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BEYOND THE SCOPE OF EMPLOYER LIABILITY:
EMPLOYER FAILURE TO ADDRESS RETALIATION BY
CO-WORKERS AFTER TITLE VII PROTECTED ACTIVITY

Shortly after Cindy complained to her supervisors about being sexually harassed at work, she filed claims with the State Division of Human Rights and the Equal Employment Opportunity Commission (EEOC). After filing these claims, she noticed that her co-workers began to behave differently toward her. Cindy had always been involved in the social aspects of the office and was generally pleased with the interactions she had with her co-workers. After filing the harassment complaint, she overheard co-workers refer to her as stupid and a problem-maker. She heard them speculate about her motives for filing the lawsuit against the company.

Cindy gradually discovered that some of her co-workers told others to completely avoid contact with her. She initially felt ostracized, but tried her best to enjoy her job. Over the next few weeks, however, simply going to work became difficult. On one occasion, she found manure piled around her car when she left the office. The next afternoon, she was struck in the head with a rubber band while seated at her desk. A few days later, she found hair in her food at lunch in the employee lounge. After noticing that her car had been scratched while parked at the office, she decided she had had enough. Cindy filed a retaliation claim with the EEOC.

During the 1998-1999 term, the Supreme Court granted certiorari on several cases and addressed several important Title VII issues. These opinions, most notably Burlington Industries, Inc. v. Ellerth and Faragher v. City of Boca Raton, alerted

1. This hypothetical is loosely based on Richardson v. N.Y. State Dept of Corr. Serv., 180 F.3d 426 (2d Cir. 1999). In Richardson, the plaintiff filed claims with the EEOC after being subjected to racial harassment in the workplace. Among the claims filed, the plaintiff alleged that co-workers retaliated against Richardson after her initial complaint. She also alleged that the company retaliated against her when it failed to respond to retaliatory acts waged against her by her supervisors and co-workers. Id. at 445. The parties disputed over whether the employer subjected her to any adverse employment action and whether there was any causal connection between the employment actions and Richardson’s claims with the EEOC. The court recognized that there was a circuit split regarding whether an employer is liable when it fails to address co-worker retaliation. Despite the split, the Second Circuit ultimately concluded that it would impose liability when such retaliation was sufficiently severe. Id. at 445-46.


3. 524 U.S. 742 (1998). In Burlington, respondent Ellerth had been a salesperson at a division of Burlington Industries. Id. at 747. Ellerth quit her job and subsequently filed complaints against the corporation, alleging that constant sexual harassment by her
employers that they would be subject to expanded liability for sexual harassment in the workplace. Specifically ruling on instances of sexual harassment by supervisors, the Court held that employers would be vicariously liable when the harassment results in a tangible employment action. When no such tangible action has resulted, employers may nonetheless be held responsible for the harassment. The Court has created an affirmative defense to claims of harassment that is only available to those employers who have effective anti-harassment policies in place and have responded appropriately to the alleged incident.

Several of these aspects of increased liability have been held applicable to retaliation claims made pursuant to section 704(a) of Title VII. The Court has not, however, offered direct

managers, mid-level supervisors, led to her resignation. Specifically, she focused on three incidents where the supervisor's advances could be construed as threats regarding "tangible job benefits." She refused any advances, but did not tell authority figures in the company about the harassment. The Court held that the employer would be responsible for sexual harassment by supervisors when there were tangible job consequences. In the absence of such consequences, defendant employers would be vicariously liable for the harassment unless they could assert an affirmative defense. The Court affirmed the Seventh Circuit's reversal of summary judgment and remanded, allowing for the plaintiff to amend her complaint or supplement her discovery. Id. at 766.

4. 524 U.S. 775 (1998). The Faragher Court adopted the same holding it outlined in Burlington. Burlington, 524 U.S. at 764. In Faragher, the plaintiff worked as a lifeguard for the City of Boca Raton, Florida, from 1985-1990. Faragher, 524 U.S. at 780. Two years after her resignation, she brought a hostile environment sexual harassment claim against the city. Id. The claim stated that Faragher's supervisors subjected her to unwarranted and offensive touching, lewd remarks and offensive comments. Id. The Court, agreeing with the district court, found that this conduct affected the "terms, conditions, and privileges" of employment and was sufficiently serious to constitute an abusive environment. Id. at 784-85.

5. The range of behavior that constitutes sexual harassment has been expanding. In 1998, the Court ruled that liability extends to same-sex harassment. Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 82 (1998). Two years earlier, the Court held that employers may be liable for post-employment retaliation. See Robinson v. Shell Oil, 519 U.S. 337, 346 (1996).

6. Burlington, 524 U.S. at 760-61. The Court defined a tangible employment action as one 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." Id. at 761.

7. Id.

8. Throughout this Note section 703 and section 704 of Title VII refer to 42 U.S.C. § 2000e-2 and § 2000e-3 respectively.

9. 42 U.S.C. § 2000e-3 (1994); e.g., Morris v. Oldham County Fiscal Ct., 201 F.3d 784, 791-92 (6th Cir. 1999) (applying the liability principles in Burlington to retaliation claims).
guidance in the resolution of retaliation claims from employees like Cindy. Instead, the Court has left employers and employees alike wondering when a claim for retaliation may be meritorious. The outcome of a retaliation suit will vary based on which circuit the employee brings suit in and how that court characterizes the behavior she cites as retaliatory.

This Note suggests that employers should not be liable for Title VII retaliation claims when an employer does not address retaliatory harassment by co-workers directed toward an employee after the employee has engaged in activity protected by Title VII. The analysis begins with a discussion of the importance of this issue in the context of expanding liability and an increasing number of retaliation claims. The next section discusses the standards courts have applied to employer liability in sexual harassment cases and introduces the applicability, if any, of those standards in the context of retaliatory harassment. After outlining the elements of a prima facie Title VII retaliation claim, the discussion turns to the reasons that such an omission by an employer should not be actionable retaliation under section 704 of Title VII. Finally, this Note concludes that the employer's failure to address retaliation by co-workers is not the type of repercussion that the policies behind section 704 were intended to address, because such conduct cannot be causally connected with the employee's protected activity and does not rise to the level of an adverse employment action.

OVERVIEW OF TITLE VII AND RETALIATION

Rise of Retaliation Claims

The last decade has seen a rapid increase in the number of retaliation claims filed by employees under section 704 of Title VII of the Civil Rights Act of 1964. In 1999 alone, employees

10. Margery Corbin Eddy, Finding the Appropriate Standard for Employer Liability in Title VII Retaliation Cases: An Examination of the Applicability of Sexual Harassment Paradigms, 63 ALB. L. REV. 361, 361 (1999) (noting that, though the Supreme Court's rulings in recent cases have addressed employer liability for sexual harassment, "none directly confront employer liability regarding . . . retaliation"); see infra text accompanying notes 110-72 (analyzing the elements of a prima facie retaliation claim and the variety of tests utilized by the circuits to meet those elements).

11. See infra text accompanying notes 110-74.

12. See infra notes 21-28 and accompanying text.
filed 17,883 Title VII retaliation claims with the EEOC.\textsuperscript{13} Despite the growth in retaliation claims and a very real need for uniform rules defining when to hold employers liable for retaliatory acts of employees, the Supreme Court has yet to address the issue of what standard should be applied in those cases. Left to derive their own standards, circuit courts utilize a wide range of parameters to determine whether an employer engaged in actionable retaliatory conduct against its employee.\textsuperscript{14} Because of these varying standards, employers and employees may be uncertain of when behavior is retaliatory. In light of the increasing volume of retaliation claims filed with the EEOC and the need for consistency in application of the law, a more uniform standard would be beneficial.

"By its nature, a retaliation claim alleges that [an] employer intentionally took adverse personnel action in retaliation for an employee's opposition to discrimination or participation in a discrimination proceeding."\textsuperscript{15} Such employment actions often consist of the employer terminating the employee, involuntarily transferring her to a less desirable facility, or perhaps reducing her pay.\textsuperscript{16} Some employees allege retaliation for harms such as diminished responsibilities in the workplace and ostracism by co-workers.\textsuperscript{17}

It is important to recognize that "not every action occurring in the workplace is a term, condition, or privilege of employment."\textsuperscript{18} Regardless of whether an action constitutes an adverse employment action, it is significant to recognize that workplace actions impact, in small and large ways, the

\begin{footnotes}
\textsuperscript{13} EEOC, CHARGE STATISTICS FROM THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, at http://www.eeoc.gov/stats/charges.html (last modified Jan. 12, 2000).
\textsuperscript{14} See infra notes 110-75 and accompanying text.
\textsuperscript{16} Melissa A. Essary & Terence D. Friedman, Retaliation Claims Under Title VII, the ADEA, and the ADA: Untouchable Employees, Uncertain Employers, Unresolved Courts, 63 MO. L. REV. 115, 133 (1998). Most courts would agree that such actions by employers could form the foundation of a retaliation claim. See id.
\textsuperscript{17} Compare Scusa v. Nestle, 181 F.3d 958, 969 (8th Cir. 1999) (finding no retaliation when the "appellant's only claim of retaliation [was] that her co-workers shunned her") with Gunnell v. Utah Valley State Coll., 152 F.3d 1253, 1264 (10th Cir. 1998) (holding that general rudeness, including ostracism, of co-workers can form the basis of an employer's liability for retaliation).
\end{footnotes}
employee's experience. Not all negative impacts on an employee's working environment, however, will be sufficient to constitute an adverse employment action that satisfies the burden necessary for a retaliation claim.

During the 1990s, the number of retaliation claims grew rapidly. Retaliation charges filed with the EEOC increased more than seventy-two percent from 1992 to 1998, resulting in more than 19,000 such claims in fiscal year 1998. Though the number of claims filed under the anti-retaliation provisions of all federal anti-discrimination laws have increased, "[t]he bulk of the growth in charges has occurred under Title VII, which accounted for 10,499 charges in 1992 and 16,394 in 1998."

When compared with other claims received by the EEOC, the percentage of retaliation charges as a total percentage of charges handled by the EEOC grew nearly fifty percent over a seven year period in the 1990s. As of January 1999, retaliation charges accounted for roughly twenty-two and one-half percent of the sum total of charges that the EEOC processes. Because of both the large numerical increase in retaliation claims and the substantial volume of such claims in relation to charges the EEOC processes, there is a serious need to do something to control the increase in retaliation claims.

Though meritorious claims clearly must be addressed, the courts must draw a line before employers become strictly liable for any type of non-employment related conduct of their employees. Without a restriction on the liability of employers in these situations, retaliation claims will increase to a level at which the courts simply will not be able to address all of the meritorious claims. Strict liability for all actions of employees

19. See, e.g., Essary & Friedman, supra note 16, at 133-40 (discussing the standards courts use to determine what kinds of negative workplace experiences constitute an adverse action in a retaliation claim).
20. See id.
22. Id.
23. Id.
25. Id.
26. Donna Smith Cude & Brian M. Steger, Does Justice Need Glasses? Unlawful Retaliation Under Title VII Following Mattern: Will Courts Know It When They See It?, 14 LAB. LAW. 373, 412 (1998) ("[T]he EEOC and the federal judiciary are being deluged with an endless wave of employment discrimination cases. In fact, employment related litigation is 'currently the fastest growing area of litigation in the country.'" (citation omitted)).
27. See id. at 413.
would overwhelm the court system. Furthermore, strict liability is not necessary to advance the policies of Title VII's anti-retaliation provision.  

Plaintiffs frequently raise retaliation claims; therefore, the need to have a consistent result in the outcomes of such claims is important. Despite the apparent benefits of clear rules in this area, the circuits are split on what test to apply in determining the definition of an actionable adverse action when ruling on retaliation claims. Even within many of the circuits, employers and employees often enter litigation without knowing how the court will apply the guidelines of that circuit to the particular case. Simply articulated, bright line rules about what actions expose an employer to a Title VII retaliation claim liability are rare. Instead, employers are left with little guidance as to when a court will consider their employment decisions to be actionable.

Because courts approach retaliation claims on a case-by-case basis, employers are often in the dark as to whether an action will be considered unlawful until a court makes a decision on liability. Employers may be liable for retaliation even when the employee is unable to recover on her underlying discrimination complaint. "Accordingly, in order to avoid claims of retaliation, employers must take special precautions

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28. Courts have successfully held employers vicariously liable for certain categories of behavior in the workplace, such as when a supervisor engages in sexual harassment that results in a tangible employment action, without having to implement a broad blanket of liability for conduct of all employees. See Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 760-61 (1998).

29. See supra text accompanying notes 22-25.


31. In Knox v. Indiana, the Seventh Circuit held that "nothing in the law of retaliation . . . restricts the type of retaliatory act that might be visited upon an employee who seeks to invoke his rights by filing a complaint. . . . [A]dverse actions can come in many shapes and sizes." 93 F.3d 1327, 1334 (7th Cir. 1996) (noting that the law "does not take a 'laundry list' approach to retaliation," instead leaving the jury to determine whether certain conduct is retaliatory on a case-by-case basis).

32. Cude & Steger, supra note 26, at 373-74.

33. In the context of sexual harassment, as with other areas of the law, employers may be held liable for their failure to act, as well as for their acts. See Burlington, 524 U.S. at 759. This principle of law is a basic premise upon which this Note, as well as legal precedent, relies. As the Supreme Court stated in Faragher, employers are frequently held liable when they have actual knowledge of sufficiently harassing conduct by employees but have failed to stop such conduct. Faragher v. City of Boca Raton, 524 U.S. 775, 789 (1998).

34. Cude & Steger, supra note 26, at 374 (citations omitted).

when seeking to discipline or discharge employees who have brought discrimination claims, even where those claims are meritless.\textsuperscript{36} In recognition of the real possibility of employees bringing successful retaliation claims even after their underlying discrimination claim is denied, employers should take the utmost care to document behavior prior to any disciplinary action.\textsuperscript{37} Faced with the uncertainty that currently shrouds the realm of retaliation claims, an employer must carefully ponder any decision to exert control in the workplace.

The need for the Supreme Court to address the issue of what conduct is sufficient to form the basis of retaliation is apparent, both from the standpoint of employers and the public. Employers need to know what actions are categorized as retaliatory, regardless of which circuit an employee brings suit in or which judge or jury happens to hear the case, in order to create effective disciplinary policies. Though discipline is a serious matter that should not be undertaken lightly, an employer should not have to walk on eggshells should it desire to correct a legitimately disruptive situation in the workplace. Given the rapidly increasing volume of retaliation claims flooding the EEOC, the courts should more clearly define actionable adverse actions needed for retaliation claims before such claims overwhelm the system. As the following discussion suggests, a common standard for employer liability may best serve to increase the effectiveness of the important protections contained in Title VII.

\textit{Purpose of the Retaliation Provision of Title VII}

Various federal statutes prohibit employer retaliation for specific employee acts.\textsuperscript{38} These statutes each forbid retaliation against employees who report violations of the particular statute,\textsuperscript{39} participate in a legal proceeding arising under a statute,\textsuperscript{40} or oppose employers' behaviors that constitute violations of the applicable statute.\textsuperscript{41} Congress intended the anti-retaliation provisions to increase the effectiveness of the

\begin{itemize}
  \item \textsuperscript{36} Id.
  \item \textsuperscript{37} Id.
  \item \textsuperscript{39} E.g., Family and Medical Leave Act § 2615(b)(1).
  \item \textsuperscript{40} E.g., id. § 2615(b)(3).
  \item \textsuperscript{41} E.g., id. § 2615(a)(2).
\end{itemize}
statute by protecting employees from potentially adverse consequences that may otherwise follow from reporting a violation of the statute.\textsuperscript{42} Additionally, the protection afforded by this type of anti-retaliation provision encourages employees to report violations of Title VII.\textsuperscript{43} Title VII's anti-retaliation provision protects employees who oppose discrimination made unlawful by or who participate in proceedings associated with Title VII causes of action.\textsuperscript{44}

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.\textsuperscript{45}

Though terminations and reductions in pay are the clearest actions that could constitute retaliatory conduct, these employment actions are simply the starting point for a wide range of conduct that can be considered retaliatory.\textsuperscript{46} The type of conduct that courts may consider retaliatory includes:

[T]he filing of a counterclaim in a lawsuit, transfer or reassignment, termination, suspension with pay, failure to promote, changing the required qualifications for an applied-for position, exclusion from necessary information, refusal to process a grievance, . . . deviation from established in-house procedures, selectively strict enforcement of a leave policy, reprimands and probation, extension of a probationary period, harassment, disciplinary demotion, unjustified evaluations and reports, loss of normal work assignments, denial of a customary commendation letter, manipulating bumping rights, and adverse statements to prospective employers . . . [and] caus[ing] fellow employees . . . to act adversely toward the employee.\textsuperscript{47}

The wide range of conduct that can be considered retaliatory in nature greatly increases the importance of courts clarifying

\textsuperscript{42} Cude & Steger, supra note 26, at 375.
\textsuperscript{43} Id.
\textsuperscript{44} 42 U.S.C. § 2000e-3(a) (1994).
\textsuperscript{45} Id.
\textsuperscript{46} See Lidge, supra note 18, at 344.
\textsuperscript{47} BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 668-69 (3d ed. 1996).
the standards to use for determining liability in retaliation claims. Without clear standards for employer liability and a common definition of what constitutes an adverse employment action, behavior that otherwise may be simply the result of an ill-mannered co-worker could ultimately wind up as the basis for a lawsuit against a company.

STANDARDS OF EMPLOYER LIABILITY IN THE EMPLOYMENT DISCRIMINATION CONTEXT

Comparison of Employer's Liability in Tort and Title VII

Prior to analyzing whether employers should be responsible for retaliatory acts of their employees against co-workers, it is necessary to discuss the various theories under which an employer can be held responsible for its employees' actions. An employer may be held liable for the acts of its employees either vicariously under the doctrine of respondeat superior or directly through negligence theories, including negligent hiring, retention, or supervision. Though these theories do not lead to an absolute responsibility for any actions of employees, they do provide an incentive for employers to police the workforce and ensure that their employees are not committing tortious acts.

Respondeat superior is premised on the notion that employers should not be able to distance themselves from responsibility for acts employees commit that might be seen as part of the employers' activities. Employers are strictly liable for the intentional torts of employees that are within the scope of employment. Jurisdictions apply various definitions of scope of employment, but generally the tests build from the definition set forth in the Restatement of Agency. Acts that a person is

48. See infra text accompanying notes 164-74.
49. See Kabat & Katz, supra note 30, at 607.
50. For a discussion on respondeat superior, see infra notes 53-57 and accompanying text.
51. See infra notes 58-63 and accompanying text. An employer may also be liable vicariously through the acts of managers and other employees who are sufficiently placed in the organization that their acts may be deemed the acts of the corporation. See Faragher v. City of Boca Raton, 524 U.S. 775, 789 (1998).
52. See Faragher, 524 U.S. at 763-65.
55. See ROTHSTEIN ET AL., supra note 53, § 2.28.
hired to perform, which occur within the authorized employment time and space limits, and that intentionally use force by the harassing employee against the object of harassment, which is not unexpectable by the employer are generally within the scope of employment.\(^56\) An act is considered to be out of the scope of employment when it goes beyond those bounds.\(^57\)

At common law, employers can be directly liable for the acts of employees through negligent hiring, retention, or supervision.\(^58\) This liability is premised on the employer's own conduct, either by condoning behavior or failing to prevent conduct.\(^59\) This common law tort action requires employers to take reasonable measures to prevent employees from causing intentional, tortious harm.\(^60\) As with other tort actions, this liability arises from a duty of care that has been breached causing some type of harm.\(^61\) For example, a breach of care could occur when an employer fails to adequately screen prospective employees\(^62\) or does not take appropriate corrective action when he/she knows that an employee is committing wrongful and intentional torts.\(^63\)

The remaining sections of this Note explore how the theories of employer liability apply in the statutory regime of Title VII. Some suggest that Title VII might impose "a nondelegable duty to keep the workplace free from discrimination."\(^64\) Such a duty would impose strict liability and would cause employers to extensively police employees.\(^65\) Employers have never been construed to have such a duty. Instead common law tort required employers to take reasonable precautions to provide a non-discriminating environment.\(^66\) The Supreme Court, in \textit{Burlington} and \textit{Faragher},\(^67\) answered the question of when employers will be liable for acts of its supervisors. The guidance offered by the Court in those decisions provides a useful

\(^{56}\) Id.
\(^{57}\) Id.
\(^{58}\) See Verkerke, supra note 54, at 305.
\(^{60}\) Verkerke, supra note 54, at 306.
\(^{61}\) Fisk & Chemerinsky, supra note 59, at 759.
\(^{62}\) Verkerke, supra note 54, at 306.
\(^{63}\) Id.
\(^{64}\) Id. at 289 n.46.
\(^{65}\) See \textit{id}.
\(^{66}\) See \textit{id}.
\(^{67}\) Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).
framework for understanding employer liability for acts of all employees that may violate Title VII.

Liability of Employers for Acts of Supervisors Under Title VII

The twin decisions of Burlington Industries Inc. v. Ellerth and Faragher v. City of Boca Raton provide some guidance as to when employers will be held vicariously liable under section 703 for actions of their employees and supervisors in the context of sexual harassment claims. These landmark decisions expanded employer liability for hostile-environment sexual harassment when the actions of supervisors are involved and have clearly put employers on notice that the extent of liability in these situations is fairly significant. After Burlington and Faragher, employers are vicariously liable for an alleged sexually hostile environment when it "is created by a supervisor with immediate or successively higher authority over the complaining employee." Though an employer will be strictly liable when the harassment leads to a tangible employment action, the Court defined a two-pronged affirmative defense that an employer could raise in the face of liability when there is no tangible employment decision. The two prongs of the affirmative defense are "that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or avoid harm otherwise." This defense provides an employer the opportunity to take corrective measures and to avoid liability when it has acted appropriately.

In Burlington, the Court defined tangible employment actions as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant

71. See Butler & Weber, supra note 24, at B5. See also supra notes 3-4 for an overview of the facts underlying the Burlington and Faragher decisions.
72. See Butler & Weber, supra note 24, at B5.
74. See id.; infra notes 77-79 and accompanying text (defining tangible employment action).
75. Id.
change in benefits." Generally, such a change "inflicts direct economic harm" on the plaintiff. Consistent with the apparent requirement of economic harm, one court has held that allegations that a supervisor insulted, failed to compliment, assigned menial tasks, and questioned the use of sick leave and vacation of female employees did not constitute tangible employment actions.

Subsequent to the holdings in Burlington and Faragher, employers know when they will be liable under section 703 of Title VII for actions of supervisors. As the Court held in Faragher, an employer will be vicariously liable when a supervisor with immediate or successively higher authority over an employee creates an actionable hostile environment. Employers may assert an affirmative defense when the supervisor's conduct has not resulted in a tangible employment action. These decisions directly impact sexual harassment claims resulting from the acts of supervisors, but the Court's analysis suggests that it may apply to employer liability for acts of all employees.

Liability of Employers for Acts of Employees Under Title VII

Though Burlington and Faragher concerned liability for the actions of supervisors, the Court provided some insight as to the extent that employers may be liable for actions of non-supervisory employees. Prior to laying out the new rule regarding the extent of liability for actions of supervisors, the Court, citing principles of agency law and the existing body of case law, noted "[a]n employer may be liable for both negligent and intentional torts committed by an employee within the scope of his or her employment." The Court did seem to indicate

77. Burlington, 524 U.S. at 761.
78. Id. at 762.
80. See supra notes 73-74 and accompanying text.
81. Faragher, 524 U.S. at 807.
82. Id.
84. Id. at 756.

Conduct . . . is within the scope of employment (when) (a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the master, and (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

RESTATEMENT (SECOND) OF AGENCY § 228 (1958).
some concern that an employer's liability not be extended too far. As the Court pondered in *Burlington*:

Were [the existence of an agency relation in the workplace and the resulting proximity and regular conduct] to satisfy [a standard for liability], an employer would be subject to vicarious liability not only for all supervisor harassment, but also for all co-worker harassment, a result enforced by neither the EEOC nor any court of appeals to have considered the issue.85

Consequently, the Court concluded that only supervisors or persons with authority could cause a tangible employment action.86

The Court observed that agency principles do not limit an employer's liability, for the actions of employees, to the scope of employment.87 This allows courts to find employers liable for acts of their employees that do not fit within the apparent authority of the employer or otherwise serve a business purpose.88 "District Courts and Courts of Appeals . . . [have] uniformly judged employer liability for co-worker harassment under a negligence standard."89 Within the context of sexual harassment by employees, an employer is directly liable for negligence if it "knew or should have known of the charged sexual harassment and failed to implement prompt and appropriate corrective action."90 Courts often phrase this standard in the language of actual or constructive knowledge of the harassment.91 Constructive knowledge is charged when "the harassment complained of is so open and pervasive that the employer should have known of it, had it but opened its corporate eyes, [and] it is unreasonable not to have done so."92 Utilizing this negligence standard, courts limit employer liability

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85. *Burlington*, 524 U.S. at 760.
86. See id. at 762.
87. Id. at 758.
88. Id. at 757. The Court rejected respondeat superior as the basis for imposing liability for sexual harassment because it is not within the scope of employment, and instead, characterized the standard as deriving from negligence. Id. at 759; *Faragher v. City of Boca Raton* 524 U.S. 775, 799 (1998).
89. *Faragher*, 524 U.S. at 799.
90. Hafford v. Seidner, 183 F.3d 506, 513 (6th Cir. 1999) (citations omitted); see also *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 766 (2d Cir. 1998) (reflecting the same standard).
92. *Sharp v. City of Houston*, 164 F.3d 923, 930 (5th Cir. 1999).
for sexual harassment by co-workers to instances in which the employer provided no means of voicing a complaint, or when it knew of the harassment and did nothing to address it.\textsuperscript{93}

Recognizing the need to constrain this realm of employer liability for employee actions, the Court indicated in \textit{Burlington} that employers would not be held vicariously liable for harassment perpetrated by their non-supervisory employees.\textsuperscript{94} Instead, courts analyze employer liability for harassing employees under a negligence standard, holding employers responsible when they had actual or constructive knowledge of the harassment and failed to take appropriate action.\textsuperscript{95} The question of when an employer will be held liable for retaliatory conduct of its employees, however, remains to be answered.

\textbf{Employer Liability for Retaliatory Conduct}

The \textit{Burlington} and \textit{Faragher} decisions revolved around hostile environment sexual harassment,\textsuperscript{96} but there is a well-founded belief that the holdings also apply to retaliation claims, expanding both the scope and impact of potential claims.\textsuperscript{97} Otherwise actionable conduct cannot lead to employer liability unless that conduct can be attributed to the employer; therefore, it is important to determine the standards of employer liability.\textsuperscript{98} Instances of harassment by supervisors, if linked to protected activity, can be the basis for a retaliation claim under anti-discrimination statutes.\textsuperscript{99} The Sixth Circuit found that retaliatory harassment by a supervisor, in the wake of \textit{Burlington} and \textit{Faragher}, could be actionable, but that the employer should have the opportunity to prove an affirmative

\begin{itemize}
\item \textsuperscript{93} See Quinn, 159 F.3d at 766.
\item \textsuperscript{94} See supra note 85 and accompanying text.
\item \textsuperscript{95} See supra notes 89-93 and accompanying text.
\item \textsuperscript{96} Burlington Indus., Inc. v Ellerth, 524 U.S. 742, 754 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 780 (1998).
\item \textsuperscript{97} Butler & Weber, supra note 24, at B5. "Although the Ellerth [Burlington] and \textit{Faragher} decisions involve sexual harassment, the same rationale logically applies to all forms of unlawful workplace harassment." \textit{Id}.
\item \textsuperscript{98} "Courts are split on ... the standard for liability of an employer for retaliation that violates Title VII." Cross v. Cleaver, 142 F.3d 1059, 1071 (8th Cir. 1998). Absent a method to impute behavior to the employer or find it directly liable, a plaintiff would be unsuccessful in a retaliation suit even if she provided that she engaged in protected activity, suffered some form of adverse employment action, and demonstrated causal connection between the protected activity and employment action. See Mattern v. Eastman Kodak Co., 104 F.3d 702, 706-07 (5th Cir. 1997).
\end{itemize}
defense showing that retaliatory harassment did not rise to the level of a tangible employment action.¹⁰⁰

The Seventh Circuit appears to view the situation in a similar light, noting "there is nothing to indicate that the principle of employer responsibility does not extend equally to other Title VII claims, such as a claim of unlawful retaliation."¹⁰¹ In Knox v. Indiana,¹⁰² the court found it necessary to ask whether "the right link [was] established between the employer and the co-workers, so that the employer can be held responsible for their actions, and . . . [whether] the conduct complained of constitute[s] something actionable under the statute, such as discrimination, harassment, or retaliation."¹⁰³ Accordingly, the court held that an employer can be liable for retaliatory conduct of its employees, whether or not they are supervisors, when the employer "know[s] about and fails to correct the offensive conduct."¹⁰⁴

Applying the tests promulgated in Burlington and Faragher to retaliation claims, the Tenth Circuit held that if the perpetrator and the victim are co-workers, then employers will be liable only under a negligence theory, meaning that the employer either orchestrated or knew about the harassment and acted (or didn't act) in such a manner as to acquiesce and condone the behavior.¹⁰⁵ Retaliation against a co-worker, absent a directive from the employer, does not seem to further any objective of the employer or otherwise fit within the scope of employment.¹⁰⁶ Because an employee is acting outside the scope of employment when she voluntarily engages in retaliatory conduct, an employer could only be held responsible for that retaliation if the plaintiff employee can establish direct responsibility.¹⁰⁷

Under this direct negligence standard, the employer's failure to correct the situation after learning of the retaliatory behavior is the action for which the employer is held liable.¹⁰⁸ In essence,

¹⁰⁰. See Morris v. Oldham County Fiscal Ct., 201 F.3d 784, 791-92 (6th Cir. 1999).
¹⁰¹. Knox v. Indiana, 93 F.3d 1327, 1334 (7th Cir. 1996).
¹⁰². Id.
¹⁰³. Id.
¹⁰⁴. Id.
¹⁰⁵. Gunnell v. Utah Valley State Coll., 152 F.3d 1253, 1265 (10th Cir. 1998).
¹⁰⁷. See Gunnell, 152 F.3d at 1265.
¹⁰⁸. Cf. Burlington, 524 U.S. at 758 ("[The employer's] own negligence is a cause of the harassment. An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it.").
the employer's negligence is the cause of the retaliation. Unless the plaintiff can show that her employer condoned the behavior of her co-workers or acquiesced in the retaliation, the employer cannot be held liable for the retaliation. Assuming the behavior can be attributed to the employer, the plaintiff must then prove a prima facie case of retaliation.

**STANDARDS FOR ESTABLISHING A PRIMA FACIE RETALIATION CLAIM**

Most courts apply a three-pronged test to retaliation cases. The plaintiff bears the initial burden of establishing a prima facie case of unlawful retaliation and “must demonstrate: (1) that she . . . engaged in activity/opposition protected, (2) that she suffered an adverse employment decision, and (3) that there was a causal link between [the] activity and the employment decision.” In some jurisdictions, the courts add a fourth element, requiring that the employer know that the employee engaged in an activity protected by Title VII. Because the employer will most likely have been served if a lawsuit has been filed or on notice if a claim is placed with the EEOC, it appears that this fourth prong would be met fairly easily in most cases.

**Protected Activity**

The first element that a plaintiff must establish in a prima facie retaliation case is that she participated in an activity under Title VII or opposed a practice that section 703 makes unlawful. In the absence of such activity, the law does not recognize the behavior by employers as being in retaliation for an employee's complaint of sexual harassment. In other words, an employee cannot allege retaliation for sexual harassment complaints if she is only thinking about filing

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109. See id.
110. Folkerson v. Circus Circus Enter., Inc., 107 F.3d 754, 755 (9th Cir. 1997). Some circuits apply a test that is substantially the same, though worded slightly differently. According to the Fifth Circuit, the employee must demonstrate that “(1) [she] engaged in activity protected by Title VII; (2) the employer took adverse employment action against the employee; and (3) a causal connection exists between that protected activity and the adverse employment action.” Mattern v. Eastman Kodak Co., 104 F.3d 702, 705 (5th Cir. 1997).
112. See Distasio v. Perkin Elmer Co., 157 F.3d 55, 66 (2d Cir. 1998); Cude & Steger, supra note 26, at 377-78.
charges or has simply mentioned the possibility to confidants and the employer has not learned of such intention. She must have undertaken an activity under either the opposition or participation clauses of section 704.114

The legislature specifically provided for and defined what types of activity can constitute the first element of a prima facie case of retaliation.115 Section 704(a) of Title VII recognizes two distinct forms of protected expression that can satisfy this element.116 An employer is prohibited from taking retaliatory action against an employee when it is "(1) because [the employee] has opposed any practice made an unlawful employment practice by [Title VII]; or (2) because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]."117

Title VII's anti-retaliation provision exists to encourage employees to report violations.118 Most likely in an effort to advance that rationale, "[c]ourts generally apply a liberal standard when determining whether an employee has participated in a protected activity."119 This suggests a less close analysis of the opposition and participation prongs. Courts have extended the participation clause to include a mere anticipation that an employee will file a complaint,120 and agree that the opposition clause requires only a reasonable belief by the employee that the employment practices she opposes were unlawful.121

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114. Id. For the text of the opposition and participation clause see infra note 117 and accompanying text.
116. Id.; Cude & Steger, supra note 26, at 377-78.

The EEOC has provided [three] generic examples of opposition activity, all of which must be read, pursuant to the statute, as involving unlawful discrimination: (1) "threatening to file a charge or other formal complaint alleging discrimination;" (2) "complaining to anyone about alleged discrimination against oneself or others;" [and] (3) "refusing to obey an order because of a reasonable belief that it is discriminatory ....

Participation activity essentially tracks the statutory definition, i.e., having "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." Kabat & Katz, supra note 30, at 605 (citing 42 U.S.C. § 2000e-3(a)).

118. Infra text accompanying notes 180-92 (discussing the policy underlying section 704).
119. Essary & Friedman, supra note 16, at 121.
120. Id. at 121-22 (citing Sauers v. Salt Lake County, 1 F.3d 1122, 1128 (10th Cir. 1993)).
121. Cude & Steger, supra note 26, at 378-79; e.g., Long v. Eastfield Coll. 88 F.3d 300, 304 (5th Cir. 1996); EEOC v. Crown Zellerbach Corp., 720 F. 2d 1008, 1013 (9th Cir. 1983).
Clearly, an employee who has filed charges with the EEOC and reported the workplace sexual harassment to the proper agency, in compliance with the procedures necessary for section 703, will meet this prong of the prima facie retaliation case. Notably, the underlying claim of sexual harassment alleged by the employee does not have to be successful for a court to find that a plaintiff has satisfied this element of her case. The Ninth Circuit has held that "[i]t is not [even] necessary... that the employment practice [that formed the basis for the complaint] actually be unlawful; opposition clause protection will be accorded 'whenever the opposition is based on a "reasonable belief" that the employer has engaged in an unlawful employment practice." It is possible that a court will not find for an employee on a sexual harassment complaint, but will find in her favor on the issue of the retaliatory conduct of her employer. Without that potential result, the anti-retaliation provision would lack the force to advance the goal of encouraging workers to report violations of section 703.

Because Congress specifically provided for the kinds of activities that are protected under section 704 of Title VII, courts can use the text of the statute to assist in their determination of whether an employee has engaged in protected activity. Perhaps to encourage employees to report violations of Title VII, courts apply a liberal standard to this first prong of a case of prima facie retaliation. As discussed in the next section of this Note, the standard for whether a plaintiff has met the second prong of the prima facie case is not as clear.

**Adverse Employment Action**

Perhaps the most contested element of retaliation charges is the second: whether the employee has suffered an adverse employment action is an issue of debate. Section 703 claims for sexual harassment also include an adverse employment action requirement; therefore, the courts can seek guidance from decisions under that section. Even in that arena, jurisdictions

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122. See Moyo v. Gomez, 32 F.3d 1382, 1385 (9th Cir. 1994).
123. Id. at 1384-85 (quoting Crown Zellerbach, 720 F.2d at 1013).
125. See supra notes 118-19 and accompanying text.
126. See Marisa Williams & Rhonda Rhode, Recent Developments in Retaliation Law and Resulting Implications for the Federal Sector, COLO. LAW, Jan. 1999, at 59, 60.
127. See Mattern v. Eastman Kodak Co., 104 F.3d 702, 708 (5th Cir. 1997) (noting that courts can utilize other sections of Title VII to help define terms).
defining an adverse employment action differ in substantive ways. There is a significant split in the circuits as to what constitutes adverse employment action for retaliation claims under Title VII.128 Without a clear resolution of what constitutes an adverse employment action, employers and employees will continue to wonder when the employer is liable for retaliation. Until the courts provide further definition, it will be difficult to determine whether an employer's failure to address retaliatory actions toward employees that are initiated by the complainant's co-workers is actionable conduct.

The text of Title VII provides little assistance in answering the question of what behavior is necessary to constitute an adverse employment action.129 "Title VII . . . contain[s] no language regarding the type of employer conduct that will trigger a retaliation claim."130 The anti-retaliation provision in section 704(a) simply states that employers shall not "discriminate" against employees for taking action protected by Title VII.131 This contrasts with the language of section 703, which goes further by qualifying the word "discriminate."132 "Courts generally agree that employment decisions involving hiring, granting leave, discharge, promotion, and compensation suffice as discrimination."133 The adverse and significant impact of such decisions is clear and difficult to refute.134 The difficulty

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128. See infra notes 138-46 and accompanying text. See also Eddy, supra note 10, at 372 (stating that the circuits disagree on the proper meaning of adverse employment action); Kabat & Katz, supra note 30, at 603-04 (same).

129. In construing a statute, the court's primary objective is to give effect to the legislature's intent. Cude & Steger, supra note 26, at 396.

130. When the resolution of a question of federal law hinges on a statute and the intention of Congress, the courts look first to the language of the statute. Specifically, the court's first step is "to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case."

131. In construing a statute, the court's primary objective is to give effect to the legislature's intent. Cude & Steger, supra note 26, at 396.

132. Id. at 709.

133. Essary & Friedman, supra note 16, at 133. The Supreme Court has recognized these actions to be tangible employment actions. See Burlington Indus., Inc., v. Ellerth, 524 U.S. 742, 761 (1998) ("A tangible employment action 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.").

134. Lidge, supra note 18, at 335 ("In most situations, such as a discharge or a failure to hire, a plaintiff may easily show the material adversity or ultimate nature of the employer's action.").
arises when the retaliatory conduct takes less obvious forms,\textsuperscript{135} such as ostracism\textsuperscript{136} or reprimands.\textsuperscript{137}

The Fourth, Fifth and Eighth Circuits can be categorized as requiring the employer's actions to be adverse that rises to the level of an ultimate decision.\textsuperscript{138} On the basis of that requirement, the Fourth Circuit found that the plaintiff had not made a prima facie case of retaliation when her employer directed co-workers to ignore and spy on the plaintiff, reasoning that the "terms, conditions, or benefits of . . . employment were [not] adversely affected."\textsuperscript{139} Conversely, the First, Ninth, Tenth and Eleventh Circuits do not require the adverse action to rise to this extent and instead allow "adverse actions which fall short of ultimate employment decisions."\textsuperscript{140} The Third Circuit applies a different test in finding whether the plaintiff has established a prima facie retaliation case,\textsuperscript{141} but the elements of that requirement imply that the Third Circuit would be classified as requiring an ultimate employment decision.\textsuperscript{142}

To summarize these differences, the circuits apply three general tests for adverse employment actions. The first test is a narrow view of retaliation, requiring that it must involve a "material" or "ultimate" employment decision.\textsuperscript{143} On the opposite end of the spectrum, another set of courts has an expansive view of retaliation, allowing a variety of actions to meet the threshold

\textsuperscript{135} Essary & Friedman, supra note 16, at 133.

\textsuperscript{136} See Munday v. Waste Mgmt. of N. Am. Inc., 126 F.3d 239, 243 (4th Cir. 1997) (finding no adverse action when employer instructed co-workers to ignore employee).

\textsuperscript{137} See Mattern, 104 F.3d at 705 (holding no retaliation when, among other things, employee was reprimanded for discussing hostility in the workplace with human resources when she should have been at her work station).

\textsuperscript{138} See Munday, 126 F.3d at 244; Ledergerber v. Stangler, 122 F.3d 1142, 1144 (8th Cir. 1997); Mattern, 104 F.3d at 707; Cude & Steger, supra note 26, at 382-84.

\textsuperscript{139} Munday, 126 F.3d at 244.

\textsuperscript{140} Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1456 (11th Cir. 1998). In Berry v. Stevinson Chevrolet, 74 F.3d 980 (10th Cir. 1996), the Tenth Circuit found that retaliation existed when an employer brought a malicious prosecution action against a former employee. \textit{Id.} at 986-87. On this basis, it is likely that the Tenth Circuit can also be classified as accepting adverse actions that do not rise to the level of an ultimate employment decision.

\textsuperscript{141} See Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1085 (3d Cir. 1996).

\textsuperscript{142} In Aman, a ruling handed down prior to Burlington and Faragher, the court required the plaintiff to show that "she was discharged subsequent to or contemporaneously with . . . [the protected] activity; and . . . that a causal link exists between the protected activity and the discharge." \textit{Id.} at 1085. The District of Columbia Circuit Court likely falls into the category of accepting less than an ultimate employment decision. Though it would not rule on the issue in Johnson v. Dimario, 14 F. Supp. 2d 107 (D.C. Cir. 1998), it held in a retaliation case brought under the Age Discrimination in Employment Act that adverse actions are not limited to ultimate employment decisions. See \textit{id.} at 111.

\textsuperscript{143} Mattern at 104 F.3d at 708.
of an adverse employment action.144 Finally, the remaining circuits apply a test that falls somewhere in the middle, neither requiring an ultimate employment decision nor setting a low threshold.145 These courts require that the retaliatory act be related to the employment, with more than a trivial impact on the employment relationship.146

In response to the circuit split, and out of a concern that the adverse action requirement was being interpreted too narrowly, the EEOC promulgated new guidelines on how courts should approach the issue of retaliation claims and arguments regarding adverse actions.147 The EEOC announced these new guidelines on May 26, 1998, rendering earlier guidance obsolete.148 Reflecting the more liberal approach, the EEOC found that the Fifth Circuit's requirement that an adverse action rise to the level of an ultimate employment decision was "unduly restrictive."149

Instead of adhering to the restrictive ultimate employment decision, the EEOC favors the approaches taken in less restrictive circuits.150 The EEOC recommends the broader interpretation that other circuits have applied to these cases.151 It finds that the "statutory protections against retaliation prohibit 'any adverse treatment that is based on a retaliatory motive and that is reasonably likely to deter the charging party or others from engaging in protected activity.'"152 Based on its own interpretation, the EEOC finds that section 704 does not

144. See Wideman, 141 F.3d at 1456 (collecting cases in the First, Ninth and Tenth Circuits that acknowledge adverse employment actions may include actions that fall short of ultimate employment decisions); Essary & Friedman, supra note 16, at 134.
145. See e.g., Manning v. Metro. Life Ins. Co., 127 F.3d 686, 692 (8th Cir. 1997) ("[A]ctions short of termination may constitute an adverse employment action, . . . [there must be a] tangible change in duties or working conditions . . . . "); Robinson v. City of Pittsburgh, 120 F. 3d 1286, 1300 (3d Cir. 1997) ("Retaliatory conduct other than discharge or refusal to rehire is thus proscribed by Title VII only if it alters the employee's 'compensation, terms, conditions, or privileges of employment,' deprives him or her of 'employment opportunities,' or 'adversely affects his [or her] status as an employee.'").
146. Essary & Friedman, supra note 16, at 134; see also Nelson v. Upsala, 51 F.3d 383, 388 (3d Cir. 1995) ("[T]he retaliatory conduct must relate to an employment relationship.").
147. See Cude & Steger, supra note 26, at 374 n.3.
148. Id.
149. Id. The EEOC's Fifth Circuit reference was to the holding in Mattern v. Eastman Kodak Co., 104 F.3d 702, 709 (5th Cir. 1997). Cude & Steger, supra note 26, at 374 n.3.
150. See Penny Nathan Kahan, Retaliation Update, in CURRENT DEVELOPMENTS IN EMPLOYMENT LAW 263, 276 (Am. Law Inst. ed. 1999), WL SE05 ALI-ABA 263.
151. Id.
152. Id. at 276-77.
mandate or even favor the stricter approach that some circuits have applied.\textsuperscript{153}

The guidelines include a listing of what types of actions the EEOC would consider sufficient to constitute adverse retaliatory action.\textsuperscript{154} This list includes actions generally agreed to be sufficient grounds for finding retaliation, such as denial of promotions and job benefits, demotion, suspension, termination and refusal to hire.\textsuperscript{155} The guidelines additionally suggest that actions such as threats, reprimands, negative performance evaluations, new incidents of harassment and limiting access to internal grievance procedures satisfy the requirement for an adverse action.\textsuperscript{156} By including these actions in its list, the EEOC goes beyond the types of actions that all the circuits agree upon and encompasses many that would be excluded by some circuits in its effort to encourage a broader interpretation.

It is important to recognize that the EEOC guidelines go beyond the existing case law in many jurisdictions, sometimes directly disagreeing with it.\textsuperscript{157} The EEOC is inconsistent with the approach the majority of courts take on this issue.\textsuperscript{158} "Thus, this Manual does not consistently state the current law, but is in part a statement of what the EEOC believes the law should be."\textsuperscript{159}

In discussing these guidelines, the Fifth Circuit stated they "are not only not promulgated pursuant to any delegated authority to define statutory terms and the like but are also not subject to the notice and comment procedure like regulations are."\textsuperscript{160} As a result, the Fifth Circuit held that the EEOC regulations are "not entitled to the high degree of deference" usually applied to federal regulations.\textsuperscript{161} Though it appears the

\textsuperscript{153} See id.
\textsuperscript{154} Butler & Weber, supra note 24, at B5.
\textsuperscript{155} Id.
\textsuperscript{156} Id.
\textsuperscript{157} For example, in Mattern v. Eastman Kodak, 104 F.3d 702 (5th Cir. 1997), the Court of Appeals held that reprimands do not satisfy the element of adverse action, a holding directly contrary to the EEOC guidelines. See id. at 705; Butler & Weber, supra note 24, at B5.
\textsuperscript{158} See Kabat & Katz, supra note 30, at 602; see also supra text accompanying notes 99-146 (discussing the tests applied by each of the circuits).
\textsuperscript{159} See Kabat & Katz, supra note 30, at 602.
\textsuperscript{160} Washington v. HCA Health Serv. of Texas Inc., 152 F.3d 464, 469 (5th Cir. 1998), rev'd on other grounds, 527 U.S. 1032 (1999).
courts will not always give much import to these guidelines, it is important to note that the guidelines will likely be given deference in many jurisdictions and could influence an expansion, in some circuits, of the realm of actions for which employers may be held liable unless, or until, a clear stance is adopted by a majority of the courts.

In short, courts apply a wide variation of definitions to determine whether a plaintiff has suffered an adverse employment action. Several circuits require that an action rise to the level of an ultimate employment decision. Others apply a test that is much easier to meet and believe that actions falling short of ultimate employment decisions may constitute adverse employment actions. Even if a plaintiff is able to show that she has suffered an adverse employment action and has established that she engaged in protected activity, she will not be successful in her retaliation claim unless she can show a causal connection between the protected activity and the adverse employment action, the final element of the prima facie claim.

Causal Connection

The final element of a prima facie retaliation claim requires the plaintiff to prove that a protected party's participation in a statutorily protected activity was the employer's motivation for the adverse employment action. It is quite simple to create an inference of retaliation and may be done with evidence of temporal proximity. Presenting evidence that the adverse action took place shortly after the protected activity and establishing that "the person who undertook the adverse action was aware of the plaintiff's protected activity before taking the action" may create this inference.

Though it may be relatively easy for a plaintiff to establish a causal connection between the adverse action and the protected activity when she can show that her employer knew about the

U.S. 134, 140 (1944)); EEOC v. Shell Oil Co., 466 U.S. 54, 74 n.28 (1984) ("The EEOC's interpretation of its own rules is entitled to deference.").
162. See supra note 138.
163. See supra note 144.
164. See Kahan, supra note 150, at 278 (citing Dowe v. Total Action, 145 F.3d 653, 657-58 (4th Cir. 1998)).
166. Kahan, supra note 150, at 280.
protected activity, it may be more difficult when she cannot show that her employer knew of her protected action. "Since, by definition, an employer cannot take action because of a factor of which it is unaware, the employer's knowledge that the plaintiff engaged in a protected activity is absolutely necessary..." Without evidence of such knowledge, temporal proximity between the protected activity and the retaliatory conduct loses its inferential value and the plaintiff will not be able to establish a causal connection.168

Though the requirements for causation are not as controversial as those for an adverse action, there is some variation between circuits in terms of the exact requirements. In some circuits, the plaintiff must establish that her employer "would not have taken the adverse action 'but for' the protected expression."169 Other courts are less stringent and find that it is sufficient "if the evidence shows that the protected activity and the adverse action are not totally unrelated."170 While stating that "no one factor is dispositive," the Sixth Circuit appears to favor an inference from temporal proximity, noting that evidence "that the adverse action was taken shortly after the plaintiff's exercise of protected rights is relevant to causation."171 The District of Columbia Circuit requires both that the employer have knowledge of the protected activity and that the adverse action be close in time to the activity.172

Though courts generally agree on the three primary elements necessary to establish a prima facie retaliation claim,173 they vary in their application of these elements, most notably of the requirement of an adverse employment action.174 This lack of uniformity and the expansive definition some courts utilize for adverse employment actions places an unnecessary burden on employers. In some jurisdictions, employers run the risk of being liable for the unexpected, non-work related, reckless behavior of their employees who choose to retaliate against co-workers on their volition. As the remaining sections

167. Dowe, 145 F.3d at 657. In Johnson v. U.S. Dep't of Health and Human Serv., 30 F.3d 45 (6th Cir. 1994), the court found no causal connection existed when the plaintiff had filed an EEOC complaint, but the supervisor who denied a promotion had no knowledge of the complaint. Id. at 47.
168. See Dowe, 145 F.3d at 657.
169. Adusumilli v. City of Chicago, 164 F.3d 353, 363 (7th Cir. 1998) (citation omitted).
173. See supra note 110 and accompanying text.
174. See supra notes 126-61 and accompanying text.
of the Note explain, employer failure to address co-worker retaliatory behavior is not the kind of conduct for which employers should be held responsible.

**EMPLOYER FAILURE TO ADDRESS RETALIATION BY CO-WORKERS IS NOT ACTIONABLE**

Holding an employer liable for the retaliatory actions of employees against co-workers who have engaged in activity protected by Title VII is beyond the intended scope of section 704. Initially, it must be assumed for this analysis that the employee has engaged in an activity protected by Title VII. For illustration purposes, assume the employee has filed a sexual harassment suit against her supervisor or testified in a discrimination hearing. When her co-workers retaliate against her, one argument for employer liability would be that the employer in some way encouraged or even required the behavior of the co-workers. If that were the case, the employees would be acting at the direction of the employer and the employer would be vicariously liable for the acts of its employees.

Alternately, as the following analysis demonstrates, the employee could argue that an employer's failure to address the actions the co-workers engaged in of their own will may constitute retaliatory conduct, which section 704 is intended to prevent. Under this argument, the action that must be examined is the employer's *failure* to stop or in some other way address the behavior of the co-workers. If it were possible for an employee to show that this failure was an actionable adverse action and that it was in some way causally connected to her protected activity, then she may be able to recover. Because such a failure does not constitute an adverse employment action, she should not be able to establish these prerequisites, though her attempts may be met with success in jurisdictions that apply broad interpretations to the rules requirements. However,

175. For a discussion of protected activity, see *supra* notes 117-25 and accompanying text.
178. In circuits recognizing a broad definition of adverse employment action, an employee may be able to recover if co-worker retaliation is sufficiently severe and the employer, despite knowledge of the retaliation, failed to remedy the situation. *E.g.* Knox v. Indiana, 93 F.3d 1327, 1354 (7th Cir. 1996).
179. *See id.*
even in jurisdictions that consider such claims satisfactory to meet the adverse employment action requirement, allowing claims for co-worker retaliation is not necessary to further the goals of Section 704.

Policy Concerns of Section 704 Are Not Applicable to These Omissions

The primary purposes of the provisions of Title VII concerning sexual harassment are compensation for the employee who engaged in the protected activity and deterrence to employers. Therefore, "[t]he underlying purpose of [the anti-retaliation provision in Section 704(a)] is to enhance the statute's effectiveness by encouraging employees to report violations of the statute without fear of adverse repercussions." In the words of the Ninth Circuit, section 704 is intended "to protect the employee who utilizes the tools provided by Congress to protect his rights." By granting this type of protection, an employee will feel comfortable in reporting violations of the sexual harassment laws without fear of consequences, such as losing her job or being involuntarily transferred. "Indeed, if an employer could lawfully retaliate against an employee for asserting his rights 'then the rights created [under Title VII] would be without substance.' Section 704 is therefore vital to achieve Title VII's intended goals." The policies behind section 704(a) are vital to the administration of justice and the effectiveness of section 703, but the anti-retaliation provision should not be onerous. The Supreme Court has held that Title VII is not a "general civility code" and does not hold employers liable for "ordinary tribulations of the workplace," implying that not every action or omission will lead to liability.

Holding employers liable for failing to address retaliation by co-workers, which they do not encourage or participate in, is not the type of act or omission that section 704 was intended to prevent. Making employers accountable for every interaction

180. See Fisk & Chemerinsky, supra note 59, at 786.
181. Cude & Steger, supra note 26, at 375.
182. Vasconcelos v. Meese, 907 F.2d 111, 113 (9th Cir. 1990) (citation omitted).
185. See Tafuri, supra note 176, at 811-12 (discussing congressional intent underlying section 704(a)).
between co-workers provides no protection from employees feeling that their jobs are in danger, that they will be discharged, demoted, or even black-listed.\footnote{186} The type of strict liability that would follow from extending section 704(a) to such a degree would not serve Congress' goal of enabling employees to engage in statutorily protected activities without the fear of employer retaliation.\footnote{187} Unless Congress intended for employers to be strictly responsible for any unsanctioned acts of its employees, there is no need to extend the protection of section 704(a) to this extent.\footnote{188} Employees will still receive needed protection from acts by their employers after they file legitimate sexual harassment claims.\footnote{189} In situations where co-workers do retaliate, the employee should still feel safe in approaching management about the actions and having her concerns addressed.

Moreover, the rights of employers to manage the workplace must factor into the balance. Courts should be cautious about intervening with the personnel and daily operating decisions that employers make.\footnote{190} An employer should not be prevented from taking a legitimate, adverse employment action against an employee simply because that employee previously engaged in some form of protected activity. As succinctly stated by practitioners Anne Clarke Snell and Lisa Eskow, "[a]nti-retaliation provisions must not be distorted into grants of absolute immunity" for the employee.\footnote{191} Although an employer should, and in most jurisdictions would, be held accountable if it

\footnote{186. See id.}
\footnote{187. See Essary & Friedman, supra note 16, at 118. But see Fisk & Chemerinsky, supra note 59, at 760 (arguing that extended vicarious liability in discrimination cases serves the purposes of compensation and deterrence, essential in the protections granted by Title VII).}
\footnote{188. The concern of imputing responsibility to employers for all acts of employees is philosophically related to discussions on the extent of an employer's obligation to "police" a workplace and the standards that are used in determining employer liability for actions of supervisors and co-workers. See supra notes 51-109 and accompanying text.}
\footnote{189. The Fifth Circuit has found import in that: [A]n individual who has engaged in protected activity remains entitled to bring a claim of constructive discharge if the level of claimed harassment because of her protected activity would cause a reasonable person in the employee's shoes to resign. Constructive discharge would certainly fall within the category of an ultimate employment decision. Cude & Steger, supra note 26, at 399-400 (citing Faruki v. Parsons S.I.P., Inc., 123 F.3d 315, 319 (5th Cir. 1997); Ward v. Bechtel Corp., 102 F.3d 199, 202 (5th Cir. 1997); Barrow v. New Orleans S.S. Ass'n, 10 F.3d 292, 297 (5th Cir. 1994)).}
\footnote{190. See Cude & Steger, supra note 26, at 408-10 (discussing reasons courts should not substitute their decisions for that of personnel managers).}
\footnote{191. Snell & Eskow, supra note 99, at 382.}
expressly condoned or directed a campaign of retaliation, not every employee act can be imputed to the employer, nor can the employer's failure to act be found to be an adverse employment action. If the courts attributed all employee action to employers or found them directly liable in negligence when employees behave in such manner, the standard would effectively create a duty for employers to make the workplace absolutely free of discomfort.

Within reasonable limits and with the necessary and deserved respect for their employees, employers must be free to conduct their business as they see fit. Expanding vicarious liability to the extent that employers are responsible for acts of employees as childish and unrelated to the employment environment as placing hair in an employee's food is stretching the protection of anti-retaliation provisions too far. In addition to being unduly burdensome on employers, protecting such omissions will do nothing to further the policies behind section 704.

No Causal Nexus Exists Between the Employer's Failure and the Protected Activity

Assuming that a plaintiff can establish that the actions of her co-workers can be imputed to the employer, or that the employer should be directly liable for such conduct, she still must be able to show that the action was connected with the protected activity. The slight disagreement between the circuits regarding the degree of this connection again creates varying outcomes and leaves employees and employers uncertain. Nonetheless, without an employer's direction or knowledge of the actions of the employees, plaintiff employees have a large barrier that they should not be able to overcome.

The Seventh Circuit, in Adusumilli v. City of Chicago, held that a plaintiff must establish that the defendant "would not have taken the adverse action 'but for' the protected expression" to meet the causal connection requirement of a prima facie case of retaliation under Title VII. "[A]n employee's maltreatment at work is not actionable as retaliation absent proof that an adverse action was taken against the

192. See id. at 382-83.
193. See supra notes 126-46 and accompanying text.
194. 164 F.3d 353 (7th Cir. 1998).
195. See id. at 363 (quoting McKenzie v. Ill. Dep't of Transp., 92 F.3d 473, 483 (7th Cir. 1996) (citing Klein v. Trs. of Ind. Univ. 766 F.2d 275, 280 (7th Cir. 1985))).
employee because he or she engaged in protected activity . . . .

[Simply,] workplace animosity does not always equate with retaliation.¹⁹⁶

Regardless of the fact that co-worker retaliation may begin within a close time after an employee has alleged sexual harassment in the workplace, “no causal link may exist if the employee does not allege that her employer was aware of her protected activity.”¹⁹⁷ Whether the adverse action was in response to an employee’s protected activity must be the focus of investigations.¹⁹⁸ Clearly, when “the ultimate decisionmaker responsible for the adverse employment action” did not know the employee had participated in protected activity, “there can be no inference of retaliation.”¹⁹⁹ Lack of knowledge about the co-worker’s actions would also defeat any inference of temporal proximity.

The actions of the co-workers would seem to survive whatever test a court applies for a causal connection. The co-workers, upon learning that the employee has filed charges and possibly feeling that they are at the center of the charges, are responding to that situation. Whether out of fear, anger, or wanting the employee to drop the charges, her co-workers have decided to take action. In the scenario of co-workers retaliating against the employee, the employer’s failure to address the adverse employment action must be the focus of the inquiry into a causal connection, not the acts of the co-workers.

The employer’s action, in this case inaction, could not conceivably be in response to the protected activity unless the employer initiated the action of the co-workers or the liability arises because the employer knew of such action and refused to respond.²⁰⁰ Inaction on the part of the employer could be for any number of reasons. It would be very difficult to show that the employer’s omission would not have been done “but for” the protected activity,²⁰¹ as it is far more likely that the employer did nothing simply because it did not know of the retaliatory conduct. In a situation in which workers are retaliating against other employees, absent a supervisor’s direction, there can be no

¹⁹⁷. Essary & Friedman, supra note 16, at 143.
¹⁹⁹. Id. at 402.
²⁰⁰. Requiring a causal connection may limit the ability of courts to impose liability on employers premised on a theory of constructive notice. See supra notes 90-93 and accompanying text.
²⁰¹. See Adusumilli v. City of Chicago, 164 F.3d 353, 363 (7th Cir. 1998).
clear inference that any adverse employment action or change in the conditions is attributable to the employer or for the purpose of retaliation.

Employer Failure to Address Such Action Is Not an Actionable Adverse Decision

Although many jurisdictions have addressed the issue, there is no consensus of whether an employer’s failure to respond to co-worker harassment because of an employee’s protected activity is an adverse employment action for retaliation claim purposes.\textsuperscript{202} Much of this debate stems from the inability to arrive at a consensus on the definition of an adverse employment action.\textsuperscript{203}

The Fifth Circuit summarized the argument against finding that an employer’s failure to address the retaliatory acts of employees is an adverse employment action. In \textit{Dollis v. Rubin},\textsuperscript{204} the court reasoned that “Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions.”\textsuperscript{205} A contrary finding would “expand the definition of ‘adverse employment action’ to include . . . anything which might jeopardize employment in the future. Such expansion is unwarranted.”\textsuperscript{206} Determining that an employer’s omission in similar cases was an adverse action would open the door to the sort of strict liability that the Supreme Court, absent an affirmative defense, declined to allow in \textit{Burlington} and \textit{Faragher}.\textsuperscript{207}

\textsuperscript{202} See \textit{Richardson v. N.Y. State Dep't of Corr. Serv.}, 180 F.3d 426, 445 (2d Cir. 1999). “Courts disagree about whether an employee suffers ‘adverse employment action’ for the purposes of a retaliation claim when, as [the plaintiff] alleges, her employer allows her co-workers to harass her because she engaged in protected activity.” \textit{Id.}

\textsuperscript{203} For a discussion of these differences, see \textit{supra} notes 126-46 and accompanying text.

\textsuperscript{204} 77 F.3d 777 (5th Cir. 1995).

\textsuperscript{205} \textit{Id.} at 781-82. In some courts, judges cite the variance in the language of section 703 and section 704 to justify a difference between the availability of hostile environment sexual harassment claims and retaliation claims. \textit{See} Mattern v. Eastman Kodak Co., 104 F.3d 702, 710-13 (5th Cir. 1997) (Dennis, J., dissenting). “Specifically, § 703(a) protects against alleged adverse action which does not rise to the level of an ultimate employment decision, while § 704(a)'s protection is limited to only ultimate employment decisions.” Cude & Steger, \textit{supra} note 26, at 399. Section 703(a) extends to any discrimination “that ‘would tend to deprive an individual of employment opportunities.” \textit{Id.} (quoting 42 U.S.C. § 2000e-2(a)(2) (1994)).

\textsuperscript{206} Essary & Friedman, \textit{supra} note 16, at 135 (quoting Mattern, 104 F.3d at 708).

\textsuperscript{207} \textit{See supra} notes 3-7 and accompanying text (discussing the extent of liability imposed on employers when supervisors harass employees).
Consistent with the rules promulgated in *Burlington*\(^{208}\) and *Faragher*\(^{209}\) the employer’s failure to address the retaliation will likely be actionable when a supervisor is responsible for the retaliation. In that instance, the action of the supervisor, if sufficiently high in the organization, may be deemed that of the employer and it will be the retaliatory *action* rather than failing to address such behavior for which the employer will be found responsible. The Eighth Circuit has held:

[W]here a supervisory employee has the power to hire, fire, demote, transfer, suspend, or investigate, and is also shown to have used that authority to retaliate for the filing of a complaint, the plaintiff need not prove that the employer participated in or knew or should have known of the retaliatory conduct.\(^{210}\)

Even then, the employee would have to establish that the employer used those supervisory powers to retaliate against her.

When co-workers commit retaliatory conduct, the rationale for extending liability that exists with supervisors fails; the courts must then analyze whether the failure of the employer to take action can be deemed retaliatory conduct. The Fifth Circuit has held that “[h]ostility from fellow employees, having tools stolen, and resulting anxiety, without more, do not constitute ultimate employment decisions, and therefore are not the required adverse employment actions.”\(^{211}\) Likewise the Third Circuit has stated that “not everything that makes an employee unhappy qualifies as retaliation for ‘[o]therwise, minor and even trivial employment actions that “an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit.”’”\(^{212}\) Such minor workplace inconveniences created by co-workers may be inappropriate, but they are not sufficient to be deemed adverse employment actions.\(^{213}\)


\(^{210}\) *Lipman & Cain, supra* note 73, at 588 (citing *Cross v. Cleaver*, 142 F.3d 1059, 1074 (8th Cir. 1998)).

\(^{211}\) *Mattern*, 104 F.3d at 707.


\(^{213}\) *See id.*
Absent action by a supervisor with real power or consent or direction from an employer, co-worker retaliation does not rise to an ultimate employment decision that is necessary to satisfy the second prong of a prima facie retaliation case. The environment of a workplace prevents courts from finding this type of failure as being an actionable adverse employment decision. Although ostracism and other actions of co-workers may create an unpleasant environment that people should not have to work in, the employer cannot be held responsible for that environment.

The Tenth Circuit, citing language used by the Supreme Court in *Faragher*, implied that an employer's failure to address this type of retaliatory conduct would not be prohibited by section 704: "We doubt that the few actions identifiably taken by co-workers, which generally seem to involve incidents of rudeness, are sufficient to support a claim for retaliation, given that Title VII neither is a 'general civility code' nor does it make actionable the 'ordinary tribulations of the workplace.'"214 This sentiment echoed a prior decision of the First Circuit that "the 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."215 Absent a finding of a materially adverse employment action, the court could not find the employer liable.216

In *Scusa v. Nestle U.S.A. Co.*,217 the court held that there was no adverse employment action when the plaintiff's only claim of retaliation was that her co-workers shunned her218 by keying her car, slamming doors and making rude comments.219 Not all courts are in agreement that the plaintiff in *Scusa* has not established a claim. The Third Circuit, in a case dealing with racial harassment, held that an employer's failure to respond to an atmosphere of harassment following an employee's protected activity may permit inference that the employer himself participated in the harassment and thus engaged in the retaliatory conduct.220

Many courts have extended liability to employers for failing to address the actions of employees only when the actions of the

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216. See id. at 726.
217. 181 F.3d 958 (8th Cir. 1999).
218. Id. at 969-70.
219. Id. at 961-62.
co-workers are severe.\textsuperscript{221} Even when the conduct of the workers is severe, courts may still limit an employer's liability for retaliatory conduct by co-workers to situations in which its supervisory personnel orchestrated or knew about and acquiesced in the harassment.\textsuperscript{222} As the Second Circuit stated in \textit{Richardson v. New York State Correctional Service}:\textsuperscript{223}

\begin{quote}
Just as an employer will be liable in negligence for a... sexually hostile work environment... if the employer knows about... that harassment but fails to take appropriately remedial action... so too will an employer be held accountable for allowing retaliatory co-worker harassment to occur if it knows about that harassment but fails to act to stop it.\textsuperscript{224}
\end{quote}

When the retaliatory conduct of an employee's co-workers is not brought to a supervisor's or manager's attention, it seems difficult to argue that the employer has taken any action that would justify a judgment against the company.

\textbf{CONCLUSION}

Although the Supreme Court made clear in its decisions in \textit{Burlington} and \textit{Faragher} that companies will be held liable for certain acts of supervisors, the Court has yet to address employer responsibility for retaliatory acts of its non-supervisory employees. The Court also has not addressed the disparity in the manner circuit courts define an adverse employment action necessary to support a claim of retaliation. Given the increase in retaliation claims and the overall volume of such claims, it is important that the Court define the standards of an employer's responsibility to police the workplace and specifically address the types of actions that can form the basis for a retaliation claim.

An employer's failure to address co-worker retaliation is not the type of behavior for which an employer should be responsible. Employers must be given some leeway to allow their employees to govern their own behavior, so long as that behavior is not discriminatory or dangerous.

\textsuperscript{221} See, e.g., Gunnell v. Utah Valley State Coll., 152 F.3d 1253, 1256 (10th Cir. 1998).
\textsuperscript{222} See id.
\textsuperscript{223} 180 F.3d 426 (2d Cir. 1999).
\textsuperscript{224} Id. at 446 (citations omitted).
Nonetheless, even if the Court determines that the actions of employees can be attributed to the employer or that employers should be directly liable in negligence for failing to respond, expanding liability to this extent would not advance the policy goals inherent in the anti-retaliation provision of Title VII. Section 704 is intended to prevent employers from retaliating against an employee who has exercised her rights provided by section 703. Applying the provision in situations of co-worker retaliatory harassment would simply create an unwarranted obligation for employers to strictly police the workforce. Limiting section 704 to actions of employers or supervisors, and instances in which the employer has orchestrated the co-worker retaliation, would still provide adequate protection; the section would retain ample prohibitions for an employee to feel secure in raising sexual harassment claims against her employer.

Moreover, this type of inaction is not an ultimate employment decision and, therefore, is not an adverse employment action that Title VII prohibits. Although it is unfortunate for any person to feel ostracized in the workplace, adverse employment actions should be limited to those that significantly impact the terms and conditions of employment. Finally, absent express encouragement or direction, there is no connection between an employee's protected activity and this type of failure on an employer's behalf.

Until the Court resolves these issues, employers must take special care to avoid liability for actions between employees. Absent clear standards, employers could potentially be liable for a wide range of retaliatory acts of their employers. To avoid liability, employers may have to carefully monitor all interactions and take special precaution to extend sexual harassment training to include education regarding retaliation.

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