

**BURLINGTON NORTHERN & SANTA FE RAILWAY CO. V.
WHITE: THE SCOPE OF RETALIATORY ACTIONS
AND A LEGAL CATCH-22**

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I. INTRODUCTION

Under Title VII of the Civil Rights Act of 1964, employers are prohibited from discriminating against their employees on the basis of race, color, religion, sex, or national origin.¹ Employers are further prohibited from discriminating against employees who have opposed incidents of discrimination in violation of the statute.² Until recently, the scope of this retaliation provision was a matter of debate: Was it limited to employment-related actions, or could it cover retaliation outside the workplace? In 2006, the Supreme Court directly addressed this question in *Burlington Northern & Santa Fe Railway Co. v. White*, resolving it in favor of a broadly drawn provision.³ Commentators hailed *Burlington* as an expansion of civil rights. The decision was put to the test six months later, however, in a district court opinion, *Sykes v. Pennsylvania State Police*,⁴ that seemed to turn the *Burlington* reasoning on its head.⁵

This Comment will examine the *Burlington* decision and the Supreme Court's efforts to create a new standard. It will then turn to the *Sykes* decision and address the ways in which it misapplied the *Burlington* standard. Finally, this Comment will consider the possible ramifications of *Sykes* on how the *Burlington* standard will be applied in other courts, as well as the broader implications for Title VII litigation.

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¹ 42 U.S.C. § 2000e-2 (2000). For the full text of the provision, *see infra* note 26.

² 42 U.S.C. § 2000e-3 (2000). For the full text of the provision, *see infra* note 25.

³ *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405 (2006).

⁴ *Sykes v. Pa. State Police*, No. 05-1349, 2007 WL 141064 (W.D. Pa. Jan. 17, 2007).

⁵ It is important to note that other courts seem to have correctly interpreted the *Burlington* standard. *See, e.g.*, *Morgan v. Masterfoods USA*, No. 2:04-CV-907, 2006 U.S. Dist. LEXIS 83152, at *25–32 (S.D. Ohio Nov. 14, 2006); *Watson v. City of Cleveland*, No. 05-3519, 2006 U.S. App. LEXIS 23218, at *24–25 (6th Cir. Sept. 8, 2006). Indeed, in another case from the Western District of Pennsylvania—decided before *Sykes* by a different judge—the *Burlington* standard was applied in a way that explicitly sidestepped the problem of the *Sykes* opinion. *Johnson v. McGraw-Hill Cos.*, 451 F. Supp. 2d. 681, 711 (W.D. Pa. 2006) (“[I]t is not necessary for Johnson to establish that he was actually dissuaded from seeking legal recourse (which he obviously was not). . .”).

II. SETTING THE STANDARD FOR TITLE VII RETALIATORY ACTION

Sheila White worked in the Maintenance of Way Department at Burlington Northern & Santa Fe Railway Company, where she was the only woman employed in her department.⁶ Marvin Brown, the roadmaster, hired White in June of 1997 to work as a track laborer, responsible for cleaning debris from the right-of-way and replacing track components, among other duties.⁷ Shortly after she began working at Burlington, she was assigned to work a forklift, which was considered to be a “less arduous and cleaner job.”⁸ This became her primary responsibility.⁹

White’s immediate supervisor was a man named Bill Joiner, and in September of 1997 White complained that Joiner had made disparaging remarks to her and said that “women should not be working in the Maintenance of Way department.”¹⁰ After investigating White’s complaints, Burlington ordered that Joiner be suspended for ten days and that he attend sexual-harassment training.¹¹ At the same time that Brown informed White of the actions taken against Joiner, Brown also told her that she was being removed from forklift duty.¹² In an October 1997 complaint to the Equal Employment Opportunity Commission (“EEOC”),¹³ White alleged that this reassignment of her duties constituted gender discrimination and retaliation for her complaint about Joiner’s comments. In December, White filed a second complaint alleging further retaliation, claiming that Brown “had placed her under surveillance and was monitoring her daily activities.”¹⁴

Later that month, White had a dispute with a supervisor, Percy Sharkey, who reported to Brown that White had been insubordinate.¹⁵ Brown ordered that White be suspended without pay, spurring White to defend herself through Burlington’s internal grievance procedures.¹⁶ When the company cleared White of the insubordination charge, she was reinstated and awarded back-pay for the thirty-seven days of suspension.¹⁷ White filed a third com-

⁶ *Burlington*, 126 S. Ct. at 2409.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ The EEOC is the federal agency charged with enforcing anti-discrimination laws, including Title VII. Federal Equal Employment Opportunity (EEO) Laws, http://www.eeoc.gov/abouteeo/overview_laws.html (last visited Mar. 1, 2007). Employees who wish to file discrimination claims under Title VII must first file charges with the EEOC and exhaust the administrative remedies before they can file suit in court. EEOC, Federal Laws Prohibiting Job Discrimination, <http://www.eeoc.gov/facts/qanda.html> (last visited Mar. 1, 2007); see also *Robinson v. Dalton*, 107 F.3d 1018, 1020–21 (3d Cir. 1997).

¹⁴ *Burlington*, 126 S. Ct. at 2409.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

plaint with the EEOC, alleging that her suspension was retaliation for her earlier complaints.¹⁸

White later brought her claims to federal court, filing suit against Burlington under the anti-retaliation provision of Title VII.¹⁹ Specifically, she claimed that the change in her job duties and the suspension without pay were retaliation for her reports of gender discrimination; the jury agreed and awarded White \$43,500 in compensation.²⁰ Burlington appealed the verdict to the Sixth Circuit.²¹ Initially, a panel of the Sixth Circuit overturned the judgment,²² but the Court of Appeals vacated that decision, and, en banc, the Sixth Circuit affirmed the judgment in favor of White.²³ The judges were divided, however, on the correct standard to apply for claims of retaliation under Title VII.²⁴

The divide among the Sixth Circuit judges was illustrative of a larger split among the circuits. The issue in dispute was whether the anti-retaliation provision of Title VII²⁵ must be read in tandem with the anti-discrimination provision,²⁶ which would limit actionable retaliations to those that resulted in a material change in the terms of employment, i.e., firing or de-

¹⁸ *Id.*

¹⁹ *Id.* at 2410.

²⁰ *Id.*

²¹ *Id.*

²² *White v. Burlington N. & Santa Fe Ry. Co.*, 310 F.3d 443 (6th Cir. 2002).

²³ *White v. Burlington N. & Santa Fe Ry. Co.*, 364 F.3d 789 (6th Cir. 2004).

²⁴ *Id.* at 795 (reaffirming the “materially adverse change in the terms of . . . employment” standard); *id.* at 809 (Clay, J., concurring) (arguing that the “reasonably likely to deter” standard was appropriate).

²⁵ The anti-retaliation provision reads:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3 (2000).

²⁶ The anti-discrimination provision reads:

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

42 U.S.C. § 2000e-2 (2000).

motion.²⁷ Circuits that adhered to this stricter reading of the anti-retaliation provision included the majority of the Sixth Circuit judges who heard White's case, and the Fifth and Eighth Circuits, which employed an even stricter nexus requirement between the retaliation and employment terms.²⁸

In contrast, the Seventh Circuit, Ninth Circuit, and D.C. Circuit held plaintiffs to a more relaxed standard, requiring only that the retaliatory action would have "dissuaded a reasonable worker from making or supporting a charge of discrimination,"²⁹ or that the action be "based on a retaliatory motive and [be] reasonably likely to deter the charging party or others from engaging in protected activity."³⁰ The Supreme Court granted certiorari in *Burlington* in order to resolve this split and articulate the standard for retaliatory action in violation of Title VII.³¹

Writing for the majority, Justice Breyer began his analysis of Title VII by comparing the language of the anti-discrimination provision with the language of the anti-retaliation provision.³² Noting that the anti-discrimination provision explicitly limited its scope to the terms of employment,³³ Breyer pointed out that the anti-retaliation provision did not contain such limiting language.³⁴ Breyer then explained that the difference in language was not accidental, but rather expressed the distinct purposes of the two provisions: "The substantive provision seeks to prevent injury to individuals based on who they are, i.e., their status. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, i.e., their conduct."³⁵ This second purpose, Breyer explained, could only be achieved by prohibiting actions both inside and outside the workplace, because retaliation might have an effect on employment regardless of where it took place.³⁶ Breyer concluded: "Thus, purpose reinforces what language already indicates, namely, that the anti-retaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment."³⁷

Breyer dismissed Burlington's and the Solicitor General's argument that precedent compelled the narrower interpretation, declaring that no precedent

²⁷ *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2411 (2006). The Court addressed the issue of retaliatory scope in *Burlington* despite the fact that White did not allege any non-employment-related retaliation.

²⁸ See, e.g., *id.* at 2410; *Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir. 1997); *Ledergerber v. Stangler*, 122 F.3d 1142 (8th Cir. 1997).

²⁹ *Washington v. Ill. Dept. of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005); see, e.g., *Knox v. Ind.*, 93 F.3d 1327 (7th Cir. 1996); *Ray v. Henderson*, 217 F.3d 1234 (9th Cir. 2000); *Passer v. Am. Chem. Soc'y*, 935 F.2d 322 (D.C. Cir. 1991).

³⁰ *Ray*, 217 F.3d at 1242-43.

³¹ *Burlington*, 126 S. Ct. at 2411.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 2412.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 2412-13.

directly addressed the issue.³⁸ In particular, Burlington and the Solicitor General argued that the suggested requirement in *Burlington Industries, Inc. v. Ellerth*,³⁹ that violations of Title VII be limited to tangible employment action, applied to the retaliatory provision as well.⁴⁰ Breyer rejected this, noting that *Ellerth* concerned hostile workplace discrimination for which employers might be vicariously liable and that the case had not “mention[ed] Title VII’s anti-retaliation provision at all.”⁴¹ Breyer also rejected their argument that the EEOC itself adopted the narrower interpretation in certain manuals by citing other EEOC manuals that seemed to express a broader view.⁴² Finally, Breyer pointed out that other statutes, including the National Labor Relations Act, contained anti-retaliation provisions that were broader in scope than their anti-discrimination provisions.⁴³

Breyer ultimately held that “Title VII’s substantive provision and its anti-retaliation provision are not coterminous. The scope of the anti-retaliation provision extends beyond workplace-related or employment-related acts and harm.”⁴⁴ Breyer then stated that an action must rise to the level of material harm in order to violate the anti-retaliation provision.⁴⁵ The materiality requirement, Breyer explained, was intended to separate mere annoyances from retaliatory harms that are so severe as to dissuade employees from seeking remedy for discrimination.⁴⁶ According to Breyer, “material” should be interpreted as that which “might have ‘dissuaded a reasonable worker from making or supporting a charge of discrimination.’”⁴⁷ The reasonable worker standard should be included, Breyer noted, because objective standards are more “judicially administrable,”⁴⁸ and the general terms of the standard take into account the unique circumstances of a given retaliation. “A legal standard that speaks in general terms rather than specific prohibited acts is preferable, for an ‘act that would be immaterial in some situations is material in others.’”⁴⁹

Finally, Breyer turned to the facts of *White*’s case, applying the newly-introduced standards to a review of the jury’s verdict.⁵⁰ First, Breyer disagreed with Burlington’s argument that taking *White* off forklift duty and returning her to track laborer tasks could not constitute retaliation because

³⁸ *Id.* at 2413.

³⁹ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

⁴⁰ *Burlington*, 126 S. Ct. at 2413.

⁴¹ *Id.*

⁴² *Id.* at 2413–14.

⁴³ *Id.* at 2414.

⁴⁴ *Id.*

⁴⁵ *Id.* at 2415.

⁴⁶ *Id.*

⁴⁷ *Id.* (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).

⁴⁸ *Id.*

⁴⁹ *Id.* at 2416 (quoting *Washington v. Ill. Dept. of Revenue*, 420 F.3d 658, 661 (7th Cir. 2005)).

⁵⁰ *Id.*

the track laborer tasks were in her job description.⁵¹ Instead, Breyer stated that while any change in job duties is “not automatically actionable,” it was reasonable in this case for the jury to find that White’s reassignment involved less desirable duties and therefore would be “materially adverse to a reasonable employee.”⁵²

Second, Breyer considered Burlington’s argument that the suspension without pay was not actionable retaliation, because White was eventually reinstated and compensated for the lost salary.⁵³ Breyer rejected the argument, noting that Congress’s 1991 Amendment to Title VII allowed for both compensatory and punitive damages.⁵⁴ Finally, Breyer concluded by declaring that White’s evidence provided adequate demonstration of the adverse effects she had suffered, emphasizing the stress of going thirty-seven days without a job or salary and noting that a reasonable employee might choose to stay silent rather than face such “emotional distress.”⁵⁵ The Supreme Court affirmed the Court of Appeals.⁵⁶

Justice Alito filed a concurring opinion.⁵⁷ Alito disagreed with the majority’s interpretation of the language of Title VII and argued that the anti-discrimination and anti-retaliation provisions should be read together.⁵⁸ His conclusion was that the anti-retaliation provision only applied to the employment-related discrimination at issue under the anti-discrimination provision.⁵⁹ Any retaliation, therefore, must be employment-related in order to be actionable, according to Alito.⁶⁰ He justified this position by noting that retaliation was much more likely to occur on the job and that employment-related retaliation was not limited to occurrences in the physical workplace setting, concluding that therefore his proposed rule would not go too far in excluding retaliation claims.⁶¹

Alito went on to suggest that an application of the majority’s test would lead to illogical results.⁶² Applying the materiality test, Alito argued, meant taking into account the severity of the underlying discrimination, since it would take greater retaliation to dissuade an employee who had suffered harsh discrimination.⁶³ The reverse implication, Alito believed, was that an employee who suffered minor discrimination would get the broadest protec-

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 2417.

⁵⁴ *Id.*

⁵⁵ *Id.* at 2417–18.

⁵⁶ *Id.* at 2418.

⁵⁷ *Id.* (Alito, J., concurring).

⁵⁸ *Id.* at 2419.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 2420.

⁶² *Id.*

⁶³ *Id.* The majority opinion addressed this criticism, clarifying that their standard did not encompass a consideration of the underlying discrimination. *Id.* at 2416.

tion from retaliation, since it would not take much to dissuade such an employee from filing a claim.⁶⁴

Alito pointed out that another difficulty of the majority's test was the level of generality to be used in applying the reasonable employee concept.⁶⁵ It was not made clear, Alito argued, how many characteristics the plaintiff and the reasonable employee should share, particularly given the majority's insistence that the inquiry be context-specific.⁶⁶ Alito's final criticism focused on the causation standard to be applied in determining whether retaliation "well might have dissuaded a reasonable worker."⁶⁷ "Especially in an area of the law in which standards of causation are already complex, the introduction of this new and unclear standard is unwelcome," he stated.⁶⁸ Alito's concurrence concluded by noting that, despite his disapproval of the majority's test, he would have reached the same holding on the merits of White's case.⁶⁹

The *Burlington* decision was received as an important case. Commentators seemed to agree that the case represented a broadening of the scope of Title VII's anti-retaliation provision, and an expansion of rights and remedies available to employees. Erwin Chemerinsky discussed the ramifications of *Burlington*, observing that "[b]y expressly rejecting the narrow definitions of retaliation embraced by several circuit courts, the Court has made it much easier for wronged employees to bring claims for retaliation."⁷⁰ He went on to suggest that this new standard might also help plaintiffs arguing cases under other anti-discrimination statutes.⁷¹ Chemerinsky declared: "*Burlington Northern* is truly a major victory for civil rights plaintiffs."⁷² The Harvard Law Review's commentary on recent cases echoed this analysis, opining that "the *Burlington* Court has provided employees a victory and has hauled the circuit courts back on track by defining retaliatory conduct in a way that facilitates efforts to redress workplace inequality."⁷³ An exami-

⁶⁴ *Id.* at 2421 (Alito, J., concurring).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* (discussing the majority's test, *id.* at 2415).

⁶⁸ *Id.*

⁶⁹ *Id.* at 2422.

⁷⁰ Erwin Chemerinsky, *Workers Win in Retaliation Case*, TRIAL, Jan. 2007, at 58.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Leading Cases*, 120 HARV. L. REV. 312, 322 (2006). The author also warned that *Burlington* might have the perhaps unintended effect of narrowing the scope of the anti-discrimination provision. *Id.* For another analysis of *Burlington* as a civil rights victory, see Joanna Grossman and Deborah Brake, *The Supreme Court Rules in Favor of Broader Protection for Employees Who Suffer Retaliation When They Complain About Discrimination*, FINDLAW LEGAL NEWS AND COMMENT, July 7, 2006, available at http://writ.news.findlaw.com/commentary/20060707_brake.html (last visited Feb. 22, 2007); 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).

nation of one early application of the *Burlington* standard, however, casts doubt on the effectiveness of *Burlington* as a victory for civil rights.

III. APPLYING THE *BURLINGTON* STANDARD

The *Burlington* decision was issued in June of 2006. In the latter half of the year, commentators praised the case as a correctly-decided broadening of the category of actions that could constitute illegal retaliation. In January of 2007, one of the first cases to apply the *Burlington* standard came down from the district court for the Western District of Pennsylvania. *Sykes v. Pennsylvania State Police*⁷⁴ used the *Burlington* analysis to narrow, rather than broaden, the scope of Title VII retaliatory action in ways that might be troubling both to legal scholars and those who suffer discrimination.

Angela Sykes is an African-American woman who worked as a police communications specialist for the Pennsylvania State Police in Washington, Pennsylvania, starting in January of 1997.⁷⁵ Her job duties included managing communications with the public and handling some types of emergency calls.⁷⁶ Sykes alleged that during her employment with the department she endured discrimination.⁷⁷

Sykes reported the incidents of discrimination to her supervisors and requested that they be investigated; in response her schedule was changed to benefit the coworker she alleged had been discriminatory.⁷⁸ Sykes then filed an internal complaint with the police department and also filed complaints with the EEOC and the Pennsylvania Human Relations Commission.⁷⁹ Sykes later withdrew those complaints, but noted in a statement that “[a]ll allegations are true, however in order for me to continue to work in a harmonious environment I withdraw this complaint.”⁸⁰

Over the next two years, Sykes alleged, she endured two other instances of discrimination⁸¹ and, as a result of her troubles at work, suffered from

⁷⁴ No. 05-1349, 2007 WL 141064 (W.D. Pa. Jan. 17, 2007).

⁷⁵ *Id.* at *1.

⁷⁶ *Id.*

⁷⁷ Specifically, in 1999 she requested Christmas Day as a day off, but instead was given Kwanzaa off. *Id.* at *2. In 2001, a white coworker “commented that Sykes needed to be ‘knocked down a peg or two’ because she was acting like ‘MBA,’ which she later explained meant ‘Miss Black America.’” *Id.* (quoting Doc. 17-2 at 22, 54–55). Sykes alleged that the same coworker, Shari Necciai, refused to send police to the site of an automobile accident in which Sykes was involved. *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at *2 n.3 (quoting Doc. 17-7 at 41).

⁸¹ Sykes stated that once another woman, April Mickey, joined the Washington barracks as a police communications specialist, Mickey received preferential treatment. *Id.* at *2. Sykes also alleged that Roger Waters, one of her supervisors who was named as a defendant, made racially-charged comments suggesting that her appearance would be a distraction to male coworkers or members of the public. *Id.* at *2 n.4 (quoting Doc. 17-6 at 2).

stress that led her to seek medical treatment in 2003.⁸² Sykes continued to report various problems to her superiors and felt that their responses were not helpful.⁸³ In August 2004, Sykes filed another complaint,⁸⁴ and around the same time she was diagnosed with “post traumatic stress syndrome,” and prescribed Lexapro and Alprazolam.⁸⁵ Later in August, Sykes tried to return to work but the state police medical officer decided that the drugs she was taking could interfere with her work duties and prevented her return.⁸⁶ She remained off the job from August 28 through October 12, 2004.⁸⁷

In November of 2004, Sykes filed additional internal complaints relating to the treatment she received from her supervisor.⁸⁸ She also filed a second claim with the EEOC alleging retaliation for the filing of her 2001 complaint.⁸⁹ In 2005, she filed suit in district court under, *inter alia*, Title VII, alleging disparate treatment due to race.⁹⁰

First, the district court considered Sykes’s hostile work environment claims and held that she failed to meet her burden of establishing a prima facie case of discriminatory treatment.⁹¹ The court stated that the comments and behavior that she alleged were discriminatory, but did not rise to an actionable level of harm.⁹² The court also noted that she had failed to show that any differences in treatment were motivated by racial discrimination.⁹³

Turning to Sykes’s retaliation claim, the court assumed *arguendo* that her 2001 complaints were protected under Title VII, but concluded that the retaliation she alleged was not actionable. Citing the *Burlington* standard, the court also noted that the “applicable standard is objective.”⁹⁴ Without considering the specifics, the court declared that Sykes’s claim did not meet the *Burlington* test: “These actions, whether characterized as major or minor, did not deter Sykes’s pursuit of new and expanded allegations of discrimination, either internally or administratively.”⁹⁵

The court detailed the numerous instances of Sykes’s complaints and the various remedial bodies to which she turned.⁹⁶ The opinion relied upon

⁸² *Id.* at *3.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* Sykes applied for workers’ compensation, but her claim was denied, possibly because her personal doctor deemed her fit for employment. *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at *4. The supervisor was eventually cleared of the internal charges. *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at *5. In fact, the court noted, Sykes herself testified that she suspected the preferential treatment given to Mickey was evidence of a romantic relationship between Mickey and Vaughan, not racial distinctions. *Id.* at *6.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at *6–7.

this pattern of behavior as the proof needed to defeat the *Burlington* standard.⁹⁷

The Supreme Court held in *Burlington* that conduct does not amount to an adverse employment action absent a likelihood that the action was significant enough to deter future complaints. . . . Sykes's own aggressive response to what she identified as instances of discrimination belies any argument she might make that a reasonable person confronted with the "adverse employment actions" that she describes would have been dissuaded from voicing additional allegations of discrimination.⁹⁸

The court went on to note that, even had Sykes met the *Burlington* standard, it would have found her claim insufficient on the issues of causation and refutation of the defendants' non-retaliatory explanations for their actions.⁹⁹ The court granted the defendants' motion for summary judgment.¹⁰⁰

IV. THE PROBLEM WITH SYKES'S APPLICATION OF THE *BURLINGTON* DOCTRINE

Regardless of whether the district court was correct to dismiss Sykes's claim on the merits, its application of the *Burlington* standard is troubling. The *Sykes* opinion seems to read a narrowness into *Burlington* that belies both the test as articulated and the general thrust of the opinion. *Sykes*, in fact, narrows the focus so far that it becomes a double bind, possibly preventing plaintiff recovery altogether.

The *Burlington* Court indicated that it was creating a context-sensitive, objective approach that "avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings."¹⁰¹ And yet by inquiring only into Sykes's particular reaction to the alleged retaliation, the Pennsylvania court limited itself to determining the plaintiff's subjective state. The only evidence of materiality that the court used was the effect the actions had on Sykes, not the effect they might have had on a reasonable employee. The court, in fact, made no effort to discuss the reasonable employee standard, beyond a brief dismissal of it based on the evidence of Sykes's behavior.

To be sure, the *Burlington* opinion declared that "context matters,"¹⁰² and Sykes's own behavior is one way to measure the context of the alleged retaliation. But in *Burlington*, the Court framed its contextual inquiry in

⁹⁷ *Id.* at *7.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2415 (2006).

¹⁰² *Id.*

terms of the possibility of broadening the scope of the anti-retaliation provision. The Court cited an example of an action that, on its face, seemed minor, but in a given context might nevertheless dissuade a reasonable employee: “A schedule change in an employee’s work schedule may make little difference to many workers, but may matter enormously to a young mother with school-age children.”¹⁰³ This example suggests that the Court imagined context would at least sometimes weigh in the plaintiff’s favor. Even assuming that context would sometimes work the other way and render a seemingly major action legally minor, the Supreme Court did not intend for courts to use the plaintiff’s context to end the materiality inquiry altogether.¹⁰⁴

The narrow bent of the *Sykes* decision also seems thematically to conflict with *Burlington*, which emphasized that it was defining the scope of the anti-retaliation provision broadly—indeed, more broadly than the scope of the anti-discrimination provision: “Interpreting the anti-retaliation provision to provide broad protection from retaliation helps assure the cooperation upon which accomplishment of the [Civil Rights] Act’s primary objective depends.”¹⁰⁵ Broadening the scope did not mean that all future plaintiffs would succeed on their claims, of course, but it does suggest the Court anticipated more attention be paid to claims than the Pennsylvania court afforded.

The most problematic part of the *Sykes* opinion is its application of the *Burlington* test for materiality of the retaliatory action. The court takes the “reasonable employee” part of the materiality test and collapses it in on itself, measuring the effect of the alleged retaliatory behavior only as it affected Sykes: “Sykes’s own aggressive response . . . belies any argument she might make”¹⁰⁶ That interpretation is dangerously self-defeating. Surely any plaintiff whose case has made it before the court has withstood whatever retaliation he or she alleges. The district court, therefore, applied the test in a way that would seem to foreclose any recovery for retaliatory action, turning it into a legal catch-22. The fact of fighting one’s way to court in the face of retaliation would be used as proof that one did not need a remedy for suffering that retaliation.

It is possible that the *Sykes* court considered the dispositive factor to be the “vigorous and repeated” nature of Sykes’s legal and administrative

¹⁰³ *Id.* The Court used one other example to illustrate the need for an inquiry into context. “A supervisor’s refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee’s professional advancement might well deter a reasonable employee from complaining about discrimination.” *Id.* at 2415–16.

¹⁰⁴ For more discussion of the use of context in applying the *Burlington* standard, see Grossman & Brake, *supra* note 73 (arguing that certain circumstances are especially relevant in the employment discrimination context).

¹⁰⁵ *Burlington*, 126 S. Ct. at 2414.

¹⁰⁶ *Sykes v. Pa. State Police*, No. 05-1349, 2007 WL 141064, at *7 (W.D. Pa. Jan. 17, 2007).

claims.¹⁰⁷ Perhaps a plaintiff who had seemed less litigious, or had less vigorously withstood the retaliation, would stand a chance of recovery. The problem with that approach is that it would mean drawing an arbitrary line—between permissibly vigorous claims and impermissibly vigorous ones—that is nowhere to be found in the text of the anti-retaliation provision or the *Burlington* decision. Moreover, it could create a perverse incentive not envisioned by Congress or the Supreme Court: employees would have incentive not to pursue too many remedies for fear of defeating their own retaliation claims. It seems self-evident that the remedies, from Title VII to the EEOC to internal procedures, were created with the intention that they be pursued.

V. CONCLUSION

Until more courts apply the *Burlington* test to retaliatory actions under Title VII, it is hard to predict the ramification of the Supreme Court's decision. If *Sykes*'s early interpretation of the new standard is any indication, *Burlington* might not have cleared up as much confusion as the Supreme Court had hoped. *Burlington*, after all, was intended to resolve a Circuit split. *Sykes* might be merely an aberration, or a well-intentioned mistake that shows the *Burlington* standard is not easily administrable, or perhaps a purposeful rebellion against the Supreme Court's resolution of the matter. In any of those cases, the implication is that the legacy of *Burlington* is anything but straightforward.

The *Sykes* opinion might also be evidence that *Burlington* was, at least in effect, less than a complete victory for Title VII plaintiffs. Certainly, the *Sykes* holding seems contrary to the broad anti-retaliatory provision that the *Burlington* Court outlined. And defeating any possibility of recovery for retaliation would go against Congress' very purpose for including an anti-retaliation provision in Title VII. Indeed, if the *Sykes* interpretation gains acceptance, remedy under the anti-retaliation provision might disappear altogether.

¹⁰⁷ *Id.* The court lists the numerous and varied claims *Sykes* filed, and points out that “[a]ll of the internal claims were investigated and determined to be unfounded.” *Id.*