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DISCRIMINATION V. RETALIATION: WHAT LEVEL OF HARM IS NECESSARY TO ESTABLISH A CAUSE OF ACTION UNDER TITLE VII?

Brendan Hanner White

I. INTRODUCTION

Title VII of the Civil Rights Act of 1964 bars employers from discriminating against employees who are members of a protected class.[1] Two provisions of Title VII advance this goal. Section 703[2] sets forth the basic prohibition, stating that an employer cannot "discriminate against" an employee based on "race, color, religion, sex, or national origin," with regard to an employee's "compensation, terms, conditions, or privileges of employment."[3] Section 704,[4] Title VII's *anti-retaliation* provision, supplements this ban by making it "an unlawful employment practice" for an employer to "discriminate against any of his employees…because he has opposed any practice made unlawful by this subchapter."[5] Also under section 704, an employer cannot discriminate against an employee because that employee has "made a charge, testified,

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[1] *See* 42 U.S.C. §§2000e et seq.

[2] 42 U.S.C. § 2000e-2(a) ("It shall be an unlawful employment practice for an employer-

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

[3] *Id*.

[4] 42 U.S.C. § 2000e-3(a) ("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 by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter").

[5] *Id*.

assisted, or participated in any manner in an investigation, proceeding, or hearing" under section 703. [6]

In analyzing these two sections, courts have struggled to determine whether some minimum level of harm must be shown to trigger the protections of these prohibitions, and, if so, what that level of harm should be. Neither statute specifies a "baseline" level of harm as an element of the cause of action. [7]

Nonetheless, prior to the Supreme Court's decision in *Burlington Northern & Santa Fe Railway Co. v. White*,[8] almost every Circuit recognized a minimum "adverse employment action" requirement in order to bring either a section 703 or section 704 claim.[9] The effect of recognizing an "adverse employment action" element was to require an employee show more than the employer's action was motivated by discrimination. In addition, the employee had to show the employer's action caused him a minimum level of harm that is "serious,"[10] "significant,"[11] or "material."[12]

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[6] *Id*.
[7] *See Leading Cases*, 120 Harv. L. Rev. 312, 320 (2006).
[8] 548 U.S. 53 (2006).
[9] *See Leading Cases*, *supra* note 7, at 320. *See also* Autumn George, Student Author, *"Adverse Employment Action"-How Much Harm Must be Shown to Sustain a Claim of Discrimination Under Title VII?*, 60 Mercer L. Rev. 1075, 1082 (2009); Rebecca Hanner White, *De Minimis Discrimination*, 47 Emory L.J. 1121, 1131 (1998); Lisa Taylor, *Adding Subjective Fuel to the Vague-Standard Fire: A Proposal for Congressional Intervention After Burlington Northern v. Santa Fe Railway Co. v. White*, 9 U. Pa. J. Lab. & Emp. L. 533, 536-7 (2007).
[10] Butler v. Alabama Department of Transportation, 536 F. 3d 1209, 1215 (11th Cir. 2008) (holding that an African American plaintiff's claim that she was disciplined more harshly that her white colleague was not a serious enough employment action to assert a cognizable claim under section 703).
[11] Vann v. Southwestern Bell Telephone Co., 179 Fed. Appx. 491, 498 (10th Cir. 2006) (holding a transfer that did not require plaintiff to buy or sell a house was not a change in employment significant enough to assert a cognizable claim under section 703).
[12] Holland v. Washington Homes, Inc., 487 F. 3d 208, 219 (4th Cir. 2007) (holding the plaintiff's reassignment to sell homes in another neighborhood was not a material harm under section 703 because the reassignment would not affect the plaintiff's compensation).

In *Burlington Northern*, the United States Supreme Court addressed whether an "adverse action" was necessary to establish a claim under section 704.[13] The Supreme Court stated the legal questions presented in *Burlington Northern* as follows: "Does [section 704] confine actionable retaliation to activity that affects the terms and conditions of employment? And how harmful must the adverse actions be to fall within its scope?"[14]

The Supreme Court answered the first question in the negative, reasoning that the coverage of section 704 "extends beyond workplace-related or employment-related retaliatory acts and harm."[15] As to the second question, the Supreme Court held an adverse action must be "material," which the Supreme Court defined as conduct harmful enough that it would have "dissuaded a reasonable worker from making or supporting a charge of discrimination."[16]

In reaching these conclusions, the Supreme Court compared the reach of section 703 and section 704. It did so in part because the defendant and the Solicitor General argued that liability under both section 703 and section 704 was triggered only by a material change in the "terms or conditions of employment."[17] The Supreme Court rejected this argument, reasoning that Title VII provided broader protection for victims of retaliation than for victims of race-based, religion-based, ethnicity-based, or gender-based discrimination.[18] The Supreme Court explained this difference resulted from Congress's inclusion of the "terms and conditions" language in section 703 but not in section 704.

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[13] 548 U.S. 53, 57 (2006).
[14] *Id*.
[15] *Id*. at 67.
[16] *Id*. at 68 (citing Rochon v. Gonzalez, 438 F. 3d. 1211, 1219 (C.A.D.C. 2006)).
[17] While the Solicitor General agreed with the defendant regarding the materiality standard in the Sixth Circuit, the Solicitor General was not arguing that the actions by the defendant were insufficient to bring a claim under that test.
[18] *Burlington Northern*, 548 U.S. at 66.

In establishing that section 703 and section 704 operate in different ways, the Supreme Court created uncertainty regarding the issue of whether a materiality standard exists for section 703 claims, and, if so, what that standard would be.[19] In particular, there is uncertainty as to whether any materiality standard for section 703 claims should be more burdensome on plaintiffs than the materiality standard the Supreme Court established for claims under section 704.

In the wake of the *Burlington Northern* decision, all Circuit Courts presented with the issue have determined that a materiality standard exists for section 703 claims, finding the employer's action must cause direct or indirect economic harm to the employee.[20] Some lower courts have gone further and determined that direct or indirect economic harm alone is not enough to establish a claim under section 703.[21] These courts have found in *Burlington Northern* support for the view that the section 703 materiality standard requires an employee establish not only direct or indirect economic harm, but direct or indirect economic harm that is greater than the level of harm required to bring an action under section 704.[22]

This reading of *Burlington Northern* is wrong. The Supreme Court did not hold or suggest that, if a materiality standard does exist for section 703 claims, it should be more onerous for plaintiffs, and more protective of employers, than the materiality standard imposed by section 704.

On close inspection, *Burlington Northern* leaves open three important questions regarding section 703 claims: First, does a materiality standard exist for such claims? Second, if a materiality standard does exist, what level of harm must be shown in order to bring such a

[19] *Leading Cases*, *supra* note 7, at 313.
[20] *See* George, *supra* note 9, at 1087 (2009).
[21] *See infra* notes 63-83 and accompanying text.
[22] This error is not limited to the courts. *See Leading Cases*, *supra* note 7, at 321-2.

claim? Third, if there is a materiality standard for section 703 claims, what is that standard's relationship to the materiality standard established by the Supreme Court in *Burlington Northern* for section 704 claims? Each of these questions is sufficiently complex to warrant its own lengthy discussion. As a result, in this paper, I will put the first two questions to one side and address only the third question.

In particular, I ask whether the Title VII plaintiff must prove a greater material injury to establish a section 703 claim than a section 704 claim. I conclude the answer to this question is clearly "no" and that lower courts have misread *Burlington Northern* in reaching a contrary result.

II. THE *BURLINGTON NORTHERN* OPINION

In *Burlington Northern*, the plaintiff Sheila White worked for defendant Burlington Northern & Santa Fe Railway Company (hereafter "defendant") as a "track laborer" with her primary responsibility being operation of the forklift.[23] After complaining that her immediate supervisor made inappropriate remarks to her, White was moved to more standard track laborer tasks. Some of the standard track labor tasks performed by White after this move were removing and replacing track components, cutting brush, and clearing litter and cargo spillage. These tasks involved dirty, heavy manual labor, unlike her forklift duties.[24] Faced with this change in job responsibility, White filed a claim with the Equal Employment Opportunity Commission (hereafter "EEOC"), claiming that this reassignment was the result of retaliation for her earlier complaints.[25] Shortly thereafter, White was suspended without pay on the basis that her

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[23] 548 U.S. at 57.
[24] *Id*.
[25] *Id*. at 58.

supervisor claimed she was insubordinate, although the suspension was later overturned and White received backpay.[26] Both the reassignment and the suspension formed the basis of the retaliation claim White brought against the defendant.

In defense of the section 704 claim brought by White, the defendant did not argue that the motivation for its actions was not retaliatory.[27] Rather, the defendant contended that its alleged actions were not harmful enough to support a claim under section 704. More specifically, the defendant stated that the reassignment of duties did not constitute impermissible retaliation because moving White to more standard track laborer tasks fell within the same job description.[28] With regard to the suspension, the defendant alleged that no adverse action had taken place because White was eventually reinstated with backpay.[29]

A jury found in favor of White and awarded her $43,500 in compensatory damages, including $3,250 in medical expenses. The District Court denied the defendant's post-trial motion for judgment based on the defenses mentioned above as a matter of law. A panel of the Sixth Circuit reversed, but the full Sixth Circuit, sitting en banc, voted to uphold the District Court's judgment.[30] The judges differed, however, on what level of harm an employer's action must reach in order to support a section 704 claim.[31] A majority of the Circuit Court used the case as an opportunity to confirm the Sixth Circuit's previously established materiality standard for section 703 discrimination claims set forth in *Kocsis v. Multi-Care Management*.[32] Specifically, the Circuit Court held that the employer's action must involve a materially adverse

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[26] *Id*. at 58-9.
[27] *Id*. at 70.
[28] *Id*.
[29] *Id*. at 72.
[30] *Id*. at 59.
[31] *Id*.
[32] 97 F. 3d 876 (6th Cir. 1996).

change in the terms of the worker's employment. [33] The Sixth Circuit majority in *Burlington Northern* concluded that this standard should also apply to retaliation claims.[34] Under this interpretation, a claim could only be brought under section 704 if the harm imposed on the employer was actionable under section 703, and vice versa. In a concurring opinion, five judges of the Sixth Circuit disagreed with this standard, suggesting that no materiality standard should operate for section 704 claims because no words within section 704 comparable to the "terms and conditions" language of section 703 expressed any limitation on the anti-retaliation provision's application.[35] The decision of the Sixth Circuit conflicted with decisions of other circuits regarding the materiality standard for section 704, and the Supreme Court took the case for that reason. [36]

In its opinion, the Supreme Court outlined the several definitions of "adverse employment action" used by lower courts in applying section 704. In addition to the Sixth Circuit's holding that section 703 and section 704 have an identical materiality standard, the Supreme Court noted the Fifth and Eighth Circuits had adopted a more defendant-favorable approach to evaluating section 704 claims.[37] Specifically, the Fifth and Eighth Circuits applied an "ultimate employment decision" standard, which limited actionable retaliatory conduct to acts "such as hiring, granting leave, discharging, promoting, and compensating."[38] The Supreme Court noted that other Circuit Courts allowed application of section 704 even when the alleged harm does not concern hiring, firing or compensation decisions. In particular, the Seventh Circuit and District of Columbia Circuit had required only that the alleged conduct "would likely have

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[33] White v. Burlington Northern & Santa Fe Railway Co., 364 F.3d 789, 800 (6th Cir. 2004) (en banc).
[34] *Id*.
[35] *See id*. at 816-7 (Clay, concurring).
[36] *Burlington Northern*, 548 U.S. at 60.
[37] *Id*.
[38] *Id*. (citing Mattern v. Eastman Kodax Co., 104 F. 3d 702, 707 (5th Cir. 1997)).

'dissuaded a reasonable worker from making or supporting a charge of discrimination,' "[39] while the Ninth Circuit mandated that the plaintiff establish that the alleged retaliatory treatment must be "reasonably likely to deter the charging party or others from engaging in protected activity."[40]

After outlining these different approaches, the Supreme Court addressed the argument of the defendant and the Solicitor General that the anti-retaliation provision should be read "in pari materia" with the antidiscrimination provision.[41] Specifically, the defendant and the Solicitor General argued that application of section 704 should be limited to conduct that "affects the employee's 'compensation, terms, conditions, or privileges of employment.' "[42] The Supreme Court rejected this argument, stating that section 703 differs from section 704 "in important ways."[43]

In drawing a distinction between the two sections, the Supreme Court stated that the words "hire," "discharge," "compensation, terms, conditions, or privileges of employment," "employment opportunities," and "status as an employee" present in the language of section 703 explicitly limit the application of that section to "actions that affect employment or alter the conditions of the workplace."[44] In comparison, the Supreme Court highlighted the fact that "[n]o such limiting words appear in the antiretaliation provision."[45] The Supreme Court determined

[39] *Id*. (citing Washington v. Illinois Dept of Revenue, 420 F. 3d 658, 662 (7th Cir. 2005)).
[40] *Id*. at 61 (citing Ray v. Henderson, 217 F. 3d 1234, 1242-1243 (9th Cir. 2000)).
[41] *Id*.
[42] *Id*.
[43] *Id*.
[44] *Id*. at 62.
[45] *Id*.

Congress must have intended this difference in language to signal that these two sections have a different scope. [46]

The Supreme Court relied on statutory purpose, as well as statutory text, in making this determination. According to the Supreme Court, the purpose of section 703 is to provide "equality of *employment* opportunities" and to avoid the creation of "stratified *job environments*." [47] To achieve these objectives, Congress did not need to prohibit employer conduct "other than employment-related discrimination."[48] The objective of section 704, in contrast, is "preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees." [49] To properly achieve this end, Congress needed to include employer actions that occur beyond the workplace because "[a]n employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm outside the workplace."[50] Based on these differences in purpose and language, the Supreme Court found that section 704, unlike section 703, "is not limited to discriminatory actions that affect the terms and conditions of employment."[51] In making this determination, the Supreme Court also noted "Congress has provided similar kinds of protection from retaliation in comparable statutes without any judicial suggestion that those provisions are limited to the conduct prohibited by the primary substantive provisions."[52] On this basis, the Supreme Court rejected the argument of the defendant and the

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[46] *Id*. at 63.
[47] *Id*. (emphasis added).
[48] *Id*.
[49] *Id*.
[50] *Id*.
[51] *Id*. at 64.
[52] *Id*. at 66. The Supreme Court relied specifically on the National Labor Relations Act and its anti-retaliation provision, 29 U.S.C. § 158(a)(4), and decisions cited under that statute. *See* Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983); NLRB v. Scrivener, 405 U.S. 117 (1972).

Solicitor General, holding instead that section 704 is not limited to discrimination with respect to employment-related activity.[53] Therefore, certain employer actions can establish a claim under section 704 if motivated by retaliation that would not establish a claim under section 703 if motivated by discrimination.

After determining that section 704 reached adverse action outside the workplace, the Supreme Court turned to the level of harm an employee needs to show in order to bring a claim under this section. Ultimately, the Supreme Court adopted the approach previously endorsed by the Seventh and the District of Columbia Circuits, namely that an employee must show the retaliatory conduct would have "dissuaded a reasonable worker from making or supporting a charge of discrimination."[54] In holding that a claim under section 704 required a level of harm that should be viewed under an objective standard, the Supreme Court stated it was trying to "separate significant from trivial harms."[55] Specifically, the Supreme Court found that "petty slights, minor annoyances, and simple lack of good manners" will not dissuade a reasonable worker from complaining of discriminatory conduct.[56] Through this holding, the Supreme Court, for the first time,[57] established a materiality standard under Title VII.

Based on this materiality standard, the Supreme Court found there was sufficient evidence to support the jury's verdict on White's retaliation claim.[58] First, the Supreme Court rejected the defendant's argument that sufficient retaliatory conduct did not occur because White's reassigned duties still fell within her job description. The Supreme Court noted that

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[53] *Id*.
[54] *Id*. at 68 (citing Rochon v. Gonzales, 438 F.3d 1211, 1219 (C.A.D.C. 2006)).
[55] *Id*.
[56] *Id*.
[57] *Cf.* Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998). *Ellerth* did not address the question of materiality; rather, it addressed the question of vicarious liability under Title VII's section 703.
[58] *Burlington Northern*, 548 U.S. at 70.

almost every job category involves responsibilities and duties that are less desirable than others and that an effective way to discourage an employee from complaining of discrimination would be to assign her more arduous tasks.[59] The Supreme Court also rejected the argument that White's reinstatement with backpay made her suspension statutorily insignificant. The Supreme Court noted that while White did receive backpay, she was still without a paycheck for a month.[60] White's emotional distress during the period in which she had no income supported the conclusion that "[a] reasonable employee facing the choice between retaining her job (and paycheck) and filing a discrimination complaint might well choose the former."[61] Therefore, the judgment of the Court of Appeals was affirmed.

III. THE LOWER COURTS' INTERPRETATION OF THE *BURLINGTON NORTHERN* OPINION

Burlington Northern did not establish the scope of a materiality standard regarding section 703 claims, nor did it explore the relationship between the section 704 materiality standard and any potential materiality standard for section 703 claims. Nevertheless, several lower courts have read *Burlington Northern* as confirming the need for plaintiffs to prove a more material injury to establish a section 703 claim than a section 704 claim.[62] The following decisions from the Eleventh Circuit, the Fifth Circuit and the Sixth Circuit illustrate the point.

[59] *Id*. at 70-1.
[60] *Id*. at 72.
[61] *Id*. at 73.
[62] *See infra* notes 63-83 and accompanying text. *See also* George, *supra* note 9, at 1085 (recognizing the Eleventh Circuit's test was unchanged by *Burlington Northern*).

A. The Eleventh Circuit

In *Grimsley v. Marshall*,[63] the Eleventh Circuit held that it would continue to apply the materiality standard for discrimination claims under section 703 that it had established prior to the *Burlington Northern* decision. In *Grimsley*, the plaintiff, a white warehouse supervisor for the defendant Marshalls of Ma, Inc., alleged he was treated differently from African American warehouse supervisors. Specifically, he alleged that, unlike African American supervisors, he was asked to work late and on weekends, was given more work than African American supervisors, and was required to perform manual labor tasks usually reserved for hourly employees, such as sweeping or re-taping lines on the floor in areas assigned to African American supervisors.[64] When the plaintiff asked why he was assigned specialized work in the African American supervisors' areas and was generally assigned more work, his supervisor responded that the African American supervisors were "too lazy" and "too stupid" to perform jobs adequately.[65] The district court held that the plaintiff had in fact presented direct evidence of discriminatory intent but granted summary judgment for the defendant on the basis that the harm alleged was not sufficient to establish an adverse employment action.[66]

On appeal, the plaintiff argued he was not required to show an "adverse employment action" because it was undisputed that the acts in question were motivated by race.[67] In support of this argument, the plaintiff cited *Burlington Northern* as confirmation of a broad application

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[63] 284 F. App'x. 604 (11th Cir. 2008).
[64] *Id*. at 606.
[65] *Id*.
[66] *See id*. at 607.
[67] *Id*. at 609.

of Title VII's anti-discrimination provision. The Eleventh Circuit rejected this argument, reasoning the "materially adverse" standard of *Burlington Northern* was limited to anti-retaliation claims and, that "the Supreme Court was careful to note that a different standard applied to substantive claims of discrimination."[68] The Eleventh Circuit went on to emphasize its view of the distinction made in *Burlington Northern* by stating that the case had held that "the anti-retaliation provision forbids conduct not prohibited by the anti-discrimination provision."[69] Based on this analysis, the Eleventh Circuit stated the *Burlington Northern* decision confirmed the application of its materiality standard for Title VII anti-discrimination claims previously established in *Davis v. Town of Lake Park*, namely, that "to prove adverse employment action in a case under Title VII's anti-discrimination clause, an employee must show a serious and material change in the terms, conditions, or privileges of employment." [70] Based on the "serious and material change" standard established in *Davis*, the Eleventh Circuit affirmed the district court's grant of summary judgment in favor of the defendant.[71]

B. The Fifth Circuit

The Fifth Circuit has also interpreted *Burlington Northern* as confirming that its demanding materiality standard of "ultimate employment decisions" remains controlling for section 703 discrimination claims even though the Supreme Court rejected this standard for purposes of section 704.[72] In *Mitchell v. Snow,*[73] the plaintiff Mitchell received a score of 4.2 out

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[68] *Id*. at 608.
[69] *Id*.
[70] *Id*. at 608 (citing *Davis v. Town of Lake Park*, 245 F.3d 1232, 1239 (11th Cir. 2001)).
[71] *Id*. at 611.
[72] Mitchell v. Snow, 326 F. App'x. 852, 855 (5th Cir. 2009). *See Burlington Northern*, 548 U.S. at 67 ("We therefore reject the standards applied in the Courts of Appeals that have treated the antiretaliation provision as forbidding the same conduct prohibited by the antidiscrimination provision and that have limited actionable retaliation to so-called 'ultimate employment decisions'").

of 5 in her early job performance review for the fiscal year ending in May 2003. Mitchell argued that this review reflected unlawful discrimination based on her race and sex.[74] The district court employed the "ultimate employment decision" test established in the Fifth Circuit, holding that section 703 supports discrimination claims only for decisions such as "hiring, granting leave, discharging, promoting or compensating."[75] Finding no evidence that connected Mitchell's performance review to her compensation, the district court granted a motion for summary judgment in favor of the defendant.[76] In other words, even if the performance review was impermissibly motivated, it was not actionable without a showing of economic loss.

On appeal, Mitchell argued the *Burlington Northern* decision suggested that a claim under section 703 only requires the employer action in question be motivated by discrimination so long as the act occurs within the workplace.[77] Therefore, because the poor job performance review was motivated by discrimination and directly concerned her work, Mitchell argued she had a valid cause of action under section 703. The Fifth Circuit rejected this argument, finding instead that *Burlington Northern* established that "title VII's anti-retaliation provision is broader than the range covered by its anti-discrimination provisions."[78] Based on this analysis of *Burlington Northern*, the Fifth Circuit reaffirmed that its highly exacting "adverse employment action" standard was "therefore accurate."[79] The Fifth Circuit upheld the district court's grant of

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[73] 326 F. App'x. 852 (5th Cir. 2009).
[74] *Id*. at 854-5.
[75] *Id*. at 854 (citing McCoy v. City of Shreveport, 492 F.3d 551, 559 (5th Cir. 2007)). The *McCoy* decision was decided after *Burlington Northern*. However, in that decision the Fifth Circuit directly addressed whether *Burlington Northern* affected its materiality standard regarding section 703 claims. The court specifically stated that even after *Burlington Northern* the previously established materiality standard regarding section 703 claims (referenced above) remains controlling.
[76] *Id*.
[77] *Id*. at 854-5.
[78] *Id*. at 855.
[79] *Id*.

summary judgment in favor of the defendant because the poor job performance review did not constitute an ultimate employment decision.

C. The Sixth Circuit

Although the Supreme Court in *Burlington Northern* directly stated that the Sixth Circuit's interpretation of the materiality standard regarding section 704 was incorrect,[80] the Sixth Circuit has read that decision as confirming the appropriateness of retaining that very standard for section 703 claims. In discussing the merits of the plaintiff's discrimination claim in *Tepper v. Potter,*[81] in which the plaintiff alleged the termination of his religious accommodation was impermissible faith-based discrimination, the Sixth Circuit spelled out its interpretation of section 703's "adverse employment action" standard in the wake of the *Burlington Northern* decision. Emphasizing that *Burlington Northern* distinguished the anti-retaliation and the anti-discrimination provisions in Title VII, the Circuit Court ruled that *Burlington Northern*, "did not expand or alter this Court's formulation of an adverse employment action for purposes of the discrimination claim before us."[82] Therefore, the court found the plaintiff did not meet the materiality standard established in the Sixth Circuit, which requires a material change in employment status such as "termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices." [83]

[80] *Burlington Northern*, 548 U.S. at 67 ("We therefore reject the standards applied in the Courts of Appeals that have treated the antiretaliation provision as forbidding the same conduct prohibited by the antidiscrimination provision and that have limited actionable retaliation to so-called 'ultimate employment decisions'").
[81] 505 F.3d 508 (6th Cir. 2007).
[82] *Id*. at 515.
[83] *Id*. (citing Hollins v. Atlantic Co., 188 F.3d 652, 662 (6th Cir. 1999)).

IV. CRITIQUING LOWER COURTS' APPLICATION OF *BURLINGTON NORTHERN* TO SECTION 703 CLAIMS.

As the previous discussion shows, Circuit Courts are holding that any materiality standard for a discrimination claim brought under section 703 is more demanding of plaintiffs than the materiality standard established for section 704 claims. A proper understanding of the language used by the Supreme Court in *Burlington Northern* to distinguish the two sections, as well as the intended purpose behind each section, shows this materiality distinction made by the lower courts is incorrect.

A. Improper understanding of the reasoning of *Burlington Northern* to distinguish section 703 and section 704.

Courts have read *Burlington Northern* as setting a heightened materiality standard under section 703, based on the belief that the case held the materiality standard established for section 704 is more protective of plaintiffs than any materiality standard for section 703.[84] This confusion is understandable. However, it reflects a misreading of *Burlington Northern*.

The fundamental misunderstanding of the lower courts in interpreting *Burlington Northern* stems from a failure to appreciate the particular context in which the Supreme Court broadened the reach of section 704 in relation to section 703. In differentiating the two sections, the Supreme Court was highlighting that section 704 is broader than section 703 in regard to section 704's coverage, not its materiality standard. In particular, the Supreme Court emphasized that section 703 outlaws discrimination only as to the "compensation, terms, conditions, or

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[84] *See supra* notes 63-83 and accompanying text.

privileges of employment."[85] The Supreme Court stated, however, that "[n]o such limiting words appear in the antiretaliation provision" of section 704.[86] This textual distinction allowed the Supreme Court to reason that "Congress intended the differences" in coverage between the two sections and that those differences mattered.[87] The Supreme Court added that this different coverage makes sense because "the two provisions differ not only in language but in purpose as well."[88] Therefore, the Court determined the anti-retaliation provision is "not coterminous" with the anti-discrimination provision because it "extends beyond workplace-related or employment-related retaliatory acts and harm."[89]

The only distinction between the two sections articulated by the Supreme Court is that section 704 has a broader coverage than section 703 in that section 704 can apply to actions that fall completely outside of the work environment, while the coverage of section 703 is limited to discrimination that takes place within the office or directly relates to the employee/employer relationship.[90] This distinction makes sense because an employer can retaliate against an employee in a way that is completely separate from the work environment, and conduct that has an impermissibly retaliatory effect can involve action wholly independent from the employee/employer relationship. Simply put, the Supreme Court recognized that retaliatory acts having no relation to terms, condition or privileges of employment can still deter an employee from complaining about discrimination. Therefore, in order to give full meaning to the language and purpose of section 704, actions outside the workplace could fall within the statute's coverage.

[85] *Burlington Northern*, 548 U.S. at 62.
[86] *Id*.
[87] *Id*. at 63.
[88] *Id*.
[89] *Id*. at 67.
[90] *Id*. at 63-8.

For example, if a supervisor is the coach of the little league team on which the employee's son is a player, and the supervisor cuts the employee's son from the team in retaliation for the employee's filing of a discrimination charge, that would be retaliatory conduct actionable under section 704 because this conduct would chill a reasonable employee from filing or moving forward with a discrimination claim.[91] However, such an act would not be actionable under section 703 even if cutting the employee's son from the team was motivated by the employee's race, national origin, religion or sex. While such an action motivated by discrimination would unquestionably be morally reprehensible, it has no connection to the work environment or the employee/employer relationship.[92] As a result, the employee would have no right to file a discrimination charge against the employer for this act under section 703 of Title VII.[93]

In this sense, but only in this sense, it is accurate to say the reach of section 704 is broader than the reach of section 703. Section 704 reaches non-work-related acts, while section 703 does not. Nothing in *Burlington Northern*, however, narrows the application of section 703 for acts that do occur within the workplace.

Rulings of the Fifth, Sixth and Eleventh Circuits illustrate how the lower courts have misinterpreted *Burlington Northern* as drawing a distinction between the two sections on the

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[91] Whether employer liability would attach vicariously is a different question and one that is outside the scope of this paper.

[92] The supervisor position in no way puts the coach in the position to cut the employee's son from the little league team. *See* White, *De Minimis Discrimination*, *supra* note 9 at 1151 (recognizing that acts wholly unrelated to employment would fall outside section 703). See also *Leading Cases, supra* note 7, at 321-2 (recognizing that employment acts only establish a cognizable claim under section 703 when they have a physical locus inside the workplace or a close connection to the employee's duties).

[93] *But see* Ernest F. Lidge III, *What Type of Employer Actions Are Cognizable Under Title VII? The Ramification of Burlington Northern & Santa Fe Railroad Co. v. White*, 59 Rutgers L. Rev. 497, 510-1 (2007). Professor Lidge argues that section 703 does reach discrimination that is not employment-related and criticizes the Court for drawing the distinction between section 703 and section 704.

basis of materiality.[94] The basic problem is that these lower courts have indicated that even adverse actions that occur entirely within the workplace can be harmful enough to be actionable under section 704 but not harmful enough to be actionable under section 703.[95] Nothing in *Burlington Northern*, however, supports this conclusion.

This misinterpretation appears to stem from language the Supreme Court used in *Burlington Northern* that the lower courts have taken out of context. For example, the Supreme Court stated in *Burlington Northern* that, "we do not accept…that it is 'anomalous' to read the statute to provide broader protection for victims of retaliation than for those whom Title VII primarily seeks to protect, namely, victims of race-based, ethnic-based, religion-based, or gender-based discrimination."[96] The Supreme Court went on to observe that it rejected the standards established in the Courts of Appeals "that have treated the antiretaliation provision as forbidding the same conduct prohibited by the antidiscrimination provision."[97] Standing alone, this language might be used, and indeed has been used, to argue that section 703 requires a greater level of harm for an employee to bring a valid cause of action than the level of harm required for a section 704 claim. The problem with such an argument, however, is that the quoted language applies only to the *coverage* of the two provisions, and in particular the text-based limitation that section 703 applies only to discrimination with regard to "terms and conditions of employment." The quoted language does not in any way suggest that, when discrimination within the workplace occurs, a greater showing of materiality of harm is required for section 703 claims than for section 704 claims.

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[94] *See supra* notes 63-83 and accompanying text.
[95] This error is not limited to courts. *See Leading Cases*, *supra* note 7, at 321-2.
[96] *Burlington Northern*, 548 U.S. at 66.
[97] *Id*. at 67.

In short, to read *Burlington Northern* as confirming that any materiality standard for section 703 claims is more difficult for plaintiffs to satisfy than the section 704 materiality standard established in that case is an incorrect interpretation of the Supreme Court's opinion.[98]

B. Why Courts should reject a heightened materiality standard for section 703 claims.

Properly understood, any employer action within the workplace reached by section 704 is an act that should support a section 703 discrimination claim. This is the case for at least three separate reasons. First, while the purpose of section 704 logically requires that an employer's discriminatory act create a reaction from an employee, the purpose of section 703 does not require that an employer's discriminatory act create any reaction at all. Second, the practicalities of human interactions support the need for a materiality standard regarding retaliation claims that is not present for claims of discrimination. Third, it would be illogical for the core provision of Title VII to give less protection to employees than the subsidiary provision that implements the basic ban on discrimination.

1. The different purposes behind section 703 and section 704 dictate that the materiality standard for section 703 should not be more exacting than the materiality standard for section 704.

Section 703 and section 704 have different purposes. The purpose of section 703 is to remove discrimination based on race, sex, religion and national origin from the workplace.[99] The purpose of section 704, in contrast, is to ensure an employee will not be deterred by his employer from filing, or assisting with, a section 703 discrimination complaint in order to ensure that the

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[98] *See* Lidge, *supra* note 93, at 513-5 (arguing standards are the same under sections 703 and 704). *But see Leading Cases*, *supra* note 7, at 321 (stating that *Burlington Northern* implied "a narrow reading of section 703 that is inconsistent with prior case law and statutory purpose"). While I agree a narrow reading would be inconsistent with prior case law and statutory purpose, I disagree that *Burlington Northern* implied such a reading.
[99] *Burlington Northern*, 548 at 63.

statutory mandate of section 703 is fulfilled.[100] Based on this purpose, the materiality standard established for section 704 claims in *Burlington Northern* is understandable. An employer's action can only give rise to *effective* retaliation when that action is so significant that it would have "dissuaded a reasonable worker from making or supporting a charge of discrimination."[101] Therefore, if the employer's action is not sufficiently harmful to the employee, the employer has not violated the purpose of section 704 even if his act was motivated by a desire to retaliate.

In striking contrast, there is no cause and effect relationship between an employer's discriminatory action and the employee's response that has anything to do with the purpose of section 703.The purpose behind section 703 is to ensure employees are not treated differently in the work place based on their race, sex, religion or national origin. Achieving this goal has no connection with how an employee will or will not react to the employer's discriminatory conduct. Therefore, discrimination, as defined by the purpose of section 703, does not logically focus at all on the reaction of the employee to the employer's conduct. For example, an employer who refuses to sit with an employee because of his religious beliefs has violated the purpose of section 703 by creating a workplace where an employee is treated differently because of his religion. Whether or not that specific employee feels uncomfortable as a result of this action is irrelevant to the purpose behind the statute. It is possible that this identical conduct, motivated by the employer's desire to retaliate, would not be harmful enough to support a claim under section 704. If this conduct would not chill an employee from filing or assisting in a charge of discrimination, the purpose behind section 704 would not be fulfilled by prohibiting such an action. However, the same is not true in respect to the purpose behind section 703. The

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[100] *Id*.
[101] *Id*. at 68 (citing Rochon v. Gonzales, 438 F. 3d 1211, 1219 (C.A.D.C. 2006)).

act itself, regardless of the employee's reaction, creates a work environment where employees are treated adversely based on discrimination.

Put another way, prohibiting discrimination in accordance with the purpose of section 703 would seem to only require analysis of the employer's intent for the act in question, not the employee's reaction to that act. In contrast, to find retaliation as defined by the purpose of section 704 requires an analysis of the employer's intent for the act in question *as well as* the employee's reaction to that act. Perhaps, the different purposes of section 703 and section 704 offer support for the view that no showing of materiality should be necessary to establish a claim under section 703. At the least, however, these differing purposes leave no doubt that any materiality standard imposed by the courts for section 703 claims should not be more demanding for plaintiffs than the materiality standard established by section 704.

2. While section 704 logically requires a materiality standard to protect understandable employer actions, no analogous justification for a materiality standard exists for section 703.

In *Burlington Northern*, the Supreme Court explained that a materiality standard makes practical sense in the particular context of retaliation claims. As the Supreme Court emphasized, an employee filing a discrimination complaint "cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience."[102] In establishing that section 704 claims cannot be brought on the basis of "snubbing" or other somewhat trivial acts, the Supreme Court meant to protect the employer from being held liable for committing acts that are an understandable, perhaps inevitable, reaction to an employee's accusation of discrimination. It is a normal human reaction to become uncomfortable with or apprehensive around an individual who has accused one of discrimination. It is likely, and

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[102] *Id*.

certainly understandable, that a supervisor would change his interactions with an employee in the workplace after that employee has accused him of committing an unlawful act. It is also possible that resulting slights by the employer could make an employee feel uncomfortable. However, the level of discomfort caused by petty slights would not be significant enough to cause a reasonable employee to stop pursuing a claim of discrimination.[103]

By requiring a minimum level of severity of the actions that would give rise to a valid section 704 claim, the Supreme Court implicitly acknowledged that an employee should anticipate his interactions with his employer will change on some level after he has accused that employer of discrimination. By requiring retaliatory conduct reach a meaningful level of harm, the Supreme Court in effect protected employers to the extent their conduct is understandable. Only when the employer's conduct goes beyond a normal response to an employee's accusation of discrimination does a section 704 claim exist.

This understandable-reaction justification for imposing a materiality standard in section 704 cases, however, has no application to employer actions that fall under section 703. The logic of this justification for claims under section 704 is that an employer acting differently toward an employee is a rational consequence of an employee accusing the employer of unlawful conduct. In contrast, an employer treating an employee differently because of his race, religion, sex or national origin is not a rational consequence of the employee's presence in the workplace. This difference between the two sections may well suggest that courts could rightly impose no materiality standard at all for claims under section 703. However, at a minimum, this difference

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[103] *See id*. at 68-9.

negates any claim that courts should apply a stricter materiality standard for section 703 than the one established under section 704.

3. It is anomalous to read Title VII as giving less protection to employees bringing a claim under its core provision than under its secondary provision.

Even if one finds a materiality standard exists for section 703, imposing a more demanding materiality standard for section 703 claims than for section 704 claims would be an anomalous reading of Title VII. Finding a more demanding materiality standard for section 703 would indicate that it is proper to provide less protection in the workplace for those who are in fact discriminated against on the basis of race, color, sex, national origin or religion, the very victims which Title VII attempts to protect,[104] than for those who merely complain about discrimination, even when such complaints are unfounded. That cannot be what Congress intended.

For example, if an employee were moved from a larger, more desirable office to a smaller office that was less prestigious and less conducive to the work involved based on a retaliatory motive by the employer, the employee would potentially have an actionable claim under the objective materiality test established by the Supreme Court in *Burlington Northern* for section 704. However, the exact same action motivated by a discriminatory intent would not be an actionable claim under section 703 based on the interpretation of the *Burlington Northern* case by several Circuit Courts because such an act does not "directly relate to the employee's compensation," reflect an "ultimate employment action" or involve a "serious" harm.[105] This example illustrates the flaw in reading section 704 to reach impermissibly motivated conduct *in*

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[104] *See id*. at 74 (Alito, concurring).
[105] *See supra* notes 63-83 and accompanying text.

the workplace that would not be actionable under section 703. Could the Supreme Court really have read Title VII to protect those who believe they have been discriminated against by their employers on the job, even if no discrimination occurred, while declining protection to those who have actually suffered workplace discrimination based on race, religion, national origin or sex? The answer is no.

Several Circuit Courts have held that section 703 contains a materiality standard based on the "terms, conditions, or privileges of employment" language within the statute.[106] It is true that the Supreme Court in *Burlington Northern* highlighted that this language is present in section 703 but is not present in section 704. However, this distinction was only used by the Supreme Court to show that section 703 was limited in its application to employer acts that occurred within the workplace. In no way was that language used by the Supreme Court as a basis for establishing that section 703 imposes its own materiality standard or that any materiality standard for section 703 must be stricter on plaintiffs than the section 704 materiality standard. The fact that the "terms, conditions, or privileges of employment" language is not present in section 704 should not be relied upon as a basis for holding section 703 has a materiality standard that is harsher on plaintiffs. Such an interpretation would undermine the purposes behind Title VII. Section 703 is centrally concerned with limiting an employer's ability to treat an employee differently based on his race, sex, religion or national origin. It would be an illogical reading of Title VII to hold an employer act that is harmful enough to deter an employee from pursuing a claim of discrimination is not harmful enough to hold an employee is being treated differently in the workplace.

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[106] *Id*.

Consider again the *Grimsley* case, in which the Eleventh Circuit held the plaintiff did not suffer an "adverse employment action" for a section 703 claim because working longer hours and doing manual labor outside of his job description did not change his compensation or position.[107] The conduct taken against the plaintiff in *Grimsley* was even worse than the tasks assigned to White in *Burlington Northern*, which the Supreme Court found harmful enough to establish a section 704 claim.[108] Therefore, the conduct against the plaintiff in *Grimsley* would necessarily be harmful enough to establish a section 704 claim if the conduct in question was motivated by retaliation. It would be an incorrect reading of Title VII, and a misunderstanding of the statute's purpose, to provide less protection for the plaintiff in *Grimsley*, who suffered a more material harm than White, simply because the harmful act in that case was motivated by the very discrimination Title VII was at its core designed to prevent.[109] If such an act is severe enough that it would dissuade an employee from filing a complaint of discrimination, and thus provide the basis for suit under section 704, then that same act motivated by discrimination must be sufficient to support a claim of actual discrimination.

VI. CONCLUSION

The purposes behind section 704 led the Supreme Court to determine that a materiality standard was required for that section. Furthermore, the Supreme Court was able to establish the extent of the section 704 materiality standard based on that section's purposes. The Supreme

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[107] *Grimsley v.* Marshall, 284 F. App'x. 604, 609 (11th Cir. 2008).

[108] The plaintiff in *Grimsley* was assigned *more* work than his fellow supervisors and was also assigned tasks that fell outside of his job description. *Id*. at 606. In comparison, all of the work White was assigned in an attempt to retaliate fell within her job description and White made no argument that she was assigned *more* work than other employees with the same job title. *See Burlington Northern*, 548 U.S. at 70.

[109] *See* White, *De Minimis Discrimination*, *supra* note 9, at 1160-4 (arguing for the absence of an "adverse action" requirement under section 703). But that view has been routinely rejected by the lower courts. *See* George, *supra* note 9, at 1083-99 (collecting cases). *See also* Lidge, *supra* note 93, at 525-7 (contending all "nontrivial" actions are cognizable).

Court, however, did not speak at all as to whether a materiality standard should exist for section 703, and, if so, what that standard should be. In making this determination, it must be understood that the purposes behind section 703 are different from the purposes of section 704. These differences may well suggest that no materiality standard should exist for section 703. At the least, however, the different purposes behind the two sections make it clear that any materiality standard for section 703 cannot be stricter on plaintiffs than the materiality standard established for section 704.