuperscript{91} Id. at 2413.
\textsuperscript{92} Id. at 2414.
\textsuperscript{93} 29 U.S.C. § 158(a)(4) (2000) (“It shall be an unfair labor practice for an employer . . . to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this [Act].”).
\textsuperscript{94} White, 124 S. Ct. at 2414; see also Bill Johnson’s Restaurants, Inc. v. NLRB, 461 U.S. 731, 740 (1983) (construing the NLRB’s anti-retaliation provision to “prohibit[] a wide variety of
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from any form of retaliatory action, but only retaliation that “produces an injury or harm.”95

2. The Appropriate Standard for Section 704

After determining that Section 704 should be interpreted more broadly than Section 703, the Court evaluated the different approaches used by circuit courts and adopted the standard used by the Seventh and District of Columbia Circuits.96 The Court held that the anti-retaliation provision of Title VII covered employer actions that “would have been materially adverse to a reasonable employee or job applicant.”97 The Court defined materially adverse as actions that were “harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination” under Section 703.98

In explaining why it chose to use a standard of material adversity, the Court held that it is “important to separate significant from trivial harms.”99 The Court justified the standard’s reference to a “reasonable employee” as necessary to make the standard objective.100 The decision stated that “the significance of any given act of retaliation will often depend upon the particular circumstances.”101 The Court held that this standard speaks in general terms rather than specific prohibitions since an “act that would be immaterial in some situations is material in others.”102 The Court gave the example of denying an employee a schedule change, noting that while this action may not be material to

employer conduct that is intended to restrain, or that has the likely effect of restraining, employees in the exercise of protected activities”); see supra, note 6 (discussing policy reasons for interpreting the retaliation provision more broadly than the general discrimination provision).

95 White, 126 S. Ct. at 2414.
96 Id. at 2415. See supra Part I.B. for a review of the various standards.
97 Id. at 2409 (emphasis added).
98 Id. (emphasis added).
99 Id. at 2415; see also Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (holding that a standard of what is actionable under Title VII must “filter out complaints attacking ‘the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender [or race] related jokes, and occasional teasing’”) (quoting B. LINDEMANN & D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 175 (1992)).
100 White, 126 S. Ct. at 2415. (“We refer to reactions of a reasonable employee because we believe that the provision’s standard for judging harm must be objective. An objective standard is judicially administrable. It avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff’s unusual subjective feelings.”). But see infra Part III.A, (arguing that the White standard is subjective).
101 Id.; see also Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81-82 (1998) (“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.”).
102 White, 126 S. Ct. at 2416 (quoting Washington v. Ill. Dep’t of Revenue, 420 F.3d 658, 661 (7th Cir. 2005)).
most employees, it would be material to a young mother with school age children.\textsuperscript{103} The Court also cited the example of a supervisor not inviting an employee to lunch as a situation where context could matter.\textsuperscript{104}

Applying the new standard to the facts of the case, the Court decided that Sheila White demonstrated that she had suffered an adverse employment action and the Court upheld the jury verdict in her favor.\textsuperscript{105} Although the decision to uphold the jury’s verdict was unanimous,\textsuperscript{106} Justice Alito wrote a separate concurrence, criticizing the majority’s interpretation of Section 704 and the standard it adopted, and proposing his own standard for an adverse employment action for a claim of retaliation.\textsuperscript{107}

\textbf{C. Justice Alito’s Concurrence}

Justice Alito disagreed with the majority’s interpretation of Section 704.\textsuperscript{108} He argued that, in line with the decisions of the Fifth and Eighth Circuits, Section 703 and Section 704 should be read together and that discrimination under Section 704 should be actionable only if it relates to compensation, terms, conditions, or privileges of employment as in Section 703.\textsuperscript{109} By limiting retaliation claims to discrimination that

\begin{itemize}
\item \textsuperscript{103} \textit{Id.} at 2415.
\item \textsuperscript{104} \textit{Id.} at 2415-16 (“A supervisor’s refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee’s professional advancement might well deter a reasonable employee from complaining about discrimination.”). These examples all deal with retaliation and not any type of initial discrimination in violation of § 703. See infra Part III.A.1. (discussing how the Supreme Court defined “context” in \textit{White}).
\item \textsuperscript{105} \textit{Id.} at 2416. The Court held that based on the evidence presented it was reasonable for the jury to find that White’s reassignment of duties within her job description and her suspension (even though she was ultimately reimbursed) would have been sufficient to deter her from filing a charge of retaliation.
\item \textsuperscript{106} \textit{Id.} at 2408.
\item \textsuperscript{107} \textit{Id.} at 2418 (Alito, J., concurring). Justice Alito concluded that the change of assignment and the 37 day suspension was an adverse employment action according to his interpretation of § 704, which was the ultimate employment decision standard used by the Fifth and Eighth Circuits.
\item \textsuperscript{108} \textit{Id.} at 2419 (Alito, J., concurring). Justice Alito also dismissed the standard proposed by White. White proposed that § 704 be read literally and therefore be completely separate from § 703. Justice Alito argued that this interpretation would make a “federal case” out of any small difference in work to an employee who is claiming retaliation. \textit{Id.}
\item \textsuperscript{109} \textit{Id.} (Alito, J., concurring). Although Justice Alito admits that this is not the most straightforward manner to interpret the two provisions, he argues that it is a reasonable reading and that reading both sections together harmonizes them. \textit{Id.} There is precedent for interpreting §§ 703 and 704 in concert. In \textit{Robinson v. Shell Oil Co.}, 519 U.S. 337 (1997), the Court read §§ 703 and 704 together for the purpose of determining that former employees were covered by § 704 despite the fact that the provision does not specifically mention them. The Court reasoned that:
\begin{quote}
The broader context provided by other sections of the statute provides considerable
affects the terms used in Section 703 there would be an objective standard that allows “insignificant claims to be weeded out at the summary judgment stage, while providing ample protection for employees who are subjected to real retaliation.” Justice Alito claimed that as a result of the loose language used in the majority’s standard, it is possible that “employer conduct that causes harm to an employee [will be] permitted so long as the employer conduct is not so severe as to dissuade a reasonable employee from making or supporting a charge of discrimination.”

III. PROBLEMS WITH THE WHITE STANDARD

A. The Subjective Component of the White Standard Could Lead to Greater Uncertainty

The standard adopted in White is relatively vague and much of its impact will be determined at the district and appellate levels. While some experts predicted that White’s final impact would be minimal,

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assistance in this regard. Indeed, § 703(a) expressly includes discriminatory “discharge” as one of the unlawful employment practices against which Title VII is directed. Insofar as § 704(a) expressly protects employees from retaliation for filing a “charge” under Title VII, and a charge under § 703(a) alleging unlawful discharge would necessarily be brought by a former employee, it is far more consistent to include former employees within the scope of “employees” protected by § 704(a).

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110 White, 126 S. Ct. at 2420 (Alito, J., concurring). Justice Alito did not see any statutory basis for the majority’s interpretation of § 704. He argued that the majority’s reading of § 704 implies that the only purpose of the anti-retaliation provision is to prevent employers from taking actions that are likely to stop employees from complaining about discrimination. Id. He claimed this assertion is unsupported, and argued that the true purpose of the anti-retaliation provision is to protect individuals who assert their rights under Title VII. Id.

111 Id. at 2420-21 (Alito, J., concurring) (“[T]he majority’s interpretation logically implies that the degree of protection afforded to a victim of retaliation is inversely proportional to the severity of the original act of discrimination that prompted the retaliation. A reasonable employee who is subjected to the most severe discrimination will not easily be dissuaded from filing a charge by the threat of retaliation; the costs of filing the charge, including possible retaliation, will have to be great to outweigh the benefits, such as preventing the continuation of the discrimination in the future and obtaining damages and other relief for past discrimination. Because the possibility of relatively severe retaliation will not easily dissuade this employee, the employer will be able to engage in relatively severe retaliation without incurring liability under § 704(a). On the other hand, an employee who is subjected to a much milder form of discrimination will be much more easily dissuaded. For this employee, the costs of complaining, including possible retaliation, will not have to be great to outweigh the lesser benefits that might be obtained by filing a charge. These topsy-turvy results make no sense.”).

112 See Graff, supra note 15, at D1.

113 See Matt Brady, High Court Ruling Fails to Settle Retaliation Disputes, NAT’L UNDERWRITER PROP. & CASUALTY/RISK & BENEFITS MGMT. EDITION, July 17, 2006, at 26 (“This won’t have any major impact . . . . It really just clears up some ambiguities in the lower courts.”). Some have argued that the vagueness of the definition will allow circuits that
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this does not appear to be the case. Lower court decisions applying the White standard have adhered to the Court’s mandate to broadly apply Section 704. 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.

1. Uneven Application by the Lower Courts

The new standard established by the Supreme Court will be difficult for the lower courts to apply. While the Court labels its standard as objective, a closer analysis indicates that in practice it will lack objectivity. Justice Alito’s concurrence described the standard as one not based on the reasonable person but rather the reasonable person with similar characteristics to the employee.

The Court began by adopting a “reasonable person” standard, as it has in other areas of Title VII. The Court then relied on a previous previously used a more restrictive definition of adverse employment action to apply White in a manner that does not lead to a great expansion of employees’ rights. See supra note 100. An “objective standard” is defined as, “[a] legal standard based on conduct and perceptions external to a particular person.” BLACK’S LAW DICTIONARY, supra note 85, at 1441.

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Title VII decision, for the proposition that “context matters.”

White’s definition of the reasonable person adds a subjective component to the standard and has the potential to negate any of the objectivity that comes from applying a standard based on the reasonable person. It appears that White has implicitly expanded the scope of “context” to include an analysis of an individual employee’s personal situation in defining the “reasonable person,” without any identifiable objective limits.

While White identifies age, gender, and family responsibilities as possible characteristics to consider when determining the nature of the reasonable worker, it indicates that the list is not exclusive. The Court used the example of changing a worker’s shift assignment as a situation where a plaintiff’s individual characteristics may be outcome determinative. The Court’s example is loosely based on the facts of a Seventh Circuit case. The Seventh Circuit held that a similar shift

individual in that employee’s position, referring to the employee’s employment situation and not his personal characteristics. In Oncale the Court gave an example of context:

A professional football player’s working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field, even if the same behavior would reasonably be experienced as abusive by the coach’s secretary (male or female) back at the office.


White, 126 S. Ct. at 2415; see Oncale, 523 U.S. at 82 (“The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships.”). Using “common sense,” and an appropriate sensitivity to social context, will enable courts and juries to differentiate trivial from nontrivial harm. Id.

A subjective standard is defined as “[a] legal standard peculiar to a particular person’s view and experiences.” BLACK’S LAW DICTIONARY, supra note 85, at 1441.

See White, 126 S. Ct. at 2421 (Alito, J., concurring) (arguing that despite the majority’s claims that the test is objective based on the use of the “reasonable worker,” the standard will become subjective because individual characteristics must be taken into account depending on the “context”).

The majority in White provides two examples of situations where context matters, discussing whether not inviting an employee to lunch and whether denying a shift change to an employee are adverse actions. In the first example the Court looks at the context of the lunch itself. Was it purely social? Was it a one time occurrence or was it part of weekly training session that the employee was not invited to? With regard to the shift change, the Court explores the characteristics of the individual discriminated against, stating that determining if a shift change was an adverse action must be based on considerations such as the sex, age, and family status of the employee. See id. at 2415-16. The first type of context inquiry, based on the specifics of the workplace, has support from the Court’s Title VII jurisprudence. See supra note 122. The second type of context inquiry, based on an individual’s characteristics, seems to contradict the Court’s desire to avoid consideration of a plaintiff’s subjective feelings and individual characteristics. See id.


Id. at 2415-16.

Id.

Washington v. Ill. Dep’t of Revenue, 420 F.3d 658 (7th Cir. 2005). In this case the plaintiff, Chrissie Washington, a single mother caring for a child with Down Syndrome, was forced to give up her flextime schedule after filing a discrimination charge. Id. at 662-63. (holding that being forced to work from 9-5 was materially adverse to her although it would not have been for 99% of the staff).
change might not have represented an adverse action for an employee without Ms. Washington’s special circumstances, but noted that her particular situation created an issue of fact to be heard by a jury. In citing the Seventh Circuit’s example with approval, but with limited discussion, the Court has exponentially expanded the analysis needed to determine whether an action is materially adverse. While, plaintiffs’ attorneys as of yet may not have picked up on the Court’s expansion of context and its potential benefit, several lower courts have expressed a willingness to entertain arguments that a particular action was materially adverse based on a plaintiff’s individual characteristics that the Court surely would not have considered relevant.

The debate over what personal characteristics should be considered and how to apply them is just beginning to develop in the lower courts. As plaintiffs begin to test the limits of White, lower courts are facing these very issues and often arriving at different results regarding which personal characteristics should be considered. Attempts to properly analyze “context” would increase the likelihood that individual

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129 Id. It appears that in Washington, the Seventh Circuit’s aim was to protect employees from their employer exploiting well known vulnerabilities. Id. The Seventh Circuit, however, clearly stated that an employer does not have a “statutory obligation to seek out idiosyncratic vulnerabilities and avoid taking steps that cause injuries,” a distinction the Supreme Court seems to have ignored. Id.; see supra notes 121-125.

130 In Washington, the Seventh Circuit even suggested that transferring an employee to an office that plays music may be considered an adverse action against an employee who has previously filed a claim of discrimination if that particular employee had a “nervous condition” that made him miserable when exposed to music for long periods of time. 420 F.3d at 662.

131 See Deters v. Rock-Tenn Co. Inc., No. C-1-04-811, 2006 U.S. Dist. LEXIS 67743, at *33-34 (S.D. Ohio Sept. 21, 2006). Here, the district court found that an employer yelling at the plaintiff did not constitute an adverse action. Citing White, however, the court seemed amenable to consider yelling an adverse action if the plaintiff had produced evidence that the yelling “took on a greater significance” than it might have for a typical employee. Id. Based on the comparative ease of succeeding with a retaliation claim as opposed to a discrimination claim, it is not unreasonable to predict that plaintiff’s lawyers will shortly be arguing that although a particular incident would not ordinarily be an adverse action, based on their individual clients’ contexts the harm is materially adverse. See supra note 23 (discussing the comparative ease of prevailing in retaliation claims).

132 See, e.g., Deters, 2006 U.S. Dist. LEXIS 67743; McCann v. Mobile County Pers. Bd., No. 05-0346-WS-B, 2006 U.S. Dist. LEXIS 47341, at *56-57 (S.D. Ala. July 6, 2006) (stating that a plaintiff should be able to present evidence as to why he operated under a set of circumstances that would make the alleged harm an adverse action); Breech v. Scioto County Regional Water Dist. #1, No. 1-03-cv-360, 2006 U.S. Dist. LEXIS 58545, at *24 (S.D. Ohio Aug. 1, 2006) (stating that it would allow a plaintiff to present evidence regarding his “position in life” to prove his alleged transfer was an adverse employment action).

133 See supra notes 131-35.

134 See, e.g., Gardner v. Dist. of Columbia, 448 F. Supp 2d 70, 76 (D.D.C. 2006) (considering whether a transfer was materially adverse since it allegedly conflicted with plaintiff’s college class schedule and evaluating the nature of the plaintiff’s after work activity to determine if the transfer was materially adverse); Johnson v. Harvey, No. 4-05-cv-01773, 2006 U.S Dist LEXIS 92981, at *11-12 (E.D. Ark. Dec. 21, 2006) (considering the plaintiff’s individual desire for career advancement in determining whether denial of transfer to an “allegedly more prestigious position” was an adverse action).
judges’ subjective perceptions will be outcome determinative despite the majority’s desire to create a standard that minimizes their importance.\textsuperscript{135} Given the widely divergent standards previously adopted by the circuits and the difficulty of assessing which retaliatory actions are subjectively outcome determinative under \textit{White}, the prospect of a new circuit split developing is not unlikely if the Supreme Court does not clarify its holding.

2. Impact on Necessary but Unrelated Disciplinary Action and the Loss of Employers’ Control

Just as the courts are struggling to determine the boundaries of \textit{White}, employers are struggling as well. In determining the appropriate standard, courts must balance the competing interests of both the employer and employee.\textsuperscript{136} This sentiment reflects the congressional intent that Title VII and other civil rights statutes not impede entrepreneurial freedom any more than is absolutely necessary to achieve the remedial and preventative goals of antidiscrimination statutes.\textsuperscript{137} After \textit{White}, employers will struggle to determine how best to deal with employees who have taken some form of protected action under Title VII.\textsuperscript{138} Since material adversity can vary from employee to employee, it is essential for employers to carefully assess each case on its own merits.

\textsuperscript{135} See \textit{Breech}, 2006 U.S. Dist LEXIS 58545, at *24 (stating that unlike the \textit{Washington} example cited in \textit{White}, in the current case a shift change was not considered materially adverse since the plaintiff was an adult with two grown children). \textit{Breech} is the opposite of the \textit{Washington} example and the result of the case appears correct. The problem, however, arises in dealing with a multitude of cases between the two extremes of \textit{Breech} and \textit{Washington}. See e.g., \textit{McCann}, 2006 U.S. Dist. LEXIS 47341, at *56 (rejecting plaintiff’s argument that a shift change was materially adverse since she needs to care for her deaf daughter who was in her early twenties). A district court recently held, contrary that a two week suspension that did not ultimately cost the plaintiff any money was not materially adverse after looking at the plaintiff’s economic circumstances. See \textit{Patton v. Potter}, No. 1-03-cv-1230, 2006 U.S Dist LEXIS 56177, at *17 (N.D. Ohio Aug. 11, 2006). This is another example of one of the many factors a court may or may not consider when evaluating the material adversity of alleged retaliation.

\textsuperscript{136} Roldan v. Chertoff, No. 04cv2515, 2006 U.S. Dist. LEXIS 78574, at *26 (S.D. Cal. Oct. 19, 2006) (recognizing the need to balance the “chilling effect of retaliation” against the “worry that employers will be paralyzed once an employee has lodged a complaint under Title VII, making such a complaint tantamount to a get out of jail free card for employees engaged in job misconduct”) (quoting \textit{Brooks v. San Mateo}, 229 F.3d 917, 928 (9th Cir. 2000)).

\textsuperscript{137} See \textit{generally} Local No. 93, Int’l Ass’n of Firefighters v. Cleveland, 478 U.S. 501, 520 (1986) (stating that Title VII ultimately was approved by Congress only after reluctant members “were given assurances that ‘management prerogatives, and union freedoms are to be left undisturbed to the greatest extent possible’)” (quoting H. R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, p. 29 (1963))); \textit{United Steel Workers v. Weber}, 443 U.S. 193, 207 (1979) (discussing “Congress’ desire to avoid undue federal regulation of private businesses”).

\textsuperscript{138} “Stephen Bokat, a lawyer from the U.S. Chamber of Commerce said that \textit{‘White} would put employers in a bind. . . . [Once an employee complains of discrimination] it’s tough to figure out what the employer can do.’” \textit{Savage}, supra note 24, at A11.
employee, an employer may feel resigned to take a hands-off approach toward any employee who has filed a claim of discrimination, rather than risk the prospect of incurring litigation expenses or damages resulting from an ensuing retaliation claim.

B. White Will Decrease Protection From Frivolous Claims

1. Summary Judgment is Less Likely Despite an Increase in Claims

Even before White, the number of retaliation claims filed was increasing significantly. It is expected that regardless of White’s ultimate effect, the decision will cause a short term increase in the number of retaliation claims filed. Furthermore, the fact specific inquiry required by White will decrease the prospect of a retaliation claim being disposed of at the summary judgment stage. As circuits

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139 See Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2416 (2006) (stating that “an ‘act that would be immaterial in some situations is material in others’”) (quoting Washington v. Ill. Dept’t of Revenue, 420 F.3d 658, 661 (7th Cir. 2005)).
140 In oral argument before the Court, Carter G. Phillips, Burlington Northern’s attorney, stated that the average cost of defending a contested retaliation claim exceeds $130,000. See Transcript of Oral Argument at 2, White, 126 S. Ct. 2405 (2006) (No. 05-259), available at 2006 U.S. Trans. LEXIS 35 at *2.
141 See 42 U.S.C. § 1981a(b)(3) (2000) (capping punitive damages in civil rights cases at $50,000 to $300,000 depending on the size of the employer).
142 Savage, supra note 24, at A11 (“[T]he inclination will be to treat [employees who have complained of discrimination] with kid gloves and not change anything until the discrimination complaint is resolved.”).
143 See supra notes 20-22.
144 See, e.g., Louis R. Lessig, Why Employers Must Pay Closer Attention to Title VII Retaliation Claims, 21 No. 1 ANDREWS EMP. LITIG. REP. 13 (2006) (“Another concern created by the new ‘reasonable employee’ standard for retaliation cases is the ability for weaker cases to find life in the court system. The challenge in this area is the fact that until courts interpret the limits of [White], plaintiffs’ attorneys may take more chances by bringing Title VII retaliation lawsuits where they would previously not have taken the case, hoping that their facts are enough to get a recovery.”); Lane, supra note 15, at A16 (“Now, many retaliation cases that had previously been dismissed because the facts were not in dispute are likely to go to trial. That will encourage lawyers for alleged victims to take on more cases . . . .”). Since most plaintiffs’ lawyers operate on a contingency fee basis they have an incentive to maximize the impact of the new standard. See Jathan Janove, Retaliation Nation, A Recent Supreme Court Ruling Will Stir Up a New Wave of Retaliation Claims, H.R. MAG., Oct. 2006, at 62. Furthermore, although it is too soon to tell if it is related to White, New York has seen a 50% increase in the number of retaliation claims filed in the third quarter of 2006 compared with the second quarter, while no increase was noted in Connecticut. See Alexander Soule, Focus Section: Human Resources, Supreme Court Ruling Doesn’t Increase Employee Lawsuits in State, FAIRFIELD COUNTY BUS. J., Oct. 23, 2006, at 19.
145 See Edwards v. Metro-North Commuter R.R. Co., No. 3:04cv1430, 2006 U.S. Dist. LEXIS 70211, at *28-29 (D. Conn Sept. 28, 2006), modified by 2006 U.S. Dist. LEXIS 88533 (D. Conn Dec. 6, 2006) (“In light of the Supreme Court’s admonition that the significance of a purportedly adverse act must be determined based upon the particular circumstances, whether the [alleged adverse action] was sufficient given the circumstances to dissuade a reasonable employee from making or supporting a charge of discrimination, seems a question best determined by a jury.
that previously had a limited definition of an adverse employment action begin to apply *White*, they are carrying out the Supreme Court’s mandate to provide broad protection to victims of retaliation.146

The new standard has the potential to be abused by employees who file unmeritorious claims of discrimination.147 Even if the underlying discrimination claim is dismissed as frivolous, it is possible that an ensuing retaliation claim could survive since it will be judged under the broader standard established in *White*.148 The potential for abuse will still exist, even if the retaliation claim is ultimately unsuccessful, since the new standard will likely create fact specific inquiries that must be decided by a jury, encouraging employers to settle frivolous claims or refrain from taking legitimate disciplinary action.149 Due to the

after presentation of all the evidence at trial.”). An article counseling employers on how to deal with *White* advises them that given the Supreme Court’s clear intention to expand workers rights, judges might initially be hesitant to dismiss claims at the summary judgment stage. See Tori L. Winfield, *Retaliation: Employers Had Better Watch Their Backs*: Burlington Northern & Santa Fe Railway Company v. White, 80 F.3d. B. J. 53, 55 (2006) (“While no one is suggesting that employees who have complained about workplace issues are ‘untouchable,’ the currency of the Supreme Court decision means that courts will be inexperienced with tackling these types of claims and may err on the side of being overly cautious when refusing to dismiss them.”).

146 See, e.g., Easterling v. Sch. Bd. of Concordia Parish, No. 05-30868, 2006 U.S. App. LEXIS 19053, at *5 (5th Cir. July 28, 2006) (“The Supreme Court recently clarified the requirement for proving retaliation under Title VII . . . . It held that the anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment and rejected standards that have limited actionable retaliation to so-called ultimate employment decisions. The district court, applying precedent from this Circuit, conducted its analysis under the old, now rejected, standard. For that reason, we vacate the award of summary judgment on Easterling’s retaliation claim and remand for a determination consistent with *Burlington Northern.*”) (internal quotations and citations omitted); Graham-Adams v. Omaha Hous. Auth., No.8-05-cv-261, 2006 U.S. Dist. LEXIS 52520, at *7-9 (D. Neb. July 28, 2006) (“In *White*, the Supreme Court . . . noted that the Eighth Circuit and other circuits employed a restrictive approach [towards retaliation claims]. . . . The Supreme Court rejected such restrictive interpretations of Title VII retaliation. . . . The Court agrees with [the plaintiff’s] assertion that *White* must affect the Eighth Circuit’s approach to determining what constitutes retaliation. . . . The Court finds that based on the Supreme Court’s formulation in *White*, [the plaintiff] has presented sufficient evidence of an ‘adverse employment action’ to preclude summary judgment on her retaliation claim.”).

147 See Graff, supra note 15, at D1 (stating that the new standard might encourage employees who know they are about to receive a bad performance review to file a frivolous discrimination claim so if anything negative happens they can claim it resulted from retaliation); Janove, supra note 144 (“The Court’s expansion of what constitutes retaliation may encourage employees with performance issues, in particular, to assert claims of discrimination—even ones that lack merit—simply to gain the protections of [the] anti-retaliation provisions of Title VII.”).

148 See supra note 23 (discussing how a retaliation claim can proceed even if the original discrimination claim was found to be without merit).

149 See supra notes 144-145 (discussing why *White* will cause more retaliation claims to be heard by juries). Considering that the cost of litigating a retaliation claim averages $130,000, it is easy to see how an employee could use the threat of potential litigation to prevent an employer from taking legitimate disciplinary action against an employee who has recently filed a claim of discrimination, regardless of the merits of the discrimination claim. See supra note 140. Although an employee will still have to prove causation to make a *prima facie* case, and under the burden shifting mechanism an employer will be able to present a legitimate reason for its action, these issues are likely to be based on factual determinations that will need to be decided by a jury.
unpredictability of a jury trial, and the belief held by many employers that juries tend to favor employees, employers view the summary judgment stage as the last clear opportunity to dispose of frivolous or disingenuous claims. A decrease in the availability of summary judgment for retaliation claims may make an employer think twice before taking any appropriate action against an employee who has filed a claim of discrimination.

2. Title VII Was Not Intended to Be a Civility Code for the Workplace

As summary judgments become less likely, employers will be forced to litigate cases over matters that Congress did not intend to be actionable under Title VII. The refrain that “Title VII is not a general civility code” has been repeated in many important employment discrimination cases decided by the Supreme Court. This is because Title VII has always been understood to only protect employees against discrimination that causes some form of significant harm. It was not meant to give employees redress for every small incident that occurs in the workplace. The Court stated in *White* that “[a]n employee’s decision to report discriminatory behavior cannot immunize that

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See note 8 (discussing the burden shifting mechanism and ultimate burdens of proof under a retaliation claim).

150 See David Sherwyn, J. Bruce Tracey, & Zev J. Eigen, *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing out the Bath Water, and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73, 140 (1999) (“There is evidence of strong jury predisposition to side with employees and against employers. A five-year poll (from 1993 to 1998) of six to ten thousand persons in juror pools from jurisdictions across the country indicated that juries favor employees in employment discrimination cases. . . . Sixty-nine percent of the respondents agreed that ‘many company decision-makers’ promotion decisions are influenced by an employee’s age, sex, or race.’ Eighty-one percent agreed that ‘discrimination is still a major problem in the workplace’ . . . . Sixty-seven percent agreed that ‘too many workers are treated unfairly by the company they work for.’ Fifty-three percent agreed that ‘executives of companies will lie to increase their profits,’ while 75% said that they ‘would tend to believe a woman who says she has been sexually harassed at work.’”).

151 Even a favorable verdict may, at most, represent a symbolic victory, given the costs of litigating the claim, especially when compared to the cost of not taking a desired disciplinary action against an employee who has filed a discrimination claim.

152 See Burlington N. & Santa Fe Ry. Co. v White, 126 S. Ct. 2405, 2419 (2006) (Alito, J., concurring) (“There is reason to doubt that Congress meant to burden the federal courts with claims involving relatively trivial differences in treatment.”).


154 See *White*, 126 S. Ct. at 2415 (stating that it is important to separate significant from trivial harms).

155 See id. (stating that courts have held that personality conflicts at work that generate antipathy and snubbing by supervisor and co-workers are not actionable under § 704).
employee from those petty slights . . . that all employees experience.”156 Despite White’s language illustrating the Court’s desire to limit liability to significant harms, the new standard makes it much more likely that trivial harms will now be actionable under Section 704.157 An employer must now be concerned about the possibility of facing liability from any adverse change, however slight, made to an employee who has previously filed a claim of discrimination, and his ability to efficiently run his business may be severely limited.158 Additionally, the new standard promulgated in White creates the surprising result of giving greater rights to those employees who file a claim of retaliation rather than those who file a claim of discrimination.159 This was clearly not the result that Congress intended when it passed Title VII.160

C. White Represents an Unnecessary Intrusion into the Workplace and Does Not Promote Informal Conciliation

Congressional intent and EEOC guidelines illustrate a desire to promote informal conciliation to resolve potential violations of Title VII.161 This allows the employer to take an active role in eliminating inequality from its workplace.162 The EEOC views filing a complaint in court as the last option for an employee subjected to discrimination or retaliation.163 This philosophy is based on the concept that many

156 Id.; see also Brooks v. San Mateo, 229 F.3d 917, 928 (9th Cir. 2000) (comparing the threat of a frivolous retaliation claim to a “‘get out of jail free card’ for employees engaged in job misconduct”).

157 See Winfield, supra note 145, at 55.

158 See Savage, supra note 24, at A11; Winfield, supra note 145, at 55.

159 Justice Alito characterizes this as a perverse result that is contrary to the ultimate purpose of Title VII, which is to eliminate inequality in the workplace and not make a “federal case” over slight changes in treatment. See White, 126 S. Ct. at 2419 (Alito, J., concurring); see also Douglass E. Ray, Title VII Retaliation Cases: Creating a New Protected Class, 58 U. PITT. L. REV. 405, 414-16 (1997) (stating that in certain circuits, an act that would not meet the materially adverse standard for discrimination under § 703 would qualify as an adverse action under § 704).

160 See supra note 29.


162 Dating back to 1980 the EEOC has encouraged employers to take “all steps necessary to prevent sexual harassment from occurring, such as . . . informing employees of their right to raise and how to raise the issue of harassment.” 29 C.F.R. § 1604.11(f) (2007). In 1990 the EEOC put forward a policy statement encouraging employers to establish complaint procedures that allow an employee to complain about harassment without first having to confront the offending supervisor. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC POLICY GUIDE ON SEXUAL HARASSMENT, 8 FEP Manual 405:6699 (1990) available at http://www.eeoc.gov/policy/docs/currentissues.html.

163 Shell Oil Co., 466 U.S. at 77 (“However, Congress did not abandon its wish that violations of the statute could be remedied without resort to the courts, as is evidenced by its retention in
incidents in the workplace can be resolved through improved communication between employees and employers, and by the implementation of strong Equal Opportunity programs. By encouraging employers to establish their own methods and procedures to prevent discrimination and retaliation, employers can create policies that are consistent with their business objectives while still protecting employees.

Unlike other Supreme Court decisions, White does not provide a clear incentive for employers to pursue informal conciliation programs. An employer who now wishes to improve internal retaliation policies in an attempt to avoid litigation will struggle in formulating policies covering all harm now actionable under White. Similarly, human resource managers will have trouble identifying situations that could lead to liability, making it difficult to provide clear guidance to supervisors on ways to avoid actions that could lead to liability. Title VII is primarily meant to be preventative and not remedial. The ultimate goal of Title VII is to eliminate unequal treatment from occurring in the workplace rather than providing redress to those who are discriminated or retaliated against. Therefore, while White may represent a strategic advantage to employees in litigation, it does not take into consideration Congress’s mandate to balance

1972 of the requirement that the Commission, before filing suit, attempt to resolve disputes through conciliation.

See generally Clevinger v. Motel Sleepers, Inc., 36 F. Supp. 2d 322, 324 (W.D. Va. 1999) (stating that it is preferable to solve many of these matters through informal conciliation).

This approach deals with the concerns of both employees and employers. See generally, Brooks v. San Mateo, 229 F.3d 917, 928 (9th Cir. 2000) (discussing the need to balance competing interests).

See Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998) (“It would therefore implement clear statutory policy and complement the Government’s Title VII enforcement efforts to recognize the employer’s affirmative obligation to prevent violations and give credit here to employers who make reasonable efforts to discharge their duty.”). Although this policy is not explicitly stated in White, as it is in Faragher, one commentator suggests that the Supreme Court made the standard in White intentionally vague to create an incentive for employers to improve their anti-retaliation policies. See, e.g., Graff, supra note 15, at D1 (“[T]he Supreme Court has a longer-term approach to keeping discrimination claims out of the courts. The high court’s hope, as expressed in previous Title VII decisions, is to have companies set up better systems for preventing discrimination, and for soliciting and responding to complaints. An entire line of Supreme Court decisions . . . shows that[]” “[w]hat they want is for employers to set up processes internally that work.”).

Janove, supra note 144 (stating that although human resource employees recognize that White will force them to strengthen their anti-retaliation policies, they are unsure of what exactly needs to be done to comply with White).

Id. (discussing the crucial role that human resource professionals play in educating supervisors and employees on their rights and duties as well as how to conduct themselves in a manner that complies with the law and internal anti-discrimination policies).

See Faragher, 524 U.S. at 805-06.

Id. (“Although Title VII seeks to make persons whole for injuries suffered on account of unlawful employment discrimination, its primary objective . . . is to influence primary conduct . . . not to provide redress but to avoid harm.”).
emplyee protection with the rights of an employer who strives to prevent discrimination or retaliation from occurring in the first place.171

IV. APPLYING AN AFFIRMATIVE DEFENSE

As in other areas of employment discrimination law, employers are vicariously liable for acts of retaliation committed by their mid and low level supervisors.172 Combined with White’s expansive definition of material adversity, absolute vicarious liability will expose even the most thoughtful employers to increased vulnerability from a widening range of less serious harms.173 When faced with a similar problem for determining employer liability standards for sexual harassment claims, the Supreme Court established a liability framework that rewards employers who show a serious commitment toward preventing sexual harassment from occurring.174 Based on the Congress’s desire for the courts to determine appropriate liability standards under Title VII in accordance with agency principles,175 the Supreme Court created an affirmative defense allowing employers to avoid liability in certain situations for less severe forms of harassment.176

A. History and Rationale of the Affirmative Defense in Sexual Harassment Claims

In 1998, the Supreme Court settled the confusion over the appropriate standard for employer liability for sexual harassment

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171 See Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998) (“To the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII’s deterrent purpose.”) (citing McKennon v. Nashville Banner Publishing Co., 513 U.S. 352, 358 (1995)).
172 See Muraj v. UPS Freight Servs., No. 04-cv-6563, 2006 U.S. Dist. LEXIS 62274, at *10 (W.D.N.Y. Aug. 31, 2006) (stating that "courts have held employers vicariously liable for retaliation committed by supervisors").
173 Even employers with strong anti-retaliation policies can face the prospect of liability from rogue supervisors who ignore their employers’ policies. As a result of the uncertainty of what is actionable under White, even the most committed employer may not be able to prevent many subtle retaliatory acts now actionable under White.
175 See Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986) (“Congress wanted courts to look to agency principles for guidance in this area. While such common-law principles may not be transferable in all their particulars to Title VII, Congress’s decision to define ‘employer’ to include any ‘agent’ of an employer, surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible.”) (citations omitted); 42 U. S. C. § 2000e(b) (2000).
176 See Part IV.A. infra.
Prior to Ellerth and Faragher, lower courts were uncertain over the appropriate standard for employer liability in sexual harassment cases. Lower courts typically used the distinction between quid pro quo and hostile work environment harassment to determine employer liability. In Ellerth, however, the Court stated that the lower courts had placed too much importance on the difference between the two forms of sexual harassment. Focusing on the severity of the harm, and not the category it belonged to, the Court used agency principles to determine the appropriate form of employer liability. Applying agency principles, the Supreme Court held that when a supervisor commits a tangible employment action against an employee, the employer is subject to vicarious liability. The Court defined tangible employment action as any act that “constitutes a significant change in employment status such as hiring, firing, failing to
promote, reassignment with significantly different responsibilities, or a
decision causing a significant change in benefits.” 185 The potential harm
to employees derives from a supervisor’s capacity to take tangible
employment actions as the employer’s agent. Since these actions are
“cloaked” with the authority of the employer, the Court stated that it
would be “implausible” to allow an employer to avoid liability despite
being unaware of a supervisor’s true intention for taking a tangible
employment action. 186

In discussing harassment that has taken place but not risen to the
level of a tangible employment action, the Court held that while the
employer is subject to vicarious liability, it could raise an affirmative
defense to liability and damages. 187 While it is clear that the agency
relationship is always present when a supervisor commits a tangible
employment action, the effect of this relationship is much less obvious
for actions that do not reach this level. 188 Due to this uncertainty the
Court allowed employers to avoid liability for non-tangible employment
actions in certain circumstances. An employer can try to prove 189 “that
[it] exercised reasonable care to prevent and promptly correct any
sexually harassing behavior” and that the “plaintiff employee
unreasonably failed to take advantage of any preventive or corrective
opportunities provided by the employer or to avoid harm otherwise.” 190
If successful, the employer will not be liable for a supervisor’s sexual
harassment as long as it is not a tangible employment action.

185 Id.
186 Id. at 761-63 (“When a supervisor makes a tangible employment decision, there is
assurance the injury could not have been inflicted absent the agency relation. . . . Tangible
employment actions are the means by which the supervisor brings the official power of the
enterprise to bear on subordinates. A tangible employment decision requires an official act of the
enterprise, a company act. . . . For these reasons, a tangible employment action taken by the
supervisor becomes for Title VII purposes the act of  the employer. . . . In that instance, it would
be implausible to interpret agency principles  to allow an employer to escape liability, as
Meritor itself appeared to acknowledge.”).
187 Id. at 765.
188 Id. at 763 (“Whether the agency relation aids in commission of supervisor harassment
which does not culminate in a tangible employment action is less obvious. Application of
the standard is made difficult by its malleable terminology, which can be read to either expand or
limit liability in the context of supervisor harassment. On the one hand, a supervisor’s power and
authority invests his or her harassing conduct with a particular threatening character, and in this
sense, a supervisor always is aided by the agency relation. . . . On the other hand, there are acts of
harassment a supervisor might commit which might be the same acts a co-employee would
commit, and there may be some circumstances where the supervisor’s status makes little
difference.”).
189 The employer must prove by a preponderance of the evidence. Id. at 765. FED R. CIV. P.
8(c) states, “[i]n pleading to a preceding pleading, a party shall set forth affirmatively . . . any
other matter constituting an avoidance or affirmative defense.”
190 Ellerth, 524 U.S. at 765. A strong anti-harassment policy will usually meet the first
requirement of the affirmative defense and an employee’s failure to make use of any complaint
procedures enumerated in the policy will normally meet the burden of proof needed for the
second aspect of the affirmative defense.
The *Ellerth* affirmative defense encourages employers to be proactive in preventing sexual harassment from occurring, thereby promoting conciliation over litigation, a prime focus of Congress when it passed Title VII. If employers adopt strong anti-harassment policies and grievance procedures, then employees who utilize these procedures will be able to deal with a potential problem before it becomes so “severe” and “pervasive” as to violate Title VII. Employees will also have an incentive to use the procedures, knowing that a failure to do so might limit their chances of prevailing at trial. By implementing strong anti-harassment policies, an employer can limit liability against less severe forms of harassment. These less severe harms that potentially subject an employer to liability might be difficult to uncover, particularly when there are no tangible employment actions and the employee does not inform anyone at his workplace about what is occurring. Furthermore, encouraging employers to take a primary role in preventing discrimination provides a methodology that will effectuate Congress’s desire to eliminate discrimination from the workplace while minimizing the need for workplace intrusion by the federal government.

B. *Applying an Affirmative Defense to Retaliation Claims*

1. *How the Retaliatory Affirmative Defense Will Work*

Applying the sexual harassment affirmative defense to retaliation claims will not eliminate all of the difficulties that could occur in the wake of *White*. It will, however, help thoughtful employers limit their liability by providing some protection from frivolous claims now possibly actionable under the new standard. Employers who implement strong anti-retaliation procedures will not have to worry about less severe retaliation claims from employees who have not taken reasonable efforts to utilize the procedures implemented by the employer. For employers with strong anti-retaliation policies, this will help to eliminate some of the uncertainty that *White* creates regarding what types of lesser forms of retaliation would now be considered materially adverse at the prima facie stage of a claim. If the employer is informed of the alleged retaliatory acts, it can work to correct them before they reach the point where an employee decides to file a charge. If the employee does not

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191 See *supra* notes 137, 161.
192 See *Ellerth*, 524 U.S. at 764.
193 A showing that an employee unreasonably failed to use complaint procedures laid out by the employer will normally satisfy the employer’s burden of proof for the second part of the affirmative defense. See *id.* at 765.
194 See *supra* note 166.
195 See generally United Steelworkers v. Weber, 443 U.S. 193, 207 (1979) (discussing Congress’s desire for Title VII not to add unnecessary regulation into the workplace anymore than was absolutely necessary).
196 For a discussion of the problems created by *White*, see *supra* Part III.
197 Employers who implement strong anti-retaliation procedures will not have to worry about less severe retaliation claims from employees who have not taken reasonable efforts to utilize the procedures implemented by the employer. For employers with strong anti-retaliation policies, this will help to eliminate some of the uncertainty that *White* creates regarding what types of lesser forms of retaliation would now be considered materially adverse at the prima facie stage of a claim. If the employer is informed of the alleged retaliatory acts, it can work to correct them before they reach the point where an employee decides to file a charge. If the employee does not
for retaliation claims would apply in the same manner that it is used in sexual harassment cases. When an employer has committed a retaliatory tangible employment action, the employer will be strictly liable and not able to use the affirmative defense. This is consistent with the widely held belief that employers are strictly liable for their supervisors’ retaliatory acts. In light of the Court’s analysis of employer liability in *Ellerth* and its desire in *White* to increase protection to retaliation victims, this is basically a restatement of the current law regarding claims under Section 704. For retaliatory acts that are not materially adverse but do not rise to the level of tangible employment actions, an employer may avoid liability by showing that it: (1) “exercised reasonable care to prevent and promptly correct” any retaliatory action and (2) that the plaintiff employee unreasonably failed to avail himself of any preventive or corrective opportunities offered by the employer.

2. Retaliatory Harassment Is One Form of Retaliation That Is Not a Tangible Employment Action

A Sixth Circuit Court of Appeals case has expressed a willingness to apply the sexual harassment affirmative defense towards claims of retaliatory harassment that do not amount to tangible employment actions so detrimental to employees.

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198 See *supra* note 172. As with claims of sexual harassment, retaliatory conduct that amounts to a tangible employment action is clearly aided by the agency relationship between the supervisor and the employer and it would undermine Congress’s desire for employers to prevent these most egregious harms from occurring in the first place if there was a way for employers to avoid liability, since it is the supervisor’s role as the employer’s agent that make tangible employment actions so detrimental to employees.


200 See *Ellerth*, 524 U.S. at 765. By using the same standard for the retaliation affirmative defense as is used in sexual harassment claims, conscientious employers will be able to mitigate some of the uncertainty arising out of *White* by being able to rely on the predictable and truly objective standard of a “tangible employment actions” to limit their liability. Joan T.A. Gabel & Nancy R. Mansfield, *Sexual Harassment in the Eye of the Beholder: On the Dissolution of Predictability in the Ellerth/Faragher Matrix Created by Suders for Cases Involving Employee Perception*, 12 DUKE J. GENDER L. & POL’Y 81, 82 (2005).

201 See Irene Gamer, Comment, *The Retaliatory Harassment Claim: Expanding Employer Liability in Title VII Lawsuits*, 3 SETON HALL CIRCUIT REV. 269, 291 (2006) (“Retaliatory harassment occurs when a supervisor or a co-worker retaliates against an employee, who engaged in protected expression, by creating a [hostile work environment]. Much like [hostile work environment] harassment under the main discrimination provision, retaliatory harassment consists of actions that do not produce tangible or economic harm. Retaliatory harassment can take the form of name-calling, poor performance evaluations, pranks or encouraging co-worker ostracism.”). Prior to *White* not all circuits recognized retaliatory harassment as an adverse employment action under § 704. Due to *White’s* expansion of what constitutes an adverse
In Morris v. Oldham County Fiscal Court, the Court of Appeals stated that it did not see any reason why an employer should not be entitled to use the affirmative defense for a claim of retaliatory harassment. The First Circuit, noting the lack of guidance from the Supreme Court on the issue of employer liability for retaliatory harassment, suggested that it is appropriate for lower courts to apply the Supreme Court’s liability framework from sexual harassment cases for claims of retaliatory harassment. In both sexual harassment and retaliatory harassment cases, the plaintiff can aggregate a variety of incidents (that individually are not actionable) to show that the totality of the harm is “severe or pervasive” enough to qualify as an adverse employment action. Retaliatory harassment is one example of a form of retaliation in which an adverse employment action (aimed at establishing a prima facie case) does not rise to the level of a tangible employment action for the purpose of determining employer liability. Many other less severe forms of retaliation will now be actionable under White. The Supreme Court’s logic in sexual harassment cases and the circuit courts’ logic in the retaliatory harassment cases apply to other forms of retaliatory conduct that do not amount to tangible employment actions. In these cases, the courts understand the difficulty for even the most committed employer to identify and correct all minor manifestations of harassment or adverse treatment by all employees with supervisory authority. Therefore, they make the affirmative defense available to conscientious employers in these situations. It is quite consistent with Title VII’s congressional intent and the Supreme Court’s logic in sexual harassment cases and the circuit courts’ logic in the retaliatory harassment cases apply to other forms of retaliatory conduct that do not amount to tangible employment actions.
Court’s Title VII jurisprudence to apply the affirmative defense to claims of retaliation.

C. Legal and Policy Rationales for Allowing a Retaliation Affirmative Defense

1. Retaliation Affirmative Defense Harmonizes White with Title VII Employer Liability Case Law

Employers are vicariously liable for sexual harassment committed by their supervisors. Whenever that harassment does not reach the level of a tangible employment action, an employer can use the affirmative defense.209 The distinction is based on the Court’s interpretation of agency principles.210 Due to the difficulty in determining whether harassment was “aided by the agency relationship,” the Court allows employers to avoid liability through the affirmative defense, even though the alleged action would otherwise lead to liability.211 Holding employers strictly liable for retaliation in a non-tangible employment action, without allowing for the use of an affirmative defense, is contradictory to the Court’s use of agency principles in determining employer liability standards under Title VII. It is possible that White’s true impact will be holding employers (including those with strong commitments towards preventing retaliation) strictly liable (and unable to use the affirmative defense) for all of a supervisor’s retaliatory acts, even if it is unclear whether the agency relationship aided in the retaliation.212 This lack of clarity over the role of the agency relationship was the Court’s primary legal motivation for applying the affirmative defense.213 In White, the Court overlooked its congressional mandate to interpret standards of employer liability in a manner consistent with agency law principles.214

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210 Id. at 762-63.
211 For sexual harassment claims, employers with strong anti-sexual harassment programs can avoid liability for non-tangible employment actions that lead to liability without the affirmative defense.
212 This will result from the combination of the broader definition of an adverse employment action under § 704 and the difficulty of even the most conscientious employer from preventing all less severe forms of retaliation from occurring.
213 See Ellerth, 524 U.S. at 763.
214 See supra notes 175, 183.
2. Retaliation Affirmative Defense Promotes Congressional Intent

Applying the sexual harassment affirmative defense to retaliation claims will help promote congressional objectives for Title VII in the same manner it has for sexual harassment law. As in sexual harassment cases, an affirmative defense for retaliation claims will encourage informal conciliation and still provide workers with the protection that they need.215 Following the Ellerth decision, employers hoping to gain the protections of the new affirmative defense took significant steps to bolster their sexual harassment policies.216 There is no reason to assume that employers would not be similarly motivated, or able to do the same, in the area of retaliation prevention. Furthermore, the affirmative defense will once again make summary judgment a realistic possibility for employers, ensuring that the Supreme Court’s desire to limit Title VII to non-trivial harms will be more than just empty words. Using the affirmative defense to obtain a summary judgment will protect employers against uncertainty arising from idiosyncratic employees,217 as well as those employees looking to gain the protection of a broad retaliation standard to limit necessary disciplinary action that is unrelated to the allegedly discriminatory action.218

Applying an affirmative defense is consistent with prior Supreme Court decisions regarding employer liability under Title VII.219 The proposed approach will add some certainty to what will likely become an uncertain area of law.220 Since eight of the Justices strongly supported a broad interpretation of Section 704, it is unlikely that White will be altered by the Court anytime soon in the absence of congressional intervention.221 Allowing employers to use an affirmative defense for retaliatory acts that are not tangible employment actions will reward employers with strong anti-retaliation policies and protect workers from employers not committed to preventing retaliation.222

215 See Ellerth, 524 U.S. at 764-65.
217 See supra Part III.B. The new standard has the potential to be abused by employees who file unmeritorious claims of discrimination.
218 Id.
220 Id.
221 Congress has amended Title VII many times since 1964 but has never considered altering the language of § 704.
222 Burlington N. & Sante Fe Ry. Co. v White, 126. S. Ct. 2405 (2006); see Graff, supra note 15 (complying with White will not be easy “[b]ut . . . if businesses can create systems to restock shelves overnight, track individual customer purchases, or do any of the other creative things they do to gain a competitive advantage, then they can create effective systems for helping their employees work well together—even when the complaints are based on the knotty issues of race, sex, religion, or national origin”).
Considering the federal judiciary’s desire to prevent plaintiffs from abusing a vague standard, it is likely that it would willingly apply the affirmative defense in an attempt to add clarity to retaliation case law and limit frivolous suits. Finally, considering the large increase in claims filed with the EEOC, this approach will free-up limited resources, allowing the EEOC to focus on the most serious violations of Title VII that have no hope of being solved through informal processes.

3. Retaliation Affirmative Defense Helps Remedy White’s Uncertainty

The evidence required to determine whether an employer is entitled to use the affirmative defense is based on a more objective standard (tangible employment action) than the determination of material adversity for a prima facie case. Employers with strong anti-retaliation policies will be able to prevent liability for less severe harms at the summary judgment stage if an employee does not make reasonable efforts to take advantage of the systems the employer has implemented. In the aftermath of White, many employers are struggling over how to fully comply with the Supreme Court’s ruling. Allowing the use of the affirmative defense would ease employers’ uncertainty by allowing them to avoid liability when they take appropriate preventative actions. The best way to avoid the

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223 See Graff, supra note 15 (stating that “lower federal courts [are] historically unfriendly” to Title VII claims that involve non-economic losses).

224 See generally Edward A. Marshall, Title VII’s Participation Clause and Circuit City Stores v. Adams: Making the Foxes Guardians of the Chickens, 1 BERKELEY J. EMP. & LAB. L. 71, 105 (2003) (“The Commission has been chronically under-funded and understaffed; pragmatic limitations will likely preclude any resurgence of administrative action on behalf of individual victims of workplace discrimination. In the words of one commentator, ‘the EEOC is spread six miles wide and an inch deep[.]’ This lack of resources will likely continue to prevent the Commission from pursuing a significant number of charges in litigation.”) (alteration in original); Elizabeth A. Roma, Comment, Mandatory Arbitration Clauses in Employment Contracts and the Need for Meaningful Judicial Review, 12 AM. U.J. GENDER SOC. POL’Y & L. 519, 528-529 (2004).

225 See generally Gabel & Mansfield, supra note 200, at 82 (“The [affirmative defense] offers predictability, simplicity, and, as a result, an incentive for employers to behave ‘well.’ The court can often determine as a matter of law whether the employee suffered a tangible action and/or whether the employer sufficiently prevented and corrected improper behavior. Such court determinations fulfill the predictability and practicability components of the [affirmative defense].”).


227 See supra notes 142-144.

228 See supra note 166. If the true purpose of White was to encourage employers to solve retaliation disputes on their own, the Court could have made the message clearer by applying the affirmative defense framework to retaliation claims as opposed to creating a vague standard and hoping that the uncertainty will force employers into action to prevent retaliation. Id.
uncertainties of White is to implement strong anti-retaliation policies that strive to prevent or immediately correct any type of retaliation.\textsuperscript{229} Furthermore, courts are familiar with the affirmative defense used in sexual harassment cases\textsuperscript{230} and applying it to retaliation cases would not represent a significant burden to the courts since this is likely to help reduce some of the increase in retaliation claims that many believe will follow White.\textsuperscript{231}

CONCLUSION

The importance of an anti-retaliation provision in employment discrimination statutes cannot be questioned. White recognizes this importance and forcefully reiterates the Supreme Court’s commitment to eradicating all unequal treatment in the workplace. Yet despite White’s intent to end inequality in the workplace, the Court overlooked the employers’ right to control their own businesses to the maximum extent possible. By applying the affirmative defense that is already used in the harassment context to retaliation claims, it is possible to protect both employers and employees, keep less severe claims out of the courts, and ultimately eliminate retaliatory action from occurring in the first place.

\textsuperscript{229} See Winfield, supra note 145, at 55 (“Employers should expect heightened scrutiny with regard to any action they take against employees who have voiced complaints about discrimination. With this in mind, employers should endeavor to... implement and strictly enforce policies prohibiting any kind of retaliation.”).

\textsuperscript{230} See generally Gabel & Mansfield, supra note 225, at 82.

\textsuperscript{231} See generally Graff, supra note 15 (“Observers agree that many more retaliation cases will be streaming into the federal courts in the wake of Burlington Northern, to the chagrin of many federal judges. Some of them will no doubt curse the Supreme Court for opening the floodgates.”).