

BURLINGTON NORTHERN & SANTA FE RAILWAY CO. v. WHITE: ARE PLAINTIFFS MORE SUCCESSFUL IN LITIGATING RETALIATION CLAIMS?

By

M. Alix Valenti*

ABSTRACT

Almost three years have passed since the Supreme Court rendered its landmark decision in *Burlington Northern & Santa Fe Railway Co. v. White*. Since then, numerous federal district courts and circuit courts of appeals have considered plaintiffs' retaliation claims under the standards set forth in that case. Initially, many commentators observed that claims against employers for illegal retaliation would increase and that plaintiffs would be more successful in collecting damages for retaliatory discrimination which adversely affected their employment. While the number of retaliation claims has increased, according to EEOC reports, a review of the cases does not indicate an overwhelming victory for plaintiffs. While the Supreme Court has expanded the definition of adverse employment action, courts continue to uphold summary judgments in favor of employers where the employment action was not material, where there is no causal link established between the protected activity and the employer's action, or where the employer can provide reasonable justification for its action. This article reviews several of those cases and suggests that employees still face a difficult challenge to prove retaliation.

In June, 2006, the U.S. Supreme Court issued its decision in *Burlington Northern & Santa Fe Railway Co., v. White*¹ addressing the issue of retaliation in discrimination actions. The case was significant for two reasons. First, it resolved a split in the circuits regarding the interpretation of the anti-retaliation statute under Title VII.² Second, it construed the anti-retaliation statute more liberally than the underlying antidiscrimination provision. After the Court's decision in *Burlington*, several commentators noted that an increase in employee claims involving retaliation could be expected given this pro-plaintiff decision, because the Court's standard was more favorable to plaintiffs than that previously adopted by many of the federal

*PhD, JD, LLM, Assistant Professor, University of Houston-Clear Lake. The author acknowledges the assistance of two students, Samantha Nguyen and Vidiya Goonie, in preparing this paper.

¹ 548 U.S. 53, 126 S. Ct. 2405 (2006) (hereinafter referred to as *Burlington*).

² See notes 5 through 8 and accompanying text *infra*.

courts of appeals.³ It was suggested that the position adopted by the Supreme Court would call into question a broader range of employer conduct that does not directly affect key employment decisions or conditions, and would make it more difficult for employers to defend against a claim of retaliation at the summary judgment stage of a case.⁴

In this note we review the case law involving retaliation claims both before and after *Burlington* to ascertain whether there has been a discernable change in judicial decisions as a result of the Court's holding. We first provide a brief overview of the retaliation statute and the *Burlington* case, and then examine specific employer actions which plaintiffs have alleged to be improper under the law. While the *Burlington* decision has opened some opportunities for employees to successfully argue that certain types of employer conduct amount to impermissible retaliation, it has not resulted in a major shift in favor of plaintiffs. This paper is not intended to provide statistical evidence to support this observation; rather it should be construed as a survey of case law interpreting and applying anti-retaliation statutes. Further, it is acknowledged that the impact of *Burlington* will vary among the circuits depending on their treatment of the cases pre-*Burlington*. This survey covers cases from all jurisdictions with some emphasis on the Fifth and Eighth Circuits which had applied a more restrictive standard. A discussion of the impact of *Burlington* follows the survey.

I. INTRODUCTION

Title VII forbids an employer to retaliate against an employee for complaining of employment discrimination prohibited by Title VII:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees ... 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

In order to present a prima facie case of retaliation a plaintiff must prove (1) that he engaged in protected activity under Title VII or another statute; (2) that the employer was aware of this activity; (3) that the employer took adverse action against the plaintiff; and (4) that a

³ Erwin Chemerinsky, *Workers Win in Retaliation Case*, 43 TRIAL 58 (January, 2007); Eileen Kaufman, *Other Civil Rights Decisions in the October 2005 Term: Title VII, IDEA, and Section 1981*, 22 TOURO L. REV. 1059 (2007); Ramona L. Paetzold, *Supreme Court's 2005-2006 Term Employment Law Cases: Do New Justices Imply New Directions?*, 10 EMP. RTS. & EMP. POL'Y J. 303 (2006). In a 2008 presentation, the EEOC reported that retaliation claims in 2007 amounted to over 30 percent of the total complaints filed with it, making retaliation second only to race as the most frequently filed charges. Suzanne M. Anderson, Supervisory Trial Attorney, EEOC, Address at the South Texas College of Law Employment Law Conference (July 25-26, 2008).

⁴ Emily White, *Burlington Northern & Santa Fe Railway Co. v. White: The Supreme Court Bolsters Worker Protections by Setting Broad Retaliation Test*, 27 BERKELEY J. EMP. & LAB. L. 530 (2006).

⁵ 42 U.S.C. § 2000e-3(a) (2000).

causal connection exists between the protected activity and the adverse action, i.e., that a retaliatory motive played a part in the adverse employment action.⁶

In determining whether the plaintiff met his burden of proof with respect to the third requirement, several circuit courts of appeals looked to whether the plaintiff suffered “a materially adverse change in h[is] employment status” or in the terms and conditions of his employment.⁷ Employment actions that have been deemed sufficiently disadvantageous to constitute an adverse employment action included termination of employment, demotion, decrease in wage or salary, material loss of benefits, or significantly diminished material responsibilities.⁸

In *Burlington Northern & Santa Fe Railway Co. v. White*,⁹ the Supreme Court announced a different standard. The *Burlington* Court ruled that “the anti-retaliation provision [of Title VII],

⁶ *Cifra v. G.E. Co.*, 252 F.3d 205, 216 (2nd Cir. 2001); *McNairn v. Sullivan*, 929 F.2d 974, 980 (4th Cir. 1991); *Archuleta v. Colo. Dep’t of Insts., Div. of Youth Servs.*, 936 F.2d 483, 486 (10th Cir. 1991); *Smalley v. City of Eatonville*, 640 F.2d 765, 769 (5th Cir. 1981).

⁷ *E.g.*, *Williams v. R.H. Donnelley, Corp.*, 368 F.3d 123, 126 (2d Cir. 2004); *Burlington N. & Santa Fe Ry. Co., v. White*, 364 F.2d 789, 795 (6th Cir. 2004) (en banc); *Von Gunten v. Maryland*, 243 F.3d 858, 866 (4th Cir. 2001); *Robinson v. Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir. 1997). The Fifth and Eighth Circuits required that the employer’s action related to an ultimate employment decision, such as hiring, firing, promotion, demotion, or compensation. *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997); *Manning v. Metro. Life Ins. Co.*, 127 F.3d 686, 692 (8th Cir. 1997). At least one district court in the Fourth Circuit also applied the “ultimate employment standard to retaliation cases. *Raley v. Bd. of St. Mary’s County Comm’rs*, 752 F. Supp. 1272, 1278 (D. Md. 1990) (citing *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981) (a Title VII discrimination case)). The Tenth Circuit required that conduct must constitute “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. *Aquilino v. Univ. of Kansas*, 268 F.3d 930 (10th Cir. 2001) (citing *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998)). The Tenth Circuit recognized that a plaintiff need not be successful on an original charge of discrimination in order to have a valid claim of retaliation. *See Romero v. Union Pacific Railroad*, 615 F.2d 1303, 1307 (10th Cir. 1980). The Seventh and DC Circuits had applied a standard similar to that ultimately adopted by the Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 126 S. Ct. 2405 (2006). *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C.C. 2006); *Washington v. Illinois Dep’t of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005), while the Ninth Circuit adopted a broader standard based on EEOC guidelines, suggesting that the action must be sufficient to deter a reasonable employee from filing a charge. *Ray v. Henderson*, 217 F.3d 1234, 1242-43 (9th Cir. 2000). The Eleventh Circuit also applied a “reasonable person” test: whether a reasonable person would consider the action adverse. *Doe v. Dekalb County Sch. Dist.*, 145 F.3d 1441, 1449 (11th Cir. 1998).

⁸ *Galabya v. N.Y.C. Bd. of Educ.*, 202 F.3d 636 (2d Cir. 2000). The court stated that a materially adverse change must be “more disruptive than mere inconvenience or an alteration of job responsibilities,” and can include, for example, “termination of employment, a demotion accompanied by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices . . . unique to a particular situation.” *Id.* at 640.

⁹ 548 U.S. 53, 126 S. Ct. 2405 (2006). In *Burlington*, the plaintiff had been hired by the defendant *Burlington* as a railroad “track laborer,” a job that entailed removing and replacing track components, transporting track material, cutting brush, and clearing litter and cargo spillage from the right-of-way. Some aspects of the job involved operation of a forklift, and while she also performed some of the other track laborer chores, operation of the forklift became her primary responsibility. After she complained to

unlike [Title VII's] substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment.”¹⁰ Rather, to prevail on a claim for retaliation under Title VII, “a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means that it might have dissuaded a reasonable worker from making or supporting a charge of discrimination.”¹¹ The Court noted the difference between the language of Title VII's substantive prohibition, which refers expressly to an employee's “compensation, terms, conditions, or privileges of employment,” and the language of its retaliation prohibition, which contains no such reference.¹² Observing that Title VII's primary goal is to promote “a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status,” the Court pointed out that “[t]he anti-retaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees.”¹³ In addition, the Court adopted a broad stance in its interpretation of the anti-retaliation statute, holding that it provides a remedy for an expansive range of retaliation, including actions that may well occur outside the work environment.¹⁴

By distinguishing Title VII's anti-discrimination and anti-retaliation sections, the Court established the definition of retaliation as any action which could create a chilling effect such that a rational worker wishing to file a complaint against her employer would be dissuaded from doing so. The Court's focus on the deterrent effect of employer actions, rather than on the actions themselves, creates an issue of fact in most retaliation actions because the question now turns on whether, under the particular circumstances, a reasonable employee would have been deterred by the employer's actions.¹⁵ The subjective nature of the inquiry which must examine the context of the action has the potential to create uncertainty and inconsistencies among courts interpreting the ruling. As pointed out by Justice Alito in his concurring opinion, under the majority's test, employer conduct is not actionable unless it is so severe as to dissuade a reasonable employee from making or supporting a charge of discrimination; depending on the nature of the underlying

Burlington officials about sexual harassment by her male supervisor, however, White was relieved of forklift duty and assigned to perform only other track laborer tasks. White sued, asserting a claim of retaliation. The Supreme Court determined that the change of duties, together with a temporary suspension was an adverse employment action under its ruling.

¹⁰ *Id.* at 2412-13.

¹¹ *Id.* at 2415.

¹² *Id.* at 2411.

¹³ *Id.* at 2412.

¹⁴ *Id.* Previous cases had recognized that the anti-retaliation statute could extend beyond incidents within the work environment when the alleged retaliation involved acts against a former employee. *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986 (10th Cir. 1996); *Beckham v. Grand Affair, Inc. of N.C.*, 671 F. Supp. 415, 419 (W.D.N.C. 1987). In *McKenzie v. Atl. Richfield Co.*, 906 F. Supp. 572 (D. Colo. 1995), the court held that a person who is discriminated against because of his spouse's protected activity may maintain the action. *Id.* at 575. Similarly, an employee can claim retaliation if it is proven that he was terminated because he complained of sex discrimination, even though he was not the target of the discrimination. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005).

¹⁵ Aida M. Alaka, *The Supreme Court Lowers the Bar on Unlawful Retaliation Claims in Burlington Northern & Santa Fe Railway Co. v. White*, 76 J. KAN. B.A. 19 (2007).

discrimination, an employer may be able to engage in relatively severe retaliation without incurring liability, noted Justice Alito.¹⁶ Thus, he concluded that the Court's standard has no basis in the statutory language and will lead to practical problems.¹⁷

After *Burlington* was decided, many circuit courts of appeal vacated previously granted summary judgments to employers, and remanded the cases back to the district courts for further proceedings in line with the *Burlington* decision.¹⁸ The Supreme Court also reversed and remanded decisions pursuant to *Burlington*.¹⁹ In light of the new standard announced by the Court and its case-by-case approach to resolving questions of retaliation, it is useful to investigate specific employer actions to determine whether they constitute retaliation and are therefore actionable under the law.²⁰

II. REASSIGNMENT

Transfer or reassignment of duties clearly falls within the ambit of *Burlington* as that was the retaliatory action before the Court. However, the Court cautioned that "reassignment of job duties is not automatically actionable,"²¹ and that the standard for assessing such a reassignment is an objective, rather than a subjective, one.²² "Whether a particular reassignment is materially

¹⁶ 126 S. Ct. at 2420.

¹⁷ *Id.* at 2418.

¹⁸ *E.g.*, *Holloway v. Dep't of Veterans Affairs*, 244 F. App'x 566 (5th Cir. 2007); *Lee v. Dep't of Veterans Affairs*, 247 F. App'x 472 (5th Cir. 2007); *Clemons v. Ala. Dep't of Human Res.*, 201 F. App'x 715 (11th Cir. 2006). The Fifth Circuit, which had previously adopted the stricter "ultimate employment decision" rejected by the Court, vacated the district court's summary judgment award and remanded the case for further action where the plaintiff, a physical education teacher, alleged the following acts of retaliation: (1) reassignment to two working offices with no increase in compensation; (2) forcing her to work both in an unpleasant office and outdoors; (3) removing certain students from her teams; (4) removing certain privileges; (5) preventing weekly practices and community outings with students; (6) denying access to files; (7) excluding her from social activities; and (8) denying her request for a transfer to a higher paying position. *Easterling v. Sch. Bd. of Concordia Parish*, 196 F. App'x 251, 252 (5th Cir. 2006).

¹⁹ *See James v. Metro. Gov't of Nashville*, 549 U.S. 801 (2006).

²⁰ The discussion herein is not intended to be an exhaustive review of the types of employment actions that may be deemed retaliatory. Retaliation can take many different forms. For example, in *United States v. N.Y.C. Transit Auth.*, 97 F.3d 672 (2d Cir. 1996), the EEOC alleged that the employer's policy of referring all employment discrimination charges to the agency's legal department rather than its EEOC division was "intended to deny [its employees] the full exercise of [their] rights" under Title VII. *Id.* at 676. The court rejected this argument, noting that an employer has latitude in deciding how to handle and respond to discrimination claims, even though differences in strategies and approaches may result in differences in treatment. The court also noted that the Transit Authority's policy did not affect the employees' work, working conditions, or compensation. *Id.* at 677. Thus the policy was not retaliatory.

²¹ 126 S. Ct. at 2417.

²² *Id.* at 2415.

adverse depends upon the circumstances of the particular case, and should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances."²³

Before *Burlington*, courts generally determined the issue of illegal retaliation based on whether the transfer or reassignment caused changes in the employee's salary, benefits, or opportunity for promotion.²⁴ The Second Circuit applied a less restrictive standard, holding that an internal transfer could be an adverse employment action if "accompanied by a negative change in the terms and conditions of employment."²⁵ Despite this standard, a number of pre-*Burlington* cases found that adverse job action could be established even when a lateral move did not reduce salary, hours, job benefits or seniority or increased workloads.²⁶ As noted in *Collins v. Illinois*,²⁷ "[o]ne does not have to be an employment expert to know that an employer can make an employee's job undesirable or even unbearable without money or benefits ever entering into the picture."²⁸ Thus, an adverse job impact may occur if the plaintiff is moved to an undesirable location,²⁹ if the plaintiff is transferred to an isolated area,³⁰ or if the plaintiff is forced to move her personal files and is prohibited from using firm supplies and support services.³¹ Repeated relocations to offices, including one described as a storage space with no windows or air-conditioning, together with reduction in job responsibilities and accusations of misconduct,

²³ *Id.* at 2417.

²⁴ *James v. Booz-Allen & Hamilton*, 368 F.3d 371 (4th Cir. 2004); *Robertson v. LSU Med. Ctr.* 54 F. App'x 591 (5th Cir. 2002); *Kocsis v. Multi-Care Mgmt., Inc.* 97 F.3d 876 (6th Cir. 1996).

²⁵ *Morris v. Lindau*, 196 F.3d 102, 113 (2d Cir. 1999). However, a mere change in job title without any changes in duties, compensation, benefits, or reporting structure was not an adverse employment action. *Mitchell v. Am. Online, Inc.*, 286 F. Supp. 2d 325, 327 (S.D.N.Y. 2003).

²⁶ *E.g.*, *St. John v. Employment Dev. Dep't*, 642 F.2d 273, 274 (9th Cir. 1981); *Harris v. Richards Mfg. Co.*, 511 F. Supp. 1193, 1203 (W.D. Tenn. 1981), *aff'd in part, rev'd in part*, 675 F.2d 811 (6th Cir. 1982). In *Harris*, the court noted that the plaintiff had been "shunted off to an isolated corner in retaliation for her filing of discrimination complaints against the company. The transfer was not temporary but appeared to be permanent, and was an intolerable move in that it demoted the plaintiff, a high seniority employee, from a highly technical and skilled job in hygienic surroundings to an unskilled, eyeball inspection of dirty and greasy in-process orthopedic goods in an isolated area of the plant." Cases where the Title VII claim is based on reassignment or relocation have also recognized that an adverse job impact can result even if there is no reduction in salary or benefits. *E.g.*, *Rodriguez v. Bd. of Educ. of Eastchester Union Free Sch. Dist.*, 620 F.2d 362, 364-66 (2d Cir. 1980); *Goodwin v. Circuit Ct. of St. Louis County*, 729 F.2d 541, 550 (8th Cir. 1984).

²⁷ 830 F.2d 692 (7th Cir. 1987). The court noted that the relative burdens for proving a retaliation claim is the same as those needed for proving a race discrimination claim. *Id.* at 792. The court held that the loss of personal office, telephone, business cards and listings in professional publications was sufficient to support jury's verdict finding retaliation.

²⁸ *Id.* at 703. Although the reassignment did not involve a reduction in pay or benefits, it was essentially demeaning. *Id.*

²⁹ *Trout v. Hildago*, 517 F. Supp. 873, 890-91 (D.D.C. 1981), *aff'd in part, rev'd in part sub nom.*, *Trout v. Lehman*, 702 F.2d 1095 (D.C. Cir. 1983), *vacated on other grounds*, 465 U.S. 1056 (1984).

³⁰ *Harris v. Richards Mfg. Co.*, 511 F. Supp. 1193, 1203 (W.D. Tenn. 1981), *aff'd in part, rev'd in part*, 675 F.2d 811 (6th Cir. 1982).

³¹ *Commonwealth v. Thorp, Reed & Armstrong*, 25 Pa. Commw. 295, 361 A.2d 497, 502 (1976) (applying a state law similar to Title VII).

“amount to more than just inconveniences or small disruptions.”³² When the employer is able to present credible evidence explaining its reason for the employee’s transfer, however, no impermissible retaliation will be found.³³

Under the *Burlington* standard, reassignment to a new position may be considered materially adverse where the new job involved significantly more difficult duties.³⁴ A change in schedule requiring the plaintiff to be on call throughout the night while continuing to work his regular work shift between 8:00am and 4:00 pm was sufficient, together with other adverse actions such as delays in processing a commendation and verbal remarks referring to those who filed EEOC charges as “complainers”.³⁵ Equally adverse is the situation in which the transfer involves a decrease in managerial responsibilities. In *Kessler v. Westchester County Department of Social Services*,³⁶ even though the plaintiff retained his title, reassignment to a new location in which the plaintiff no longer had managerial duties and was not even allowed to attend management meetings, coupled with his new tasks being clerical in nature and his new supervisor having the same pay grade as his, was sufficient under the *Burlington* standard. Similarly, in *Fuentes v. Postmaster General of United States Postal Service*,³⁷ the Fifth Circuit held that the plaintiff established a prima facie case of discrimination because she was no longer responsible for supervising or managing employees, and although her pay grade was unaffected, she became ineligible for merit-based “spot awards.” Conversely, in *deJesus v. Potter*,³⁸ the court held that the exclusion of the plaintiff from managerial decisions or a realignment which changed her supervisory authority over two employees did not amount to an adverse action because she continued to maintain her day-to-day supervisory duties and the status quo remained. Only a dramatic decrease in supervisory authority would constitute an adverse action.³⁹

³² *Demoret v. Zegarelli*, 361 F. Supp. 2d 193, 203 (S.D.N.Y. 2005), *aff’d in part, rev’d in part*, 451 F.3d 140 (2d Cir. 2006).

³³ *Sauers v. Salt Lake County*, 1 F.3d 1122, 1128-29 (10th Cir. 1993). The court noted that evidence was introduced that the plaintiff’s supervisor sought the reassignment four to six weeks before it occurred, that reassignment would save the plaintiff’s job, and that a backlog existed at the new location creating a need for assistance. *Id.* at 1128.

³⁴ *Roulette v. Chao*, No. 03-00824, 2007 WL 437678 at *3 (D. Colo., Feb 6, 2007). In *Roulette*, the plaintiff was reassigned to a job whereby the plaintiff would be responsible for a problem caseload that had been neglected for over a year by the employee previously responsible for the caseload. The court found that this would amount to more arduous duties and therefore constitute a materially adverse action.

³⁵ *Austion v. City of Clarksville*, 244 F. App’x 639, 652-53 (6th Cir. 2007).

³⁶ 461 F.3d 199, 209-210 (2d Cir. 2006). *Kessler* involved a claim under ADEA which contains a nearly identical provision prohibiting retaliation for complaining of employment discrimination on the basis of age, *see* 29 U.S.C. § 623(a) (2000), and the same standards and burdens apply to claims under both statutes, *see, e.g.*, *Terry v. Ashcroft*, 336 F.3d 128, 141 (2d Cir. 2003).

³⁷ 282 F. App’x 296, 303 (5th Cir. 2008). The court nevertheless upheld that award of summary judgment for the defendant based on its justification for not allowing the plaintiff to return to her managerial job after a disability.

³⁸ 211 F. App’x 5 (1st Cir. 2006).

³⁹ *Id.* at 10.

A perceived loss of prestige caused by the reassignment or relocation, however, is not sufficient to constitute an adverse employment action. The new position must result in a qualitatively more difficult or less desirable position.⁴⁰ In *Csicsmann v. Sallada*,⁴¹ the plaintiff alleged that on his return from FMLA leave, his new position after the leave was less prestigious than his former position and failure to restore him to an equivalent position constituted a materially adverse action.⁴² While certain aspects of the new job may have been different, where the terms and conditions of employment were the same, the court did not find an adverse employment action. The plaintiff failed to show any material harm other than his preference for his previous position.⁴³ Similarly, in *James v. Metropolitan Government of Nashville*,⁴⁴ a lateral transfer, poor performance evaluations, and imposing work quotas after filing EEOC charges were not sufficient to establish retaliation. The court stated that none of these affected the plaintiff's personal advancement and that she continued to receive the same pay. Further her evaluations were poor even before the charges were filed and evidently did not affect her earnings.⁴⁵ Thus the state's action would not have dissuaded a reasonable person from filing a Title VII claim.

⁴⁰ *Higgins v. Gonzales*, 481 F.3d 578, 587 (8th Cir. 2007).

⁴¹ No. 05-2087, 2006 WL 3611729 (4th Cir. Dec. 12, 2006)

⁴² FMLA contains an anti-retaliation section comparable to that in Title VII as follows:

(a) Interference with rights

(1) Exercise of rights

It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

(2) Discrimination

It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.

(b) Interference with proceedings or inquiries

It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual--

(1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this subchapter;

(2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this subchapter; or

(3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this subchapter.

29 U.S.C. § 2615 (2000).

The court stated that its analysis of a retaliation claim under FMLA is similar to that under Title VII and *Burlington* applies.

⁴³ 2006 WL 3611729 at *4. The court specifically examined the *Burlington* Court's analysis, 126 S. Ct. at 2412-2415, and concluded that the alleged adverse action must still be material and this is a heavy burden for the plaintiff to prove.

⁴⁴ 243 F. App'x 74 (6th Cir. 2007).

⁴⁵ *Id.* at 79.

Where the reassignment to a job that was objectively less prestigious, the courts may find a material adverse action. In *Billings v. Town of Grafton*,⁴⁶ the First Circuit noted that the plaintiff, in her new job, reported to a lower ranked supervisor, enjoyed less contact with the board and members of the public, and the job itself required less experience and fewer qualifications; this was sufficient to dissuade a reasonable person from filing a complaint. The new position also required the plaintiff to pay union dues and punch a time card, and subjected her to union associated mechanisms such as grievance procedures and collective bargaining.⁴⁷ The Eighth Circuit also recognized that a transfer to objectively less prestigious job could dissuade a reasonable employee from complaining about discrimination.⁴⁸ Before the court were five situations where employees were reassigned shortly after filing racial discrimination cases. While each case was somewhat different, the district court found that each transfer resulted in a loss of status and responsibility and was sufficient to make a claim of discrimination.⁴⁹

A shift transfer may also constitute an adverse employment action if it would require the plaintiff to incur additional costs to work the new shift.⁵⁰ However, a change in shift which does not involve differences in pay or benefits or more difficult work will not be actionable even if it

⁴⁶ 515 F.3d 39 (1st Cir. 2008).

⁴⁷ *Id.* at 53-54.

⁴⁸ *Betton v. St. Louis County, Mo.*, No. 4:05-CV-1455, 2007 WL 433259 (E.D. Mo. February 05, 2007), *rev'd*, 307 F. App'x 27 (8th Cir. 2009). In *Betton*, the district court found that the plaintiffs made out a prima facie case of retaliation based on the reassignments, but nevertheless awarded summary judgment for the defendant based on its explanation of its decision to reassign plaintiffs. The Eighth Circuit reversed holding that a question of fact existed whether the employer's proffered explanation was pretext.

⁴⁹ 2007 WL 433259 at *4-5. One of the plaintiffs was transferred to a job where her duties were to make copies of deeds, staple them, and put them into the proper folder. The court noted that even though she worked in the same location and received the same benefits, the transfer resulted in a loss of status and responsibility. Another plaintiff was transferred to a "runner" position where she had to run errands for other employees and was moved to an undesirable desk next to the office equipment. Her testimony that coworkers looked down upon her new, and relatively marginal, responsibilities, was sufficient to make a case for retaliation, said the court. A third plaintiff was reassigned to a job where her duties included stuffing envelopes, answering phones, and filling out forms. The court noted that: "[s]tuffing envelopes, like copying, is a duty that most employees with years of experience in data entry would find a humiliating demotion if it became their primary duty." *Id.* at *5.

⁵⁰ *Washington v. Illinois Dep't of Rev.*, 420 F.3d 658, 663-64 (7th Cir. 2005). Although *Washington* was decided before *Burlington*, the Seventh Circuit had applied the standard ultimately adopted by the Supreme Court. Interestingly, the court examined the shift transfer as how it would specifically affect the plaintiff, rather than a "reasonable employee." While the court noted that removing flexible hours would not materially affect "a normal employee," the court found that the plaintiff "was not a normal employee, [and her employer] knew it." Her son's medical condition created a vulnerability making regular hours "a materially adverse change for her, even though it would not have been for 99% of the staff" and therefore caused a significant (and hence an actionable) loss. *Id.* at 662. The *Burlington* Court cited *Washington* as an example when the "significance of any given act of retaliation will often depend upon the particular circumstances. Context matters." 126 S. Ct. at 2415.

is less desirable or less convenient for the plaintiff.⁵¹ Even when a transfer to a new relocation required a longer commute, the Third Circuit ruled in favor the employer.⁵² A plaintiff's claim that a transfer to a different crew caused loss of overtime and therefore a decrease in pay is sufficient to generate a material issue of fact; however, the plaintiff must present credible evidence comparing the number of hours worked by each crew.⁵³

Denial of a transfer will not be considered an adverse employment action if the requested job did not involve greater pay, prestige or advancement opportunities.⁵⁴ Further, the plaintiff must present some evidence that the job requested in the transfer was objectively preferable in terms of pay, work load, or benefits, beyond a subjective desire for the position.⁵⁵ Applying *Burlington*, a district court in Florida held that a reasonable person would not have found the denial of the request to transfer to be materially adverse.⁵⁶ Unlike *Burlington*, the responsibilities of the two positions at issue in this case were almost identical, noted the court. The only differences of record between the two positions were that (1) the requested position was indoors where there is heat and air conditioning, (2) the requested position began work earlier in the day than the plaintiff's position; and (3) the requested position handled customer complaints.⁵⁷ The requested position did not entitle plaintiff to greater pay or greater prestige. Additionally, the evidence did not demonstrate that such transfer would result in greater opportunities for advancement. Simply put, said the court, a reasonable person, when viewing the record before the court, would not find that the denial of a request to transfer was materially adverse.⁵⁸

Denial of a transfer to light duty for temporary medical disabilities may be materially adverse, under certain circumstances. The Fifth Circuit considered a plaintiff's claim that an employer's denial of a transfer to a light duty assignment to accommodate a disability was retaliation, but held that the plaintiff must prove that his circumstances were similar to those of employees who received light-duty assignments.⁵⁹ In addition, the plaintiff must be able to show that a vacancy was available.⁶⁰ However, a denial of a plaintiff's request to work part-time before she exhausted her FMLA leave, preventing her from earning income on a part-time basis

⁵¹ *McGowan v. City of Eufala*, 472 F.3d 736, 747 (10th Cir. 2006); *Thomas v. Potter*, 202 F. App'x 118, 119 (7th Cir. 2006). This analysis is the same as under pre-*Burlington* decisions. *E.g.*, *Demars v. O'Flynn*, 287 F. Supp. 2d 230, 246 (W.D.N.Y. 2003).

⁵² *DiCampli v. Korman Communities*, 257 F. App'x 497 (3rd Cir. 2007).

⁵³ *Pastula v. Lane Constr. Corp.*, No. 05-133-B-W, 2006 WL 2925239 at *12 (D. Me. Oct. 11, 2006).

⁵⁴ *Reis v. Universal City Devel. Ptrs., Ltd.*, 442 F. Supp. 2d 1238 (M.D. Fla. 2006). *Reis* involved a discrimination and retaliation claims in violation of the ADA, and the Florida Civil Rights Act, and were analyzed under the same framework that courts employ for retaliation claims arising under Title VII. *Stewart v. Happy Herman's Cheshire Bridge, Inc.* 117 F.3d 1278 (11th Cir. 1997).

⁵⁵ *Semsroth v. City of Wichita*, 555 F.3d 1182, 1185 (10th Cir. 2009).

⁵⁶ *Reis v. Universal City Devel. Ptrs., Ltd.*, 442 F. Supp. 2d 1238 (M.D. Fla. 2006).

⁵⁷ *Id.* at 1253.

⁵⁸ *Id.* at 1254.

⁵⁹ *Ajao v. Bed Bath and Beyond, Inc.*, 265 F. App'x 258, 265 (5th Cir. 2008).

⁶⁰ *Id.* at 264; *Novak v. Nicholson*, 231 F. App'x 489, 495 (7th Cir. 2007).

and causing her to exhaust her FMLA leave sooner, was found to be an adverse employment action.⁶¹ The denial caused her to lose both salary and benefits, which would dissuade a reasonable worker from making or supporting a charge of discrimination, noted the court.⁶² Failure to select the plaintiff as “a replacement leader” for a therapy group when the regular leader was not available did not meet the *Burlington* standard, especially since the plaintiff continued to fulfill her previously assigned group therapy leadership responsibilities.⁶³

In a somewhat related case pertaining to staffing decisions, the court noted that actions that do not affect a plaintiff individually are not likely to be considered adverse employment actions. The reversal of a hiring recommendation and loss of a lecturer’s position was not determined to be an adverse action because the decision reversed that of the entire search committee; the plaintiffs were not individually affected.⁶⁴ Further, the removal of a temporary position affected the entire department not just the plaintiffs.⁶⁵

Burlington makes it clear that transfers and reassignments can constitute adverse employment actions. However, to be successful, the courts have been fairly consistent in requiring a showing that the reassignment resulted in some tangible loss of benefits or a significant change in work responsibilities. It is likely that the decisions reached would have been the same under pre-*Burlington* application of the law in most circuits other than those which employed the “ultimate employment decision” standard, and perhaps even in those courts if the transfer or reassignment resulted in a pay decrease or *de facto* demotion.

III. FAILURE TO PROMOTE

Failure to promote could constitute an ultimate employment decision even under the strict interpretation given by the Fifth and Eighth Circuits, which included any action against an employee relating to “hiring, granting leave, discharging, promoting, and compensating.”⁶⁶ Similarly, under the Second Circuit’s construction, an adverse employment action included “discharge, refusal to hire, refusal to promote, demotion, reduction in pay, and reprimand.”⁶⁷ Nevertheless, a decision not to promote a plaintiff was not considered to be retaliation if the decision did not involve denial of an increase in salary, benefits, or other tangible factors. For example, the denial of tenure will not be considered an adverse employment action because it did

⁶¹ *Mickelson v. N.Y. Life Ins. Co.*, 460 F.3d 1304, 1316 (10th Cir. 2006).

⁶² *Id.* at 1316.

⁶³ *Chamberlin v. Principi*, 247 F. App’x 251, 254 (2d Cir. 2007).

⁶⁴ *Somoza v. Univ. of Denver*, 513 F.3d 1206, 1218 (10th Cir. 2008).

⁶⁵ *Id.*

⁶⁶ *Dollis v. Rubin*, 77 F.3d 777, 782 (5th Cir. 1995) (citing *Page v. Bolger*, 645 F.3d 227, 233 (4th Cir. 1981) (en banc)).

⁶⁷ *Morris v. Lindau*, 196 F.3d 102, 110 (2d Cir. 1999). The Sixth Circuit also noted in *Jeffries v. Wal-Mart Stores, Inc.*, 15 F. App’x 252 (6th Cir. 2001), that “Wal-Mart has not argued, nor can it, that failure to promote someone because of her protected activities will not constitute an adverse employment action.” *Id.* at 262.

not alter the plaintiff's terms and conditions of employment and the plaintiff could not show that it harmed her future employment opportunities.⁶⁸ Even if the new position would have provided the plaintiff with additional benefits, a subjective feeling that her denial of a promotion was related to her EEOC charge is not sufficient to establish retaliation without a showing that she was treated differently from other employees or that similarly situated employees were in fact promoted at the time of the plaintiff's employment.⁶⁹

In addition the plaintiff must be able to show that the promotion decision can be traced to the same decision makers involved in the EEOC claim or other protected activity. If the decision maker under consideration was involved in the promotion decision in only some non-discretionary manner, for example, responsible for forwarding salary information, the court would conclude that he was not the decision-maker.⁷⁰ If, on the other hand, his participation in the promotion process was more significant, for example, if he had the discretion to select those candidates suitable for promotion, then the court could find that "he had the opportunity to impose any discriminatory or retaliatory animus he harbors."⁷¹

The *Burlington* decision does not appear to have impacted the analysis of retaliation claims based on a failure to promote. In *Zelnik v. Fashion Institute of Technology*,⁷² the plaintiff filed a claim under 42 U.S.C. § 1983 alleging violations of his First Amendment rights. The defendants conceded that the plaintiff's speech related to a matter of public concern and that the decision not to grant him emeritus status was linked to his speech. The Second Circuit applied the standard set forth in *Burlington* to First Amendment retaliation claims and held that decision not to grant emeritus status was not an adverse action because the benefits of such status carry little or no value and their deprivation is considered de minimis. The plaintiff's statement that the title carries with it things of intangible value such as prestige, status, and respect were merely conclusory statements. Further the decision is highly discretionary. Moreover, while plaintiffs may be able to present prima facie case, courts will reject the plaintiff's claim if (1) the defendant can offer legitimate reasons for not promoting, and (2) the plaintiff cannot show that the proffered reason is pretextual. Evidence of a poor disciplinary record, the existence of better qualified applicants, and the fact that no other employee was treated more favorably are

⁶⁸ *Aquilino v. Univ. of Kansas*, 268 F.3d 930, 936 (10th Cir. 2001). The plaintiff must also be able to specify the position to which he or she expected to be promoted. *Kato v. Ishihara*, 239 F. Supp. 2d 359, 365 (S.D.N.Y. 2002), *aff'd*, 360 F.3d 106 (2d Cir. 2004).

⁶⁹ *Beaver v. Prudential Inc. Co. of Am.*, No. Civ. A 94-4181-Des, 1996 WL 109547 at *5 (D. Kan. Feb. 1, 1996). In *Ballou v. Univ. of Kan. Med. Ctr.*, Civ. A. No. 93-2524-GTV, 1995 WL 261981 at *6 (D. Kan. Apr. 7, 1995), the district court in Kansas articulated the standard that the plaintiff needs to prove that she was treated differently from other employees after filing her sexual harassment claim.

⁷⁰ *Malarkey v. Texaco, Inc.*, No. 81 Civ. 522, 1990 WL 241588 at *4 (S.D.N.Y. Dec. 28, 1991).

⁷¹ *Id.*

⁷² 464 F.3d 217 (2d Cir. 2006). In a case decided prior to *Burlington*, the Second Circuit held that summary judgment in favor of the employer was improper when the plaintiffs produced tangible evidence of a retaliatory motive: that the reason for his and another candidate's promotion denials was their filing of EEOC complaints. *Terry v. Ashcroft*, 336 F.3d 128, 141-42 (2d Cir. 2003).

legitimate reasons for denying the promotion.⁷³ Conversely, if the plaintiff can show that he or she met the basic requirements for the job, the burden shifts to the employer to explain its decision.⁷⁴

Since failure to promote an employee was generally considered an ultimate employment action by all circuits before *Burlington*, the Supreme Court's decision has not significantly altered courts' determinations in this context. Nevertheless, the employee must prove that the decision not to promote resulted or will result in a tangible loss of benefits or opportunities.

IV. DENIAL OF TRAINING OPPORTUNITIES

A denial of a request for training would not have been considered an "ultimate employment action" under the strict standards previously applied by the Fifth and Eighth Circuits.⁷⁵ However, after *Burlington*, rejecting a plaintiff for training could be considered an adverse employment action because it is implicit that a reasonable employee would find denial of training and other benefits to be materially adverse.⁷⁶ Some courts appear to impose a condition that the training must be required for future promotion opportunities.⁷⁷ *Hare v. Potter*⁷⁸ explains why denial of training amounts to a materially adverse action under *Burlington*. In this case the plaintiff had originally been selected to participate in a special career management program for promising employees. However, just four days after her senior manager suggested that she drop a sexual harassment claim against another employee, the senior manager decided not to send her to the training program. The court held that this action was materially adverse because the training was an "important stepping stone to advancement."⁷⁹ Further, the close temporal proximity of four days together with evidence that the manager expressly threatened her if she pursued her claim was sufficient to establish causality. The employer attempted to refute the claim by alleging that the plaintiff was at a grade level too low to be considered for the program, but evidence that another employee at the same level as the plaintiff was recommended for the program made the "asserted nonretaliatory reason unworthy of credence."⁸⁰ Similarly, where the

⁷³ *Allen v. Nat'l RR Passenger Corp.*, 228 F. App'x 144, 149-50 (3rd Cir. 2007). See notes 193 through 214 and accompanying text *infra* for a discussion of pretext.

⁷⁴ *Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87, 92 (2d Cir. 2001) ("all that is required is that the plaintiff establish basic eligibility for the position . . ."). See also *Jones v. HSBC Bank USA*, No. 00-CV-532A, 2004 WL 1563080 at *5 (W.D.N.Y. June 17, 2004).

⁷⁵ *Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir. 1995).

⁷⁶ *Beckham v. Nat'l RR Passenger Corp.*, 590 F. Supp. 2d 82, 87-88 (D.C. Cir. 2008).

⁷⁷ *Cain v. Potter*, No. 1:105 CV 2378, 2006 WL 3146435 at *4 (N.D. Ohio Oct. 31, 2006). In a case decided prior to *Burlington*, the defendant did not raise the issue of whether denial of training and overtime opportunities constituted an adverse employment action under Title VII. *Hummer v. Postmaster Gen. of U.S.*, 21 F. Supp. 2d 758 (W.D. Mich. 1998).

⁷⁸ 220 F. App'x 120 (3rd Cir. 2007).

⁷⁹ *Id.* at 129.

⁸⁰ *Id.* at 130.

plaintiff was able to show that denial of a training opportunity resulted in numerous adverse consequences, including being denied a transfer, being denied a promotional position, being disqualified from a preferable assignment, and a loss of thirty-two (32) hours overtime, the court held that a question of material fact clearly remained concerning whether the plaintiff's inability to receive training constituted an adverse employment action.⁸¹ If the defendant can show that the training opportunities denied to the plaintiff were not job-related to the plaintiff, no adverse employment action will be found.⁸²

The *Burlington* Court, in dicta, specifically noted that excluding an employee from a weekly training event that might enhance the employee's professional advancement could well deter a reasonable employee from complaining about discrimination.⁸³ Thus, while denial of a training opportunity probably would not have previously been considered an adverse employment action in many jurisdictions, *Burlington* has opened the issue for litigation as long as the employee can show that the denial would result in a disadvantage with respect to future employment advancement.

V. DISCIPLINARY ACTIONS/POOR PERFORMANCE REVIEWS/NEGATIVE JOB REFERENCES

Prior to *Burlington*, the courts generally held that a disciplinary action will not constitute an adverse employment action if the plaintiff was not able to show that the ramifications of the action would be serious or have materially changed his or her working conditions.⁸⁴ Harsh criticism of the plaintiff's work⁸⁵ or counseling by the employee's immediate supervisor⁸⁶ does not qualify as adverse action as such actions have intangible and indirect effects on an employee's status.⁸⁷ Ongoing documentation of performance problems, while creating an

⁸¹ *Kondas v. Potter*, No. 3:05-CV-1861, 2008 U.S. Dist. LEXIS 71959 *1 (M.D. Pa. Sept. 4, 2008), *aff'd*, 2009 U.S. App. LEXIS 13691 (3d Cir. June 24, 2009). The defendant's attorney had previously stated: "By denying [plaintiff] the opportunity to attend training, we are denying him full employment privileges, effectively limiting his employment opportunities, and in all likelihood, ultimately terminating his employment." 2008 U.S. Dist. LEXIS 71959 at *34.

⁸² *Jackson v. Geren*, No. 07-1063, 2008 U.S. Dist. LEXIS 64176 at *15 (E.D. Va. Aug. 19, 2008).

⁸³ 126 S. Ct. at 2415-16.

⁸⁴ *Weeks v. N.Y.S. Div. of Parole*, 273 F.3d 76, 85 (2d Cir. 2001). The court noted that the plaintiff could not describe the ramifications of the notice or whether it even was entered into her personnel file. *Id.*

⁸⁵ *Simmerman v. Hardee's Food Sys., Inc.*, No. Civ. A. 94-6906, 1996 WL 131948 at *14 (E.D. Pa. Mar. 22, 1996), *aff'd*, 118 F.3d 1578 (3d Cir. 1997).

⁸⁶ *McAllan v. Kerr*, No. 84 Civ. 0671 (TPG), 1990 WL 212958 at *2 (S.D.N.Y. Dec. 17, 1990), *aff'd*, 948 F.2d 1275 (2d Cir. 1991).

⁸⁷ *Lefevre v. Design Prof'l Ins., Cos.*, No. C-93-20720 RPA, 1994 WL 544430 *1 (N.D. Cal. Sept. 27, 1994). The court noted that "[e]ven indulging the dubious assumption that a verbal warning is an adverse employment action," the defendant never issued the planned verbal warning and its threat to issue poor performance evaluations never came to fruition. Similarly, defendant's statement that he would continue

uncomfortable working environment, will not constitute an adverse employment action if it did not affect the plaintiff's employment status.⁸⁸ Even a suspension or probation would not be considered an adverse employment action if it did not result in a denial of a merit increase or raise.⁸⁹ However, where the plaintiff was subjected to a pattern of disciplinary actions over a period of less than two years, several of which were subsequently found to be without merit, and almost all of which were subsequently found excessive, a triable issue exists whether such actions were retaliatory.⁹⁰ If written reprimands contain threats of immediate discharge, thus making the future loss of a job more likely, those reprimands could be used to chill employees' constitutionally protected rights and thus considered an adverse employment action.⁹¹

Subsequent to the *Burlington* decision, courts continue to hold that supervisor criticism of the plaintiff does not, without more, support a claim of retaliation. The Fifth Circuit ruled that receiving a reprimand is not retaliation because is not the type of action that would dissuade a reasonable worker from making or supporting a charge of discrimination.⁹² Similarly, written warnings are not considered adverse employment actions.⁹³ Further, if a written warning is insufficient to constitute adverse action, informal coaching remarks and comments in a personal log will not constitute adverse action under *Burlington*.⁹⁴ In order to be actionable, the disciplinary action must contain a threat of termination such that a reasonable worker would be dissuaded from making the charge of discrimination.⁹⁵ A written reprimand is an adverse employment action when it stated that the plaintiff "must never again make inappropriate comments," and warned that if she "violates any of the above [conditions], she will be

to "hammer" the plaintiff, though perhaps indicative of retaliatory animus, had no material bearing on her employment status. *Id.* at *2.

⁸⁸ *Horn v. Univ. of Minn.*, 362 F.3d 1042, 1046 (8th Cir. 2004).

⁸⁹ *Bumpers v. Harris County*, No. 05-577, 2006 WL 1030066 at *4 (S.D. Tex. Apr. 19, 2006).

⁹⁰ *Garvin v. Potter*, 367 F. Supp. 2d 548 (S.D.N.Y. 2005). The court noted that although several of these disciplinary measures individually might not comprise an adverse employment action, they contribute to establishing an adverse employment action in which the plaintiff was subjected to a pattern of letters of warning, suspensions, and notices of removal that were subsequently reduced or rescinded only after the plaintiff was forced to file grievances. *Id.* at 571.

⁹¹ *Fowler v. Sunrise Carpet Indus., Inc.*, 911 F. Supp. 1560, 1583 (N.D. Ga. 1996). The court found that the threatening nature of the written reprimand sufficient even though it was later removed from the plaintiff's personnel file. In *Rivers v. Baltimore Dep't of Recreation*, No. R-87-3315, 1990 WL 112429 at *10 (D. Md. Jan. 9. 1990), the court found that letters threatening the plaintiff with suspension established a prima facie case for retaliation, although the defendants were able to articulate legitimate reason for the letters of reprimand. However, a formal warning that was eventually removed from the plaintiff's file was not found to be an adverse employment action. *Hopkins v. Baltimore Gas & Elec. Co.*, 871 F. Supp. 822, 836 (D. Md. 1994), *aff'd*, 77 F.3d 745 (4th Cir. 1996)..

⁹² *Drake v. Nicholson*, 324 F. App'x 328, 330 (5th Cir. 2009).

⁹³ *DeHart v. Baker Hughes Oilfield Operations, Inc.*, 214 F. App'x 437, 442 (5th Cir. 2007).

⁹⁴ *See Beaumont v. Tex. Dep't of Crim. Justice*, 468 F. Supp. 2d 907, 929 (E.D. Tex. 2006).

⁹⁵ *Wilson v. O'Grady-Peyton Int'l, Inc.*, No. 407CV003, 2008 U.S. Dist. Lexis 24394 (S.D. Ga. Mar. 26, 2008).

terminated immediately.”⁹⁶ The district court concluded that such a warning could create a chilling effect such that a reasonable worker wishing to file a complaint against her employer might be dissuaded from doing so.⁹⁷

The Sixth Circuit held that a supervisor's letter to the plaintiff warning him to stop discussing his EEO complaints during business hours and threatening “official disciplinary action” if he failed to stop did not, “as a matter of law, constitute materially adverse actions.”⁹⁸ Courts have even held that a supervisor's statements to a plaintiff's co-workers that he would “get rid of” the plaintiff because he was “creating problems,”⁹⁹ and “[b]admouthing or being mean to an employee within the workplace,”¹⁰⁰ are not materially adverse actions capable of sustaining a retaliation claim. Conversely, where the supervisor's threats of disciplinary action directly referred to the filing of an EEOC complaint, a court may determine that a material issue of fact exists whether such threats would meet the *Burlington* standard.¹⁰¹

The receipt of a poor performance review subsequent to engaging in a protected activity will not, standing alone, amount to retaliatory action. The plaintiff must be able to show that retaliatory action resulted in some adverse action – generally in an actual or potential economic loss.¹⁰² Low scores on a performance evaluation will not amount to retaliatory conduct where the plaintiff cannot show a more tangible form of adverse action such as ineligibility for promotion opportunities or failure to secure employment with other employers.¹⁰³ Placement on a performance improvement plan without a reduction in salary or grade level was not an adverse

⁹⁶ Link v. Trinity Glass Int'l, No. 05-6342, 2007 WL 2407101 at *8 (E.D. Pa. Aug. 22, 2007).

⁹⁷ *Id.*

⁹⁸ Jones v. Johanns, 264 F. App'x 463, 469 (6th Cir. 2007).

⁹⁹ Thomas v. iStar Fin., Inc., 438 F. Supp. 2d 348, 366 (S.D.N.Y. 2006).

¹⁰⁰ Roldan v. Chertoff, No. 04CV2515, 2006 WL 4632503, at *12 (S.D. Cal. Oct. 19, 2006). However, when defendants badmouthed a former employee in front of potential clients, causing him to lose future employment opportunities, retaliation under ADA, ADEA, and FMLA was established. Smith v. SEIU United Healthcare Workers West, No. C 05-2877 VRW, 2006 WL 2038209, at *5 (N.D. Cal. July 19, 2006).

¹⁰¹ Fallon v. Potter, 277 F. App'x 422 (5th Cir. 2008). The plaintiff had presented evidence that his supervisor stated: “You just keep filing those EEO complaints and I promise you one thing-there won't be a person in this post office to testify against me,” “You need to call her [an EEOC officer] and talk to her so you can drop this EEO,” “You need to tell her you don't need redress . . . cause you're canceling the EEO complaint,” and “You'll never have anyone in this post office stand up for you. If you continue to file these charges, I'll show you what you're up against.” *Id.* at 428.

¹⁰² Grube v. Lau Indus., Inc. 257 F.3d 723, 729 (7th Cir. 2001). Although decided before *Burlington*, the Seventh Circuit had adopted the more broad definition of an adverse employment action; nevertheless, the court held that negative performance evaluations, unaccompanied by some tangible job consequence, do not constitute actionable actions.

¹⁰³ Sykes v. Pa. State Police, 311 F. App'x 526, 529 n. 2 (3rd Cir. 2008) (citing Brown v. Snow, 440 F.3d 1259, 1265 (11th Cir. 2006)). The court stated: “there is no evidence that Sykes' claimed failure to secure employment with other state agencies was the result of the evaluations or that she was otherwise qualified for those positions.” *Id.*

employment action.¹⁰⁴ “Papering” the plaintiff’s personnel file and performance reviews that are otherwise given to all employees are not considered adverse if the plaintiff cannot show any negative impact from it.¹⁰⁵ More obvious, the performance review must be actually negative. A plaintiff will not defeat a summary judgment motion based on an evaluation of “meets expectations,” even if that might have been lower than a previous evaluation.¹⁰⁶ Further, the employer can refute the plaintiff’s claim that a poor performance review was motivated by retaliatory intent by presenting previous performance reviews that document poor work performance or poor interpersonal skills.¹⁰⁷ The fact that the plaintiff was never disciplined does not disprove the defendant’s claim that the plaintiff had performance problems. Speculation that not receiving a “Far Exceeds” performance review was in retaliation for filing EEOC claims is not sufficient.¹⁰⁸

Negative performance evaluation may constitute an adverse action if the performance rating given causes the employee to lose a performance award.¹⁰⁹ Where inappropriate performance standards were applied causing the plaintiff to be put on a performance plan and to be denied a bonus, the plaintiff has sufficiently stated an adverse action.¹¹⁰ Negative performance evaluations are also more likely to support a claim of retaliatory action where there is direct evidence that the negative reviews were motivated by a retaliatory animus.¹¹¹

A negative job reference as a result of complaining of discrimination might be the type of retaliatory action that would support an action under *Burlington*.¹¹² In *Rascon v. Austin I.S.D.*,¹¹³ the court found that the plaintiff’s prior employer’s remark of “God bless you” in response to a request for a reference was sufficient to meet the *Burlington* standard. The court stated: “Retaliation claims can be pursued based on actions that go beyond workplace-related or employment-related retaliatory acts and harms. . . . [T]he provision extends to materially adverse nonemployment-related discriminatory actions that might dissuade a reasonable employee – not the plaintiff herself – from lodging a discrimination charge.”¹¹⁴ Knowing that one would receive a negative reference for complaining about discrimination could dissuade a person from making

¹⁰⁴ Taylor v. Small, 350 F.3d 1286, 1293 (D.C. Cir. 2003).

¹⁰⁵ Higgins v. Gonzales, 481 F.3d 578, 590 (8th Cir. 2007). The notes and evaluations of the plaintiff were generally positive or neutral.

¹⁰⁶ Meredith v. Beech Aircraft Corp., 18 F.3d 890, 896 (10th Cir. 1994).

¹⁰⁷ Perches v. Elcom, Inc., 500 F. Supp. 2d 684, 693-94 (W.D. Tex. 2007).

¹⁰⁸ Hare v. Potter, 220 F. App’x 120, 131 (3rd Cir. 2007).

¹⁰⁹ Weber v. Battista, 494 F.3d 179, 185 (D.C. Cir. 2007).

¹¹⁰ Vance v. Chao, 496 F. Supp. 2d 182, 186 (D.D.C. 2007).

¹¹¹ Boumehdi v. Plastag Holdings, LLC, 489 F.3d 781 (7th Cir. 2007). According to the plaintiff, her supervisor twice accused her of complaining about him and warned her that if she didn’t watch it, she’d end up scrubbing floors. Furthermore, when she asked him about her negative annual review, he allegedly warned her to stop complaining about him. *Id.* at 793.

¹¹² Roulettee v. Chao, No. 03-00824, 2007 WL 437678 (D. Colo., Feb 6, 2007).

¹¹³ No. 05-1072, 2007 WL 1390605 at *1 (W.D. Tex. Mar. 8, 2007).

¹¹⁴ *Id.* at *8.

the charge in the first instance.¹¹⁵ A false negative reference that resulted in the plaintiff's failure to be admitted into a training program needed to keep her job was also found to be materially adverse.¹¹⁶

A review of the decisions involving reprimands, poor evaluations and negative references indicates that although courts apply *Burlington* on a case-by-case basis, it is still difficult for plaintiffs to succeed on these grounds. Evidence of poor performance will negate the claim. Further, even if the employer's conduct is not supported by past performance, employees must be able to show that a disciplinary action or poor performance review amounted to a threat of termination (which in itself is an adverse employment action) or resulted in a tangible economic loss such as ineligibility for a bonus or rejection of a job application.

I. INVESTIGATIONS, AUDITS, AND FILING CHARGES

Investigations or increased monitoring of the plaintiff will not amount to an adverse employment action if the plaintiff is unable to show that the investigation resulted in any action being taken against the plaintiff¹¹⁷ or otherwise affected the plaintiff's employment status.

Commencement of an investigation or even threats of an investigation can constitute a materially adverse action if the investigation leads to harmful action against the plaintiff. In *Green v. FedEx Kinko's, Inc.*,¹¹⁸ the plaintiff's store was audited shortly after he filed a race discrimination complaint, and the audit resulted in a low score. The plaintiff claimed that the audit was in retaliation for the complaint which was less than two weeks after the complaint. Further, the plaintiff was fired within six months after he informed his manager that he would not withdraw the complaint. Kinko's claimed that the plaintiff was fired because of the poor score on the audit. The Ninth Circuit disagreed and said that the audit which resulted in the low score was sufficient to be a material adverse employment action under *Burlington*.¹¹⁹ Further, evidence showed that the second act, the firing, may also have been motivated by retaliation as

¹¹⁵ *Id.* Note that the negative employment reference breached a settlement agreement previously executed by the defendant and plaintiff. The Supreme Court in *Burlington* stated that "the anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace." 126 S. Ct. at 2409. Thus actions by the employer that could well dissuade a reasonable worker, former worker, or applicant from making or supporting a charge of discrimination are covered by the provision.

¹¹⁶ *Richard v. Bd. of Supervisors of La. State Univ.*, 960 So. 2d 953 (La. Ct. App. 2007). In *Richard*, phone calls made by the plaintiff's supervisor advising other schools that the plaintiff had filed charges against the university and falsely stating the plaintiff had been kicked out of the university resulted in all of those schools declining to admit the plaintiff for required training. *Id.* at 971-72. In an earlier case, the Tenth Circuit held that the act of the former employer in advising a prospective employer that the plaintiff had filed a sex discrimination charges was itself a retaliatory act. *Rutherford v. Am. Bank of Commerce*, 565 F.2d 1162, 1164 (10th Cir. 1977).

¹¹⁷ *DeMars v. O'Flynn*, 287 F. Supp. 2d 230, 246 (W.D.N.Y. 2003).

¹¹⁸ No. 06-35713, 2007 WL 2915436 *1 (9th Cir. Oct. 4, 2007).

¹¹⁹ *Id.* at *3.

the plaintiff testified that his manager asked him to drop the complaint and when he did not, he was fired. The court found sufficient evidence that the poor scores on the audit was a mere pretext for the retaliatory termination.

A threat of reopening an investigation into complaints about the plaintiff if the plaintiff continued to complain to the human resource department was not sufficient to establish an adverse employment action if there is no actual harm proven. In *Perches v. Elcom, Inc.*,¹²⁰ there was no evidence that the investigation was actually reopened; the plaintiff was not disciplined nor were any complaints added to her personnel file, and the threat did not deter the plaintiff from continuing to file HR complaints and EEOC charges.¹²¹ Conversely, failure to investigate reports or take action against a co-worker who threatened the plaintiff was considered actionable.¹²² Courts have held that Title VII protects employees from employers who condone and encourage harassment subsequent to the plaintiff's protected activity by failing to investigate or remedy it.¹²³

Even prior to *Burlington* a plaintiff could establish a prima facie case of retaliation by showing that the employer filed charges against the employee in response to an EEOC complaint if the charge would not have been filed had the plaintiff not filed his complaint.¹²⁴ Further, the plaintiff does not have to be a current employee.¹²⁵ In *Beckham v. Grand Affair Inc.*,¹²⁶ a district court in North Carolina found that the arrest and prosecution of a former bartender for criminal trespass after she filed an EEOC sex discrimination complaint was an adverse employment

¹²⁰500 F. Supp. 2d 684, 692-93 (W.D. Tex. 2007).

¹²¹ In *Somoza v. Univ. of Denver*, 513 F.3d 1206 (10th Cir. 2008), the court noted that while there was no question that the plaintiff had engaged in protected activity, the fact that the plaintiff continued to be undeterred in pursuit of a remedy sheds light on whether the actions are sufficiently material and adverse. *Id.* at 1214.

¹²² *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321 (6th Cir. 2008). In *Hawkins*, after the plaintiffs claimed that a male co-worker sexually harassed them, the worker retaliated by setting fire to the plaintiffs' car and house. Although he was ultimately terminated based on the sexual harassment charge, the court found that the company knew or should have known about the arson reports but failed to investigate them. Knowledge of the co-worker's retaliatory behavior and failure to take action was both indifferent and unreasonable, sufficient to reverse a summary judgment in favor of the employer. *Id.* at 347. In another case where the plaintiff claimed that failure to remedy harassment constituted retaliation, the court stated that once the claim for deliberate indifference failed, the issue was concluded. A plaintiff does not get "a second bite at the apple through a retaliation claim based on the same events." *Ross v. The Corp. of Mercer Univ.*, 506 F. Supp. 2d 1325, 1361 (M.D. Ga. 2007).

¹²³ *E.g.*, *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2007); *Knox v. Indiana*, 93 F.3d 1327, 1334-35 (7th Cir. 1996). *See also* *Galdamez v. Potter*, 415 F.3d 1015, 1022 (9th Cir. 2005).

¹²⁴ *Berry v. Stevinson Chevrolet*, 74 F.3d 980 (10th Cir. 1996); *Beckham v. Grand Affair, Inc. of N.C.*, 671 F. Supp. 415 (W.D.N.C. 1987).

¹²⁵ *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986 (10th Cir. 1996); *Beckham v. Grand Affair, Inc. of N.C.*, 671 F. Supp. 415, 419 (W.D.N.C. 1987).

¹²⁶ *Id.*

action. A criminal trial is public and “carries a significant risk of humiliation, damage to reputation, and concomitant harm to future employment prospects.”¹²⁷ Similarly, filing a civil defamation action in response to a former employee’s filing of an EEOC complain is actionable retaliation.¹²⁸ Where a civil suit to enjoin the plaintiff from disclosing trade secrets was filed 10 days from when the employer learned of the plaintiff’s informal complains, there is a strong evidence of a causal connection between the events.¹²⁹ The plaintiff’s ability to show that the employer did not conduct a technical and legal trade secret analysis supported her claim that the lawsuit was not motivated by a true belief that any trade secret violations had occurred.¹³⁰ However, when the plaintiff admitted to stealing confidential documents, her subsequent discharge was not considered a retaliatory act where there was no causal connection established between the filing of the complaint and her termination.¹³¹ Responding to an EEOC charge by obtaining false evidence and submitting it to the EEOC does not “implicate” employment and therefore the employer’s actions did not affect a term or condition of the plaintiff’s employment; such evidence affects an administrative proceeding for which the plaintiff has an adequate remedy in that forum, said the court.¹³²

Both before and after the *Burlington* decision filing false charges against an employee or former employee has generally been considered actionable. *Burlington* clarifies that internal investigations may also be considered adverse if they could lead to more serious actions such as termination or loss of benefits.

VII. RETALIATORY HOSTILE ENVIRONMENT

To establish the existence of retaliation based on a hostile environment prior to *Burlington*, the plaintiffs often relied on the theory of constructive discharge. Most circuits defined constructive discharge as an action by the employer that makes “working conditions so

¹²⁷ *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986 (10th Cir. 1996) (citing *Passer v. Am. Chem. Soc.*, 935 F.2d 322 (D.C. Cir. 1991) (holding that cancellation of a benefit to honor plaintiff in retaliation for filing an age discrimination suit constitutes an adverse employment action because of the public humiliation involved)). In a post-*Burlington* case the Eighth Circuit found that a union’s actions of reading legal bills at meetings and identifying members who had filed EEOC charges raised a potential reasonable inference of retaliation because the union was aware of a negative impact on the plaintiffs. *Franklin v. Local 2 of the Sheet Metal Workers Int’l Ass’n*, 565 F.3d 508, 520 (8th Cir. 2009).

¹²⁸ *EEOC v. Va. Carolina Veneer Corp.*, 495 F. Supp. 775, 778 (W.D. Va. 1980).

¹²⁹ *Lin v. Rohm and Hass Co.*, 293 F. Supp. 2d 505, 512-13 (E.D. Pa. 2003).

¹³⁰ *Id.* at 514-15.

¹³¹ *Meredith v. Beech Aircraft Corp.*, 18 F.3d 890 (10th Cir. 1994). The plaintiff was unable to establish a claim of pretext even though two other employees were not fired for violating other company rules; the court stated that these were unrelated incidents and did not cast doubt on the employer’s explanation of the plaintiff’s termination. *Id.* at 896.

¹³² *Boyd v. Brookstone Corp. of N.H.*, 857 F. Supp. 1568, 1573 (S.D. Fla. 1994).

difficult that a reasonable person in the employee's position would feel compelled to resign."¹³³ The Fourth Circuit also held that to establish constructive discharge, the employee must have been deliberately subjected to conditions that were intended by the employer as an effort to force the employee to quit.¹³⁴

Other circuits did not require a constructive discharge, but examined whether co-worker hostility or retaliatory harassment was so severe so as to constitute adverse employment action for purposes of a retaliation claim.¹³⁵ The Second Circuit observed that there existed disagreement among the circuits about whether an employee suffers an adverse employment action when an employer allows co-workers to harass a plaintiff because she engaged in protected activity.¹³⁶ Further, the court stated that no bright line test existed and each situation must be decided on a case-by-case basis.¹³⁷ It concluded that unchecked retaliatory co-worker harassment, if sufficiently severe, may constitute adverse employment action.¹³⁸

Public threats and harangues, while admittedly creating friction and unpleasantness, are not sufficient to establish the existence of an objectively intolerable work environment. While conflicts engender stress and make it more difficult for persons to perform their jobs, standing alone they are not grounds for constructive discharge.¹³⁹ A "deplorable attitude" by a supervisor towards women might create bad relations, but absent a finding of adverse impact, no constructive discharge occurred.¹⁴⁰

The *Burlington* Court expressly noted that "normal petty slights, minor annoyances, simple lack of good manners will not" deter victims of discrimination from filing their complaints.¹⁴¹ Further, it is generally difficult to prove causal link between such actions and the

¹³³ *Ramsey v. City & County of Denver*, 907 F.2d 1004, 1010 (10th Cir. 1990) (quoting *Clark v. Marsh* 665 F.2d 1168, 1175 n.8 (D.C. Cir. 1981)); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1465 (9th Cir. 1994).

¹³⁴ *EEOC v. Fed. Reserve Bank of Richmond*, 698 F.2d 633, 672 (4th Cir. 1983), *rev'd on other grounds sub nom.*, *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867 (1984).

¹³⁵ *Richardson v. N.Y.S. Dep't of Correctional Servs.*, 180 F.3d 426, 445 (2d Cir. 1999); *Gunnell v. Utah Valley State College*, 152 F.3d 1253, 1264 (10th Cir.1998); *Knox v. Indiana*, 93 F.3d 1327, 1334 (7th Cir.1996).

¹³⁶ *Richardson v. N.Y.S. Dep't of Correctional Servs.*, 180 F.3d 426, 445 (2d Cir. 1999).

¹³⁷ *Id.* at 446 (citing *Wanamaker v. Columbian Rope Co.*, 108 F.3d 462, 466 (2d Cir.1997)).

¹³⁸ 180 F.3d at 446. In *Richardson*, the plaintiff presented evidence showing that she was the target of abusive treatment from her co-workers at CCF after filing her lawsuit, including placing manure in her parking space, hair in her food, shooting a rubber band at her, and scratching her car. The record further showed that officials did little to improve the situation, suggesting only that she try mediation and reminding her that it might be "hard to change attitudes." *Id.* at 447.

¹³⁹ *Lefevre v. Design Prof'l Ins. Cos., No. C-93-20720 RPA*, 1994 WL 544430 at *2 (N.D. Cal. Sept 27, 1994). The court held that the plaintiff's inability to show more than extreme professional incompatibility precludes a finding of constructive discharge. "Because Plaintiff has failed to present evidence of adverse employment action, no reasonable jury could find in favor of Plaintiff on her retaliation claim." *Id.*

¹⁴⁰ *Geisler v. Folsom*, 735 F.2d 991, 995 (6th Cir. 1984).

¹⁴¹ 126 S. Ct. at 2415.

protected activity.¹⁴² The Eighth Circuit, in examining a claim after *Burlington*, noted that a retaliation claim cannot be based on personality conflicts, bad manners or petty slights and snubs. The plaintiff must be able to show that the manager's conduct adversely affected her life such that a reasonable employee would be dissuaded from bringing a complaint.¹⁴³ The First Circuit further noted that the anti-retaliation provision protects plaintiffs from harm, not merely inconvenience.¹⁴⁴ The standard established by the Tenth Circuit is that the behavior must render the workplace "permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."¹⁴⁵ Further, applying the *Burlington* guidance, the very fact that the plaintiffs did not cease attempting to remedy what they perceived to be acts of discrimination indicates that they were not dissuaded by the alleged material and adverse retaliatory conduct by the defendants.¹⁴⁶

Thus, several cases have determined that conduct, although unpleasant, does not rise to the level of materiality under *Burlington*. For example, unruly behavior and derogatory emails were found not sufficient to support a lawsuit for retaliation.¹⁴⁷ Not being invited to a "happy hours" party was a nonactionable petty slight.¹⁴⁸ Racist comments about the plaintiff's wife, misloading the plaintiff's truck, and placing garbage in the plaintiff's vehicle were deemed "trivial harms."¹⁴⁹ Similarly, refusal to provide the plaintiff with designated seat at a ceremony, assignment of "menial and degrading" work, assignment of "non-critical" tasks, and removal of an assigned parking spot were deemed insufficient.¹⁵⁰ Early morning phone calls about the prior day's sales were annoying but not actionable under *Burlington*.¹⁵¹ No retaliatory action was found when a manager stopped direct communication with the plaintiff.¹⁵² In *Bryan v.*

¹⁴² *Haley v. Alliance Compressor LLC*, 391 F.3d 644, 651 (5th Cir. 2004).

¹⁴³ *Higgins v. Gonzales*, 481 F.3d 578 (8th Cir. 2007). In *Higgins*, the plaintiff had complained of being inadequately supervised and trained and being removed from a project. Lack of mentoring or supervision might constitute a materially adverse action if it is shown that the plaintiff was left to flounder or was negatively impacted by lack of supervision. In fact where a transfer does not result in a qualitatively more difficult or less desirable position, there is no adverse let alone materially adverse action. *Id.* at 590.

¹⁴⁴ *Carmona-Rivera v. Puerto Rico*, 464 F.3d 14 (1st Cir. 2006). The plaintiff had alleged retaliation based on a delay in granting the plaintiff's request for a private bathroom and a parking space.

¹⁴⁵ *McGowan v. City of Eufala*, 472 F.3d 736, 743 (10th Cir. 2006).

¹⁴⁶ *Anderson v. Gen. Motors*, No. 08-2540, 2009 WL 237247 at *4 (3d Cir. Feb. 3, 2009).

¹⁴⁷ *Mickelson v. N.Y. Life Ins. Co.*, 460 F.3d 1304, 1318 (10th Cir. 2006).

¹⁴⁸ *Weger v. City of Ladue*, 500 F.3d 710, 725 (8th Cir. 2007).

¹⁴⁹ *Carpenter v. Con-Way Cent. Express, Inc.*, 481 F.3d 611, 619 (8th Cir. 2007). The court further noted that the conduct was not shown to be connected in any way to the racial slurs (most of which were never reported to management).

¹⁵⁰ *Peace v. Harvey*, 207 F. App'x 366, 368-69 (5th Cir. 2006).

¹⁵¹ *Pittman v. Gen. Nutrition Corp.*, 515 F. Supp. 2d 721, 743-44 (S.D. Tex. 2007).

¹⁵² *DeJesus v. Potter*, 211 F. App'x 5, 11-12 (1st Cir. 2006).

Chertoff,¹⁵³ the Fifth Circuit found that racially insensitive remarks, yelling at the plaintiff and other employees, and removing the plaintiff's uniform from his work space was not sufficient to create a prima facie case of hostile work environment. Similarly, allegations of retaliatory harassment, including: harassing phone calls; malicious and baseless queries by the supervisor; threats of termination; public humiliation during weekly conference calls that included all of the plaintiff's peers; and vindictive visits by the director, amounted to slights or minor annoyances that often take place at work and that all employees experience.¹⁵⁴ Being called worthless and told not to talk to co-workers did not amount to more than petty slights.¹⁵⁵ Denial of vacation, shift, and schedule preferences, and being subjected to harassment are the type of slights and minor annoyances that are not actionable under Title VII.¹⁵⁶

Prior to *Burlington*, the Third Circuit looked at the acts in total determine whether they created a hostile work environment. In *Jensen v. Potter*,¹⁵⁷ the court noted that it would be improper "to isolate incidents of facially neutral harassment and conclude, one by one, that each lacks the required discriminatory animus."¹⁵⁸ The "discrimination analysis must concentrate not on individual incidents, but on the overall scenario."¹⁵⁹ Thus, in *Hare v. Potter*,¹⁶⁰ decided subsequent to *Burlington*, although each incident alone was not very convincing, when

¹⁵³ 217 F. App'x 289 (5th Cir. 2007). The court observed that there was evidence that the racial remarks occurred both before and after the complaint was filed and that action was taken to stop such conduct. *Id.* at 294. In a later case, the Fifth Circuit reiterated its position that a heated exchange of words in a work place confrontation does not constitute retaliation; verbal abuse, amounts at best to nothing more than the "petty slights" or "minor annoyances" that all employees face from time to time. *Browning v. Sw. Research Inst.*, 288 F. App'x 170, 179 (5th Cir. 2008).

¹⁵⁴ *Pittman v. Gen. Nutrition Corp.*, 515 F. Supp. 2d 721, 741 (S.D. Tex. 2007).

¹⁵⁵ *Gilmore v. Potter*, No. 4:04-CV-1264 GTE, 2006 WL 3235088 at *10 (E.D. Ark. Nov. 7, 2006). The court conducted a detailed analysis of *Burlington* and noted that in *Burlington*, there was "considerable evidence" that the duties the plaintiff was reassigned to were "by all accounts more arduous and dirtier," less prestigious because the previous job duties required more qualifications, and that the previous position "was objectively considered a better job and the male employees resented [the plaintiff] for occupying it." *Id.* (citing *Burlington*, 126 S. Ct. at 2417). In *Gilmore*, the plaintiff claimed that the defendant isolated her into a small room and threatened with being fired if she came out onto the workroom floor, told her that she was "worthless," and told her not to talk to coworkers. The court held that the conduct was not actionable because the "plaintiff has not alleged or proven that she suffered any loss of pay or benefits as a result of the alleged retaliatory actions of the Defendant." 2007 WL 3235088 at *10. Further being called "worthless," is the type of "petty slights, minor annoyances, and simple lack of good manners" that does not constitute an adverse employment action. *Id.*

¹⁵⁶ *Smith v. Home Depot U.S.A., Inc.*, No. 2:05CV2188 LG-JMR, 2007 WL 4292572 at *6 (S.D. Miss. Dec 5, 2007).

¹⁵⁷ 435 F.3d 444 (3d Cir. 2006).

¹⁵⁸ *Id.* at 450.

¹⁵⁹ *Id.*

¹⁶⁰ 220 F. App'x 120 (3d Cir. 2007). *But see* *Sykes v. Pa. State Police*, 311 F. App'x at 529. Although the court found no dispute that the numerous slights or wrongs, real or perceived, caused or fueled the friction and tension in the workplace, it concluded that based on the record the reason was neither discrimination nor retaliation.

considered as a whole, the court held that there was competent evidence that the actions were motivated out of retaliatory animus and created hostile work environment. The actions included: the manager's threatening the plaintiff that filing the EEOC claim would end her career, screaming at the plaintiff, the manager's failure to provide the plaintiff with necessary resources, and an increasing the number of audits of the plaintiff. The court stated: [W]e find it suspicious that an employee who had excelled in previous assignments and who had good working relationships with her supervisors encountered so many problems just after she told her supervisor that she had engaged in protective conduct. In addition while we agree that any one of the incidents . . . does not constitute adverse conduct or demonstrate retaliatory animus, the incidents, when considered together, could."¹⁶¹ In an earlier case, the Third Circuit found no retaliation when the plaintiff complained of his manager's undercutting the plaintiff's authority regarding granting subordinates' time off, criticizing his work, failing to provide promised training, changing the plaintiff's work schedule, not welcoming the plaintiff after a suspension, and informal questioning about attendance.¹⁶² In that case, the court noted that written reprimands were supported by the facts.

A district court in New York also looked at the conduct of the plaintiff's supervisor in toto to determine that the plaintiff stated a case under *Burlington*. In *Edwards v. Town of Huntington*,¹⁶³ the plaintiff claimed that his supervisor unduly scrutinized his work, required doctor's notes if the plaintiff had been absent, denied him overtime, yelled at him, prohibited his use of a cell phone at work, and failed to provide him with necessary equipment. While any single action would not be sufficient to dissuade a plaintiff from filing a complaint, taken together, they were materially adverse.¹⁶⁴ In *Billings v. Town of Grafton*,¹⁶⁵ the First Circuit noted that while some of the actions such as criticizing the plaintiff's written memos and becoming aloof toward her are the kind of petty slights or minor annoyances that fall outside the scope of the non discrimination laws, other actions such as commencing an internal investigation for mistakenly opening up personal correspondence, barring the plaintiff from the office, and charging her with personal time for attending a deposition when other employees were not, were sufficient to meet the *Burlington* standard.¹⁶⁶ Similarly, a district court in Tennessee found that sending the plaintiff home from work, dumping dirt on the plaintiff's cab, and throwing objects

¹⁶¹ 220 F. App'x at 132. The court determined, however, that this conduct was not so intolerable so as to constitute constructive discharge. Thus, back pay award was not granted. *Id.* at 135.

¹⁶² *Allen v. Nat'l RR Passenger Corp.*, 228 F. App'x 144, 148 (3rd Cir. 2007).

¹⁶³ No. 05-CV-339, 2007 WL 2027913 *1 (E.D.N.Y. July 11, 2007).

¹⁶⁴ *Id.* at *7.

¹⁶⁵ 515 F.3d 39 (1st Cir. 2008).

¹⁶⁶ *Id.* at 55

at the plaintiff are sufficient to dissuade a reasonable worker from filing discrimination charges.¹⁶⁷

A collective approach was not applied by the Fifth Circuit in ruling in favor of the employer when the plaintiff alleged the following: refusal to allow the plaintiff to act as lead assembler in the absence of a lead assembler, wrongful accusation of forging a signature, accusation of falsifying a accident report, failing to inform the plaintiff of a change of shift, holding safety meetings in a smoking area, calling the plaintiff names, and using the n word, but not in front of the plaintiff, were found not to be the type of actions that would dissuade a reasonable employee from filing a complaint.¹⁶⁸ Similarly, an Arkansas district court denied recovery to two females who alleged retaliation based on harsh treatment, scrutiny of work, threats of disciplinary action, limited contact with supervisors, and removal of certain authority.¹⁶⁹ The Tenth Circuit ruled that negative comments, condescending looks, perceived exclusion from hiring and firing decisions, and a reduction in the administrative authority within the department do not in the aggregate to produce material and adverse actions.¹⁷⁰ The court noted that while the plaintiffs may have had to withstand colleagues that do not like them, who are rude and may be generally disagreeable people, it is not the court's obligation to mandate that certain individuals work on their interpersonal skills and cease engaging in inter-departmental personality conflicts. Furthermore, the employee was junior to the plaintiffs, such that the conduct complained of would be less likely to deter a senior employee from making a complaint for fear of repercussions.¹⁷¹

Given the Supreme Court's language that "petty slights, minor annoyances, [and] simple lack of good manners"¹⁷² will not form the basis of a retaliation action, employees will be successful in retaliation claims only if they can show that their treatment was sufficiently extreme or pervasive to make their working conditions intolerable or that the employer was grossly negligent in failing to prevent harm. Name-calling, pranks, and rude behavior are not sufficient to uphold a retaliation claim.

VIII. CAUSATION

Because the *Burlington* decision was specifically directed at the definition of an adverse employment action under the anti retaliation provision, it did not change courts' analyses of whether plaintiffs can meet the burden of proving a causal connection between the protected

¹⁶⁷ *Vanover v. White*, No. 3:07:CV-15, 2008 WL 2713711 at *13 (E.D. Tenn. July 10, 2008). The plaintiff had presented evidence that her foreman told her that she was being sent home so that she would quit rather than be fired. *Id.*

¹⁶⁸ *Grice v. FMC Techs., Inc.*, 216 F. App'x 401, 408 (5th Cir. May 15, 2007).

¹⁶⁹ *O'Brien v. Johanns*, No. 4:06-CV-00674, 2007 WL 1443674 at *7-8 (E.D. Ark. 2007).

¹⁷⁰ *Somoza v. Univ. of Denver*. 513 F.3d 1206, 1218-19 (10th Cir. 2008).

¹⁷¹ *Id.* at 1218.

¹⁷² 126 S. Ct. at 2415

activity and the subsequent action. Indeed, where a pre-*Burlington* decision was based on the causality issue, the summary judgments in favor of the employer were allowed to stand despite the Supreme Court's decision.¹⁷³ Nevertheless, a review of cases before and after *Burlington* on the causation issue is instructive, because even though a plaintiff may be able to establish a prima facie case of retaliation, cases are often dismissed based on the causation issue.

In most cases causation is inferred simply by the proximity in time between the protected activity and the employer's action. Where the only evidence of a connection between the protected activity and the adverse action is "temporal proximity," decisions both before and after *Burlington* have held that the proximity must be "very close."¹⁷⁴ Generally courts will not find evidence of temporal proximity if the time difference is six months or more.¹⁷⁵ The Fifth Circuit held that an employee who was fired seven months after she filed an EEOC charge could not prevail on a claim of retaliation based solely on temporal proximity.¹⁷⁶ Similarly, gaps of six months from the filing of the lawsuit and eleven months from filing of the EEOC charge were "too great to establish retaliation based merely on temporal proximity."¹⁷⁷ In the Fifth Circuit, a span of up to four months has been found adequate to show causal connection for summary judgment purposes.¹⁷⁸ Conversely, the Eighth Circuit has stated that "though in rare circumstances an adverse action may follow so closely upon protected conduct as to justify an inference of a causal connection between the two, we have held that an interval of two months is too long to support such an inference."¹⁷⁹

¹⁷³ *Strong v. Univ. Healthcare Sys., L.L.C.*, 482 F.3d 802 (5th Cir. 2007); *Motley v. Securitas Sec. Servs., USA, Inc.*, No. 05-71064, 2006 WL 2228924 *1 (E.D. Mich. Aug. 3, 2006).

¹⁷⁴ *Clark County School Dist. v. Breeden*, 532 U.S. 268, 273 (2001); *Summers v. Winter*, 303 F. App'x 716, 720 (11th Cir. 2008); *Pittman v. Gen. Nutrition Corp.*, 515 F. Supp. 2d 721, 737 (S.D. Tex. 2007).

¹⁷⁵ *E.g.*, *Nguyen v. City of Cleveland*, 229 F.3d 559, 567 (6th Cir. 2000).

¹⁷⁶ *Bell v. Bank of Am.*, 171 F. App'x 442, 444 (5th Cir. 2006).

¹⁷⁷ *Foster v. Solvay Pharmaceuticals, Inc.*, 160 F. App'x 385, 389 (5th Cir. 2005). *But see* *Garvin v. Potter*, 367 F. Supp. 2d 548, 571 (S.D.N.Y. 2005) (an eleven-month time period between the EEOC complaint and the beginning of the pattern of disciplinary actions supports a finding that there is a genuine issue of material fact as to whether the actions were taken in retaliation for the plaintiff's protected conduct).

¹⁷⁸ *Evans v. City of Houston*, 246 F.3d 344, 354 (5th Cir. 2001). The DC Circuit applies a three-month rule of thumb to establish causality on the basis of temporal proximity alone. *Rattigan v. Gonzales*, 503 F. Supp. 2d 56, 77 (D.D.C. 2007). However, the Tenth Circuit found a lapse of three months insufficient to establish the necessary causal connection. *Richmond v. ONEOK, Inc.*, 120 F.3d 205, 209 (10th Cir. 1997). Where the plaintiff's employment was terminated about a month after her first written complaint, the court nevertheless found that any temporal proximity between her complaint and the termination of her employment was weak, especially in light of the other strong evidence that her termination was for a reason other than her complaints. *Banta v. OS Restaurant Servs, Inc.*, No. C07-4041-PAZ, 2008 U.S. Dist. LEXIS 97279 at *50 (N.D. Iowa, Dec. 1, 2008).

¹⁷⁹ *Van Horn v. Best Buy Stores, L.P.* 526 F.3d 1144, 1149 (8th Cir. 2008) (citing *Kipp v. Mo. Hwy & Transp. Comm'n*, 280 F.3d 893, 897 (8th Cir. 2002)).

The Third Circuit applies an “unusually suggestive” test in examining the closeness in timing between the protected act and the adverse employment action. The timing of the incidents must be sufficiently close to be unusually suggestive, if there is no other evidence suggesting a causal connection.¹⁸⁰ The Fifth Circuit notes that “temporal proximity alone will be insufficient to prove proximity; it is just one of the elements.”¹⁸¹ Thus, other facts such as poor performance, improper conduct, prior disciplinary record, and reports of disruptiveness will undermine a claim for retaliation based on temporal proximity even if only three and one-half months elapsed between the complaint and the employer’s action.¹⁸²

However, where there is additional evidence to support retaliation, for example, evidence of disparate treatment, the court will find sufficient evidence to permit the inference that retaliatory conduct was motivated by a previous lawsuit.¹⁸³ Timing is not important when the facts clearly indicate an unbroken chain of action from the time an employer first learns of a claim to the adverse action.¹⁸⁴ Proximity in time is also not necessary to establish causation when there is other non circumstantial or direct evidence.¹⁸⁵ For example, if the employee can prove an intent to retaliate, the courts will find in favor of the plaintiff.¹⁸⁶

If the employer can present evidence of disciplinary actions or reprimands *before* the complaint was filed, it will likely prevail on the temporal proximity issue. Reassignment and denial of training opportunities before the complaint negate the causal link.¹⁸⁷ Causation could not be established when the plaintiff was told two months before her participation in an EEOC investigation that she would not receive a pay raise.¹⁸⁸ Similarly, a decision not to promote the

¹⁸⁰ *Morrison v. Carpenter Tech. Corp.*, 193 F. App’x 148, (3d Cir. 2006) (citing *Thomas v. Town of Hammonton*, 351 F.3d 108, 114 (3d Cir. 2003)).

¹⁸¹ *Strong v. Univ. Healthcare Sys., L.L.C.*, 482 F.3d 802, 807-08 (5th Cir. 2007).

¹⁸² *Id.* at 808. The Tenth Circuit held that three and one half months between the EEOC charge and denial of tenure was too much time to establish causation by temporal proximity alone. *Meiners v. Univ. of Kansas*, 359 F.3d 1222, 1231 (10th Cir. 2004).

¹⁸³ *Campbell v. Univ. of Akron*, 211 F. App’x 333, 351 (6th Cir. 2006).

¹⁸⁴ *Richard v. Bd. of Supervisors of La. State Univ.*, 960 So. 2d 953, 971 (La. Ct. App. 2007).

¹⁸⁵ *Vance v. Chao*, 496 F. Supp. 2d 182, 186 (D.D.C. 2007).

¹⁸⁶ *Terry v. Ashcroft*, 336 F.3d 128, 141 (2nd Cir. 2003). In *Patane v. Clark*, 508 F.3d 106 (2d Cir. 2007), one year had elapsed between when the plaintiff first reported sexual harassment and removal of her secretarial functions. There was evidence that the plaintiff specifically overheard her supervisor conspiring to drive her out of her job and that another professor to whom she reported issued a negative performance review, constantly monitored her actions, and picked up her telephone. Thus, there was a sufficient causation between the complaint and the adverse action despite the one-year gap. *Id.* at 116. Conversely, lack of intent may support summary judgment for the employer. *Carmona-Rivera v. Puerto Rico*, 464 F.3d 14, 20 (1st Cir. 2006) (ongoing construction and administrative delays negated the claim of retaliatory intent).

¹⁸⁷ *Grother v. Union Pacific RR Co.*, No. 04-3279, 2006 WL 3030769 at *4 (S.D. Tex. Oct. 23, 2006).

¹⁸⁸ *Dehart v. Baker Hughes Oilfield Oper., Inc.*, 214 F. App’x 437 (5th Cir. 2007). In addition, the court found no causation based on the employee’s prior disciplinary record and the fact that the

plaintiff before the complaint was filed, plus previous disciplinary problems, defeats the causal connection between the complaint and the employment decision.¹⁸⁹ In one case, however, the Court of Appeals for the Tenth Circuit held that action taken against an individual in anticipation of that person engaging in protected opposition to discrimination is no less retaliatory than action taken after the fact.¹⁹⁰

Further, a subjective belief that incidents were retaliatory is not sufficient to establish the causal link between the incidents and EEOC complaint,¹⁹¹ nor are beliefs that the incidents were motivated by personal dislike retaliation.¹⁹²

IX. PRETEXT

Once the plaintiff has established a prima facie case of retaliation the burden switches to the employer to prove a legitimate nondiscriminatory reason for the adverse employment action.¹⁹³ In many cases, although the plaintiff is able to overcome the hurdles of establishing retaliation and a causal connection, the case will be ultimately dismissed if the employer can establish a reasonable explanation for its conduct.¹⁹⁴ Poor job performance is a commonly used and accepted reason to justify an employer's actions.¹⁹⁵ Thus, even though the *Burlington* decision might have eased plaintiffs' burden on the adverse action element of their cases, a discussion of pretext is needed to complete the examination of the challenges that plaintiffs face in proving retaliation.

To rebut the defendant's testimony the plaintiff may establish that defendant's proffered explanation is merely a pretext for the alleged retaliatory action. The evidence may be direct or circumstantial and must be sufficient such that the court could reasonably disbelieve the defendant's articulated reasons or believe that a discriminatory motive was more likely than not the motivating or determinative cause of the employer's action.¹⁹⁶ However, the plaintiff's

employer had followed its policy and procedures. The plaintiff had been written up in the past for taking leave without authorization, for poor attendance, and for insubordination. *Id.* at 442.

¹⁸⁹ *Bryan v. Chertoff*, 217 F. App'x 289, 293 (5th Cir. 2007).

¹⁹⁰ *Sauers v. Salt Lake County*, 1 F.3d 1122, 1128 (10th Cir. 1993). There was direct evidence in the form of a tape recorded conversation two days before the plaintiff's transfer that her supervisor feared that she would file a sexual harassment complaint against him.

¹⁹¹ *Peace v. Harvey*, 207 F. App'x 366, 369 (5th Cir. 2006).

¹⁹² *Allen v. Nat'l RR Passenger Corp.*, 228 F. App'x 144, 148 (3rd Cir. 2007).

¹⁹³ *Fuentes v. Perskie*, 32 F.3d 759, 763 (3d Cir. 1994).

¹⁹⁴ *E.g.*, *Fuentes v. Postmaster Gen. of U.S. Postal Serv.*, 282 F. App'x 296 (5th Cir. 2008).

¹⁹⁵ *E.g.*, *Arensdorf v. Geithner*, No. 08-20712., 2009 WL 1311511 at *3 (5th Cir. May 12, 2009).

¹⁹⁶ *Fuentes v. Perskie*, 32 F.3d at 764. In *Simmerman v. Hardee's Food Sys., Inc.*, No. Civ. A. 94-6906, 1996 WL 131948 at *15 (E.D. Pa. Mar. 22, 1996), *aff'd*, 118 F.3d 1578 (3d Cir. 1997), defendant's explanation that failure to complete the plaintiff's performance review was due to lack of time and no pressing need to complete the review was deemed a valid reason.

perception of the decision is irrelevant – the courts will determine the legitimacy of the employer’s action through the perception of the employer.¹⁹⁷

There is no “mechanical formula” for finding pretext.¹⁹⁸ Pretext can be shown through “weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer’s proffered legitimate reasons for its actions.”¹⁹⁹ On the other hand, in conducting a pretext analysis it is not the court’s job to engage in second guessing of an employer’s business decisions.²⁰⁰ The law does not require that the employer make proper decisions, only non-retaliatory decisions. Even a decision based on incorrect information can be a legitimate reason.²⁰¹ The Third Circuit noted that to discredit the defendant, “the plaintiff cannot simply show that the defendant’s decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent.”²⁰² A close proximity in time between the plaintiff’s claim and the adverse employment action is one factor that the courts will examine in determining the issue of pretext.²⁰³

Since the Supreme Court’s decision in *Burlington* did not address the pretext issue, it would appear that the standards articulated before the decision would continue to apply. Thus, where the employer has proffered a nondiscriminatory purpose for the adverse employment action, the employee has the burden of proving that but for the discriminatory purpose he would not have been terminated.²⁰⁴ This “but for” test is strictly applied.²⁰⁵ Summary judgment will be awarded to an employer if an employee cannot show that employer’s explanation for terminating the employee, falsification of expense report, was pretext for retaliatory discharge after the employee exercised his protected rights.²⁰⁶ The issue, said the court, is what the employer believed when it made the termination decision.²⁰⁷ An employer’s explanation for its actions will not be deemed a pretext if the employee cannot show that the employer’s explanation is false or

¹⁹⁷ *Smith v. Flax*, 618 F.2d 1062, 1067 (4th Cir. 1980).

¹⁹⁸ *Feliciano de la Cruz v. El Conquistador Resort & Country Club*, 218 F.3d 1, 6 (1st Cir. 2000).

¹⁹⁹ *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997).

²⁰⁰ *Bryant v. Compass Group USA, Inc.*, 413 F.3d 471, 478 (5th Cir. 2005).

²⁰¹ *Little v. Republic Ref. Co.*, 924 F.2d 93, 97 (5th Cir. 1991).

²⁰² *Fuentes v. Perskie*, 32 F.3d at 765.

²⁰³ *Lin v. Rohm and Hass Co.*, 293 F. Supp. 2d 505, 514-15 (E.D. Pa. 2003).

²⁰⁴ *Pittman v. Gen. Nutrition Corp.*, 515 F. Supp. 2d 721, 738-39 (S.D. Tex. 2007) (citing *Septimus v. Univ. of Houston*, 399 F.3d 601, 607 (5th Cir. 2005)). In *Pittman* the plaintiff claimed that his employment was terminated because of his opposition to an allegedly racially discriminatory policy that Black employees should not be promoted above a certain level and because he filed an EEOC charge and lawsuit.

²⁰⁵ *Rivers v. Baltimore Dep’t of Recreation and Parks*, No. R-87-3315, 1990 WL 112429 at *11 (D. Md. Jan 9, 1990).

²⁰⁶ *Pittman v. Gen. Nutrition Corp.*, 515 F. Supp. 2d at 739.

²⁰⁷ *Id.* at 740.

unworthy of credence.²⁰⁸ Further, the employer's action can be motivated by the Title VII complaint where the employer's attorney advised that the plaintiff be reassigned to a new position to avoid working with a potential witness in the proceedings.²⁰⁹ When a plaintiff had received prior warnings for absences and had received a written reprimand, the court held that the discipline was for a highly plausible, legitimate, non-retaliatory reason.²¹⁰

However, even if the employer's explanation is credible, if the plaintiff can establish that at least one motivating factor was unlawful retaliation, then it is incumbent upon the employer to prove that it would have made the same decision absent the retaliatory motive.²¹¹ In *Mickelson v. New York Life Insurance Company*,²¹² the plaintiff filed a complaint with the EEOC in March 2002, and was denied permission to work part-time in December of that year. The court noted that while the timing between these events, alone, would not support an inference of causation, if the employee can show that the employer's proffered reason for taking adverse action is false, a jury could infer that the employer was lying to conceal its retaliatory motive.²¹³ The defendant's proffered reason for denying the plaintiff's request was that the plaintiff's position must be filled by a regular, full-time employee. But this contention was belied by the fact that just three months later, the defendant permitted another employee to transition back to work on a part-time basis following a back injury. Thus, the court found that the defendant's justification of its denial of the plaintiff's request was pretextual.²¹⁴

X. CONCLUSION

Based on a review of the cases, it appears that subsequent to *Burlington*, plaintiffs may be able to establish retaliation where the employer's action was less serious than an ultimate employment action, such as reassignment or denial of training opportunities. It is submitted, however, that the case did not significantly change the ability of plaintiffs to recover in a retaliation action for several reasons. First, although the Supreme Court has established a standard of review, such standard has not been interpreted uniformly among the circuits. For example, with respect to a reassignment case, as recently as 2008, the Fifth Circuit stated:

²⁰⁸ *Floyd v. Amite County Sch. Dist.*, No. 3:04CV78TSL-JCS, 2008 WL 2954972 *3 (S.D. Miss. July 29, 2008).

²⁰⁹ *McGowan v. City of Eufala*, 472 F.3d 736, 746 (10th Cir. 2006).

²¹⁰ *Link v. Trinity Glass Int'l*, No. 05-6342, 2007 WL 2407101 at *8 (E.D. Pa. Aug. 22, 2007). However, the court ruled in another plaintiff's favor where it found sufficient doubt about the employer's motive for disciplining the plaintiff, such that a jury could reasonably infer a causal connection between the plaintiff's participation as a witness and her subsequent written reprimand.

²¹¹ *Kenworthy v. Conoco, Inc.*, 979 F.2d 1462, 1471 (10th Cir. 1992) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)).

²¹² 460 F.3d 1304 (10th Cir. 2006).

²¹³ *Id.* at 1317.

²¹⁴ *Id.*

We have narrowly construed the term “adverse employment action” to include only “*ultimate employment decisions* such as hiring, granting leave, discharging, promoting, and compensating.” *Pegram v. Honeywell, Inc.*, 361 F.3d 272, 282 (5th Cir.2004) (emphasis in original). However, a discriminatory reassignment may also constitute an adverse employment action when it involves a “major change in compensation, duties, and responsibilities.”²¹⁵

The Sixth Circuit takes a somewhat broader reading of *Burlington*’s application to claims based on a reassignment, holding that a transfer of an employee to a new work unit was not an adverse employment action absent any indication that the transfer resulted in significantly different responsibilities, a change in benefits, or any other negative effect.²¹⁶ The Eighth Circuit found sufficient evidence to support a claim of retaliation, even where the plaintiff did not suffer any loss of benefits or change in work location.²¹⁷ This suggests that courts have not taken a consistent approach in defining what type of reassignment would dissuade a reasonable employee from filing a discrimination complaint.

In cases where the adverse employment action takes the form of rude conduct and an otherwise hostile work environment, the circuits are generally in agreement that such behavior falls into the definition of “normal petty slights, minor annoyances, [and] simple lack of good manners” that the *Burlington* Court expressly characterized as non-actionable. Nevertheless, some courts look to the totality of the situation and find that at some point the conduct crosses the line,²¹⁸ while other court have not interpreted the Court’s language in this manner.²¹⁹

Second, in determining whether an employer’s actions would dissuade a reasonable employee from making a complaint, many circuits which had adopted a more restrictive stance, continue to apply the criteria developed pre-*Burlington*. This is particularly evident in cases involving disciplinary actions or negative performance reviews. In the former case employees must prove that they were threatened with termination;²²⁰ in the latter case, employees must be able to show that they suffered some economic loss due to the review.²²¹ Similarly, where the alleged adverse action is the denial of training activities or a promotion, evidence must be

²¹⁵ *Fuentes v. Postmaster Gen. of U.S. Postal Serv.*, 282 F. App’x 296, 301 (5th Cir. 2008).

²¹⁶ *Hunter v. Sec’y of U.S. Army*, 565 F.3d 986, 996-97 (6th Cir. 2009).

²¹⁷ *Betton v. St. Louis County, Mo.*, 307 F. App’x 27 (8th Cir. 2009). The court found that the timing of the reassignments, the changes in the plaintiffs’ duties, and other factors raised a jury question as to whether the reassignments were retaliatory. *Id.* at 29.

²¹⁸ *Hare v. Potter*, 220 F. App’x 120 (3d Cir. 2007); *Billings v. Town of Grafton*, 515 F.3d 39 (1st Cir. 2008).

²¹⁹ *Somoza v. Univ. of Denver*. 513 F.3d 1206, 1218-19 (10th Cir. 2008); *Grice v. FMC Technologies, Inc.*, 216 F. App’x 401, 408 (5th Cir. 2007).

²²⁰ *Drake v. Nicholson*, No. 07-60855, 2009 WL 1043810 at *2 (5th Cir. April 20, 2009); *DeHart v. Baker Hughes Oilfield Operations, Inc.*, 214 F. App’x 437, 442 (5th Cir. 2007).

²²¹ *Sykes v. Pa. State Police*, 311 F. App’x 526, 529 (3rd Cir. 2008) (citing *Brown v. Snow*, 440 F.3d 1259, 1265 (11th Cir. 2006)).

presented that such denial would result in the plaintiff being ineligible for a raise²²² or subsequent promotion opportunities.²²³ It is suggested that the standard enunciated by the Court still requires a showing of some tangible harm, such as loss of employment, reduction in pay, or significant change in employment circumstances.

Third, the effect of *Burlington* being not as far-reaching as originally thought may also be explained in that Supreme Court only addressed whether the action constituted an adverse action as defined by the statute. Plaintiffs must still be able to establish the causality between the protected action and the employer's retaliation. Absent direct evidence of retaliatory intent, plaintiffs must rely on temporal proximity which must be "very close."²²⁴ *Burlington* did not change this requirement. Accordingly, even if the plaintiff can establish a prima facie case for an adverse employment action, the employer's motion for summary judgment will nevertheless be granted because a causal connection between the protected activity and the adverse action cannot be established.²²⁵ Next, if the employer can produce any credible evidence justifying its decision for the action, the plaintiff must be able to demonstrate that such action was merely a pretext. Even if the employer's action was misguided or clearly wrong, courts are unlikely to second guess the decision.

Finally, *Burlington* appears to have established a new defense for employers: if the employee continues to pursue his or her Title VII claim, that fact alone indicates that the employer's action did not serve to dissuade a reasonable worker from making or supporting a charge of discrimination.²²⁶ In *Sykes v. Pennsylvania State Police*,²²⁷ the Third Circuit noted that none of the alleged conduct deterred the plaintiff from her "vigorous and repeated use of all available means to supplement, expand, and pursue allegations of discrimination to Human Resources, to her union representatives who filed grievances on her behalf, to the Bureau of Integrity and Professional Affairs, and to the EEOC."²²⁸ One author has noted that this interpretation of the *Burlington* test "would seem to foreclose any recovery for retaliatory action, turning it into a legal catch-22."²²⁹ Indeed, this position seems to fly in the face of the Supreme

²²² *Zelnik v. Fashion Inst. of Tech.*, 464 F.3d 217 (2d Cir. 2006).

²²³ *Cain v. Potter*, No. 1:105 CV 2378, 2006 WL 3146435 at *4 (N.D. Ohio Oct. 31, 2006).

²²⁴ *Summers v. Winter*, 303 F. App'x 716, 720 (11th Cir. 2008); *Pittman v. Gen. Nutrition Corp.*, 515 F. Supp. 2d 721, 737 (S.D. Tex. 2007).

²²⁵ *E.g.*, *Webb-Edwards v. Orange County Sheriff's Office*, 525 F.3d 1013, 1028-29 (11th Cir. 2008), *cert. denied*, 129 S. Ct. 915 (2009); *Bryan v. Chertoff*, 217 F. App'x 289 (5th Cir. 2007); *Black v. Ind. School Dist.* No 316, 476 F. Supp. 2d 1115, 1124-25 (D. Minn. 2007). *But see* *Levitant v. N.Y.C. Human Res. Admin.*, No. 05-CV-0230, 2008 WL 5273992 *1 (E.D.N.Y. Dec. 18, 2008).

²²⁶ *Anderson v. Gen. Motors*, No. 08-2540, 2009 WL 237247 at *4 (3d Cir. Feb. 3, 2009); *Somoza v. Univ. of Denver*, 513 F.3d 1206, 1214 (10th Cir. 2007).

²²⁷ No. 07-1494, 2008 WL 901969 (3rd Cir. Apr. 4, 2008).

²²⁸ *Id.* at *2.

²²⁹ Mary Newman, *Burlington Northern & Santa Fe Railway Co. v. White: The Scope of Retaliatory Actions and a Legal Catch-22*, 30 HARV. J. OF L. & GENDER 519, 529 (2008).

Court's intent to broaden the scope of the anti-retaliation provision, as evidenced in the recent case of *Crawford v. Metropolitan Government of Nashville*.²³⁰

In conclusion, a review of the cases suggests that while courts examine the facts alleged to constitute retaliation on a case-by-case basis, the trend indicates that plaintiffs must still be able to demonstrate a harmful outcome as a result of the employer's action. Further, while the courts vary as to the interpretation of the *Burlington* standard, thus confirming some of the fears of Justice Alito that the *Burlington* decision would produce "perverse results,"²³¹ they have for the most part required not only a showing of harm but that the harm was material. It is submitted that in determining whether a reasonable person would have been dissuaded from engaging in a protected activity, the courts are in effect applying a "materially adverse" standard previously adopted by several circuits prior to *Burlington*.²³² One may argue that with less than four years since the *Burlington* decision was handed down, it may be too soon to grasp its full effects on plaintiffs' claims of retaliation. No doubt additional Supreme Court decisions will be written to clarify and, perhaps, extend the scope of the statute, allowing more recoveries for plaintiffs.

²³⁰ 129 S. Ct. 846 (2009). In *Crawford*, the Court held that protected activity includes situations where an employee speaks out about discrimination not only on his or her own initiative, but also in answering questions during an employer's internal investigation. *See also* *Gomez-Perez v. Potter*, 128 S. Ct. 1931 (2008); *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951 (2008).

²³¹ 126 S. Ct. at 2420.

²³² *See* note 7 and accompanying text *supra*.