

Summer 2003

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Recommended Citation

David Anthony Rutter, Title VII Retaliation, A Unique Breed, 36 J. Marshall L. Rev. 925 (2003)

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TITLE VII RETALIATION, A UNIQUE BREED

DAVID ANTHONY RUTTER*

Ask an average employee whether her employer can fire her because of her gender or the color of her skin and she will probably say no. She probably thinks that her private employer cannot discriminate against her because it would violate her constitutional rights.

Thus, employees are generally aware that they have some rights.¹ The source of protection for employees in the private sector comes from Title VII of the Civil Rights Act of 1964 (Title VII).² Title VII prohibits employers from discriminating against employees because of their race, color, religion, sex or national origin.³ A lesser known, although equally important section of Title VII, intended to serve as a guardian over the anti-discrimination section of Title VII, is the anti-retaliation section of Title VII.⁴ Normally, an employer has considerable control over its employees' employment conditions, benefits, and career advancement. Congress was concerned when it introduced Title VII that employers might misuse that authority in order to create a chilling effect and thereby inhibit the effectiveness of the anti-discrimination section of Title VII.⁵ Employees are not likely to attempt to exercise their rights under the anti-discrimination section of Title VII if they know that they face termination or other punishments from their employer in retaliation. To deter such employer conduct, and to encourage employees to come forth with legitimate discrimination complaints, Congress included in Title VII an anti-retaliation section that prohibits

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1. Contrary to what one might think, the protections of the Title VII discrimination and retaliation sections are not exclusively given to lowly peons in employment that are powerless. *Mathur v. Bd. of Trs. of S. Ill. Univ.*, 207 F.3d 938, 944 (7th Cir. 2000) (noting that the sections apply equally to all employees including "highly placed employees," such as a president of a university).

2. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2000).

3. 42 U.S.C. § 2000e-2(a). The scope of this article shall be limited to disparate treatment claims. It will not consider disparate impact claims which are brought under 42 U.S.C. § 2000e-2(b).

4. Due to the separate protection of retaliation, the Seventh Circuit has limited the scope of equitable estoppel in the Title VII context where the plaintiff claims that he was deterred from making a complaint because of threats from the employer. *Shanoff v. Ill. Dep't of Human Servs.*, 258 F.3d 696, 702 (7th Cir. 2001).

5. *Sweeney v. West*, 149 F.3d 550, 556 (7th Cir. 1998).

retaliation against persons that oppose unlawful employment discrimination or participate in an employment discrimination claim.⁶ The retaliation section of Title VII is becoming increasingly prominent in the federal system. The number of Title VII discrimination cases continue to rise and fill the federal court dockets and the number of claims alleging retaliation are increasing as well.⁷

This Article will explain the Seventh Circuit's body of Title VII law. It will also discuss some of the complexities and unique nuances in the law governing retaliation claims. Finally, it will address certain changes in the law surrounding retaliation claims and conclude with proposals for the future of the law in the retaliation context.

I. PRESENT LAW IN THE RETALIATION CONTEXT

Title VII is a remedial statute that the courts interpret broadly.⁸ Its purposes are to ensure equal employment opportunities, to remove barriers that inhibit the advancement of protected classes, and to provide a remedy to employees harmed by employment discrimination.⁹ The anti-discrimination section of Title VII states that "[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or [] to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of [his] race, color, religion, sex or national origin."¹⁰ The anti-retaliation section of Title VII states:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice 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.¹¹

6. 42 U.S.C. § 2000e-3(a). See *Heuer v. Weil-McLain*, 203 F.3d 1021, 1023 (7th Cir. 2000) (noting that the "purpose of the anti-retaliation provision is to prevent Title VII claims from being deterred").

7. See Wendy Hyland, *Equal Opportunity for Employers: Elevating the Adverse Employment Action Standard to Allow Only Meritorious Retaliation Claims*, 90 KY. L.J. 273, 276 (2002) (finding that retaliation cases went up 72% between 1992 and 1998). There were approximately 7,900 retaliation cases filed in 1991, and in 1998, there were 31,059 retaliation cases filed. *Id.* See also Kari Jahnke, *Protecting Employees from Employees: Applying Title VII's Anti-Retaliation Provision to Coworker Harassment*, 19 LAW & INEQ. 101, 126 n.172 (2001) (citing authority that between 1991 and 1997 the number of retaliation charges filed with the EEOC went from 7,900 to 18,100). The years 1991 to 1997 saw a 300% increase in employment cases filed in federal district courts. *Id.* See also Debra S. Katz & Alan R. Kabat, *Retaliation in the Workplace*, in ADVANCED EMPLOYMENT LAW AND LITIGATION 1, 4 (A.L.I.-A.B.A. eds., 2002) (noting that retaliation claims constituted 15.3% of all charges filed with the EEOC in 1992 and constituted 27.5% of all charges in 2001).

8. *Veprinsky v. Fluor Daniel, Inc.*, 87 F.3d 881, 888 (7th Cir. 1996).

9. *Id.* at 889.

10. 42 U.S.C. § 2000e-2(a) (2000).

11. 42 U.S.C. § 2000e-3(a).

The federal courts apply many of the same standards and procedures for Title VII discrimination claims to retaliation claims. Thus, most of the rules discussed in this article will generally be applicable to both retaliation and discrimination claims.

To prove a retaliation claim a plaintiff has two paths she can follow: the direct method or the indirect method.¹² To proceed under the direct method a plaintiff must show through direct or circumstantial evidence that an employer took an adverse employment action against the plaintiff because of some impermissible bias.¹³ A plaintiff, however, will generally not have the type of “smoking gun” evidence necessary to proceed under the direct method.¹⁴ Practitioners should not confuse the “direct method” with “direct evidence,” which is evidence that shows discrimination without the need for any inference.¹⁵ While direct evidence is likely sufficient for the direct method, the Seventh Circuit has stated that certain types of circumstantial evidence suffice as well.¹⁶

A plaintiff will usually proceed under the indirect method employing a modified version of *McDonnell Douglas Corp. v. Green*'s¹⁷ burden shifting method.¹⁸ To establish a prima facie case of retaliation under the indirect method, a plaintiff employee must show that: (1) she engaged in an activity protected under the statute; (2) her job performance met the legitimate expectations of her employer; (3) her employer treated her less favorably than similarly situated employees that did not engage in the protected activity; and (4) her employer took a materially adverse employment action against her.¹⁹ If a plaintiff establishes all the elements for a prima facie case, the burden shifts to the employer to demonstrate a legitimate non-discriminatory reason for the adverse employment action.²⁰ If the defending employer provides a legitimate non-discriminatory reason, then the burden

12. *Haywood v. Lucent Techs., Inc.*, 323 F.3d 524, 531 (7th Cir. 2003).

13. *Id.*; *Rogers v. City of Chicago*, 320 F.3d 748, 753 (7th Cir. 2003). *See* *Fyfe v. City of Fort Wayne*, 241 F.3d 597, 601 (7th Cir. 2001) (stating that direct evidence “usually takes the form of an acknowledgment of discriminatory intent by the employer”).

14. *See* *Hilt-Dyson v. City of Chicago*, 282 F.3d 456, 465 (7th Cir. 2002) (noting that there usually is not sufficient evidence to proceed under the direct method); *Rogers*, 320 F.3d at 753 (noting that admissions by the employer are rare).

15. *Rogers*, 320 F.3d at 753 (defining direct evidence as “evidence that . . . would prove the fact in question ‘without reliance on inference or presumption’”).

16. *Haywood*, 323 F.3d at 529 (permitting circumstantial evidence to show that the employer's job action was motivated by race or national origin); *Rogers*, 320 F.3d at 754 (defining circumstantial evidence as “evidence that allows a jury to infer intentional discrimination by the decisionmaker”); *Hilt-Dyson*, 282 F.3d at 465 (stating that “an employee may present direct or indirect evidence of [an] employer's retaliatory intent [and] [d]irect evidence . . . frequently does not exist”).

17. 411 U.S. 792 (1973).

18. Edward A. Marshall, *Excluding Participation in Internal Complaint Mechanisms From Absolute Retaliation Protection: Why Everyone, Including the Employer, Loses*, 5 EMPLOYEE RTS. & EMP. POL'Y J. 549, 566 (2001). *Compare* *Hilt-Dyson*, 282 F.3d at 465 (outlining a prima facie Title VII retaliation claim) *with* *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (outlining a prima facie Title VII discrimination claim).

19. *Hilt-Dyson*, 282 F.3d at 465.

20. *Id.*

shifts back to the plaintiff to show that the employer's excuse is merely a pretext for discrimination.²¹ This Article will now discuss each aspect of a Title VII claim in more detail, giving special attention to the material adverse employment action element, an intensely debated element within the Seventh Circuit and among the various other Circuits in the federal system.

A. Protected Activity

Title VII prohibits retaliation against employees that oppose an unlawful employment practice or participate in a discrimination claim.²² The retaliation section is sometimes divided into the "opposition" clause and the "participation" clause.²³ A plaintiff commonly claims she was retaliated against after she complained about discrimination²⁴ or after she filed a complaint with the Equal Employment Opportunity Commission (EEOC).²⁵ Generally, the anti-retaliation section is applicable only if the employee complained to her employer about unlawful discrimination because an employer cannot retaliate if it is unaware of the employee's discrimination complaint.²⁶ Retaliation claims are not limited to employees affected by an employer's original discriminatory action. Other parties may also file a retaliation claim. For instance, if a co-worker comes forward and defends a complaining employee, the co-worker may have a retaliation claim against the employer if she suffers harm from the employer because of her assistance.²⁷

21. *Id.* See *Worth v. Tyler*, 276 F.3d 249, 265-66 (7th Cir. 2001) (explaining requirement to show pretext); *Walker v. Glickman*, 241 F.3d 884, 889 (7th Cir. 2001) (same).

22. 42 U.S.C. § 2000e-3(a) (2000).

23. *Speedy v. Rexnord Corp.*, 243 F.3d 397, 405-06 (noting the difference between "opposition" conduct and "participation" conduct); Marshall, *supra* note 18, at 557-65 (discussing how courts distinguish between the "opposition" clause and the "participation" clause). See, e.g., *Worth*, 276 F.3d at 265 (finding that plaintiff opposed discrimination within the meaning of Title VII by filing a police report regarding an alleged sexual assault). But see *Johnson v. ITT Aerospace/Communications Div. of ITT Indus., Inc.*, 272 F.3d 498, 501 (7th Cir. 2001) (holding that "it is not actionable retaliation [if an employer] discipline[s] an employee for 'filing a frivolous charge against the employer'"). See also *Moore v. Principi*, No. 00 C 2975, 2003 WL 21281765, at *3 (N.D. Ill. June 4, 2003) (indicating that it is unsettled in the Seventh Circuit as to whether the reasonable and good faith standard used for opposition clause claims is applicable to a participation clause claim).

24. E.g., *Williams v. Pharmacia, Inc.*, 137 F.3d 944, 948 (7th Cir. 1998) (noting that the plaintiff alleged her employer terminated her in retaliation for filing a grievance).

25. E.g., *Spears v. Mo. Dep't of Corr. & Human Res.*, 210 F.3d 850, 852 (8th Cir. 2000) (noting that the plaintiff alleged her employer terminated her in retaliation of her filing an EEOC complaint). *Miller v. American Family Mut. Ins. Co.*, 203 F.3d 997, 1008 (7th Cir. 2000).

26. *Miller v. American Family Mut. Ins. Co.*, 203 F.3d 997, 1008 (7th Cir. 2000).

27. *Herrnreiter v. Chicago Hous. Auth.*, 315 F.3d 742, 746 (7th Cir. 2002). See 42 U.S.C. § 2000e-3(a) (stating that a co-worker falls within the literal language of the retaliation section if he or she "participat[es] . . . in an investigation, proceeding, or hearing" on behalf of a co-worker).

B. Subsequent Improper Behavior and Meeting an Employer's Legitimate Expectations

An employee is not “immunize[d] . . . from being subsequently disciplined or terminated for inappropriate behavior” simply because the employee filed a discrimination charge.²⁸ Likewise, Title VII should not tie the hands of employers by making them unable to discipline or discharge an employee that has a poor work performance. If an employee is not adequately performing her job, then the employer has a legitimate reason to discipline or discharge the employee and the employee should not get the benefit of proceeding under the indirect method.²⁹ For the legitimate expectations element, an employee’s injury is based on how well the employee was performing her job at the time that she suffered the adverse employment action.³⁰ The courts look unfavorably on self-serving affidavits from employees as the sole means to show that an employee performed her work satisfactorily.³¹

C. Being Treated Differently Than Similarly Situated Employees

A plaintiff must show that she was treated differently than similarly situated employees that did not engage in the protected activity.³² An employee is similarly situated if “the employee is one who is ‘directly comparable to the plaintiff in all material respects.’”³³ Where the plaintiff is

28. *Hall v. Bodine Elec. Co.*, 276 F.3d 345, 359 (7th Cir. 2002). See *Paluck v. Gooding Rubber Co.*, 221 F.3d 1003 (7th Cir. 2000) (noting that the fact that an employee files a discrimination charge against her employer it does not subsequently preclude the employer from disciplining the employee for legitimate reasons).

29. See *Buckner v. Ill. Dep’t of Children & Family Servs.*, No. 01 C 7329, 2003 WL 187408, at *2 (N.D. Ill. Jan. 27, 2003) (indicating that an employee should not be able to use a retaliation claim to “immunize herself from adverse employment action despite poor work performance, bad attitude, truancy, etc.”).

30. *Lang v. Ill. Dep’t of Children & Family Servs.*, No. 00 C 7581, 2003 WL 21147711, at *5 (N.D. Ill. May 14, 2003). If the plaintiff is singled out for punishment and other employees not within the selected class were not punished in a similar way the question for the legitimate expectations element is whether the plaintiff was treated more harshly than other employees that broke the same rule. *Peters v. Renaissance Hotel Operating Co.*, 307 F.3d 535, 546 (7th Cir. 2002). A prima facie case can also be made out by showing that although similarly situated employees outside the protected class were punished, they were not punished as severely as the plaintiff was. *Peele v. Country Mut. Ins. Co.*, 288 F.3d 319, 330 (7th Cir. 2002).

31. See *Adusumilli v. City of Chicago*, 164 F.3d 353, 363 (7th Cir. 1998) (noting an employee’s self-serving statement is not sufficient to contradict an employer’s accusation of poor performance); *Koelsch v. Beltone Elecs. Corp.*, 46 F.3d 705, 709 (7th Cir. 1995) (noting that a plaintiff’s self-serving testimony is insufficient to call into doubt employers evidence that plaintiff was terminated for legitimate reasons); *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1460-61 (7th Cir. 1994) (noting that generally self-serving statements by employees concerning good work performance do not create a legitimate factual dispute, but if an employee specifically refutes the deficiencies claimed by the employer there may be a sufficient disputed issue to preclude summary judgment).

32. *Hilt-Dyson*, 282 F.3d at 465.

33. *Rogers*, 320 F.3d at 755 (quoting *Grayson v. O’Neill*, 308 F.3d 808, 819 (7th Cir. 2002)). See *Shelvy v. Potter*, 63 Fed. Appx. 273, 275 (7th Cir. 2003) (unpublished

complaining about a disciplinary action by the employer, the Seventh Circuit has required "a showing that two employees dealt with the same supervisor, were subject to the same workplace rules, and engaged in similar conduct."³⁴ Although this element may seem to be a trivial issue, it can become a major roadblock for a plaintiff under the indirect method if she cannot find a similarly situated employee.

D. Pretext

Once an employer presents a non-discriminatory reason³⁵ for the material adverse employment action, the burden shifts to the employee to show that the employer's reason is a pretext.³⁶ To establish pretext, the plaintiff must show that the employer's explanation is "not worthy of belief."³⁷ The plaintiff can show pretext by establishing that "(1) the defendant's explanation has no basis in fact, or (2) the explanation was not the real reason, or (3) [] the reason stated was insufficient to warrant the termination."³⁸ A pretext means that the employer intentionally lied; evidence, therefore, that shows that an employer's reason for terminating the employee was incorrect, imprudent, or a mistake is irrelevant to the pretext determination.³⁹

E. Material Adverse Employment Action

A plaintiff must also show that the employer took a material adverse employment action against her.⁴⁰ However, the courts have recognized that Title VII should not become involved in every minor dispute in the workplace. By narrowing or broadening the definition of what constitutes an "adverse employment action" the courts can limit the scope of Title VII.⁴¹

opinion) (stating that comparison can be made in terms of performance, qualifications, and conduct).

34. *Adams v. Wal-Mart Stores, Inc.*, 324 F.3d 935, 940 (7th Cir. 2003).

35. *E.g., Velasco v. Ill. Dep't of Human Servs.*, 246 F.3d 1010, 1017 (7th Cir. 2001) (noting that a legitimate non-discriminatory reason for the termination of physician is that the physician's conduct endangered patients).

36. *Hilt-Dyson*, 282 F.3d at 465.

37. *Sanchez v. Henderson*, 188 F.3d 740, 746 (7th Cir. 1999); *Adusumilli*, 164 F.3d at 364.

38. *Worth*, 276 F.3d at 266 (quoting *Sanchez*, 188 F.3d at 746). *See Walker*, 241 F.3d at 889 (stating that pretext can be established by "suggesting that retaliation was the most likely motive for the failure to hire, or by showing that the defendant's proffered reason was not worthy of belief").

39. *Grube v. Lau Indus., Inc.*, 257 F.3d 723, 730 (7th Cir. 2001); *Logan v. Kautex Textron N. Am.*, 259 F.3d 635, 640 (7th Cir. 2001); *Miller v. Am. Family Mut. Ins.*, 203 F.3d 997, 1008-09 (7th Cir. 2000).

40. *Hilt-Dyson*, 282 F.3d at 465. Although an employer is prohibited from taking an adverse action against an employee, the Seventh Circuit has found that an employer can bribe an employee in order to get the employee to voluntarily choose not to file a discrimination claim. *Cullom v. Brown*, 209 F.3d 1035, 1041 (7th Cir. 2000).

41. *See Sweeney v. West*, 149 F.3d 550, 556 (7th Cir. 1998) (finding that the adverse employment action element is utilized to limit cases that are severe "enough to prompt a federal case"). It should be noted that narrowing the scope of the definition of an adverse

The Seventh Circuit has stated more than once that it is not the role of courts to become “super-personnel departments” that evaluate an employer’s every decision.⁴² Courts have thus tried to limit their interference with employers’ management of personnel and their enforcement of discipline and workplace rules.⁴³ Courts limit the definition of “disability” under the Americans with Disabilities Act (ADA)⁴⁴ in a similar manner, in that it does not encompass every physical or mental discomfort or ailment.⁴⁵ In regards to Title VII, by striking a balance in the definition of an adverse employment action, courts can provide protection to employees while allowing employers some freedom to run their businesses without fearing lawsuits at every turn.⁴⁶ The Circuits employ several different standards for the adverse employment action element.⁴⁷

In the Seventh Circuit, a plaintiff must show that her employer took an adverse employment action against her.⁴⁸ The adverse employment action must be material,⁴⁹ meaning it is “more than ‘a mere inconvenience or an alteration of job responsibilities.’”⁵⁰ A material adverse employment action is described as “a tangible change in working conditions that produces a material disadvantage . . . and [a] change[] in employment that significantly affect[s] an employee’s future career prospects.”⁵¹ An adverse employment action is not material simply because it makes an employee unhappy,⁵² or because the complaining employee is overly irritable or has a chip on her

employment action would limit the overall number of claims. However, in some cases where the plaintiff clearly suffered a material adverse employment action, such as termination, this element is a non-issue and the element’s ultimate definition will have little relevance.

42. *Grayson*, 308 F.3d at 820; *Chiaramonte v. Fashion Bed Group, Inc.*, 129 F.3d 391, 400 (7th Cir. 1997).

43. *Jahnke*, *supra* note 7, at 124.

44. Americans with Disabilities Act, 42 U.S.C. § 12101 (2000).

45. See *Toyota Motor Mfg., Inc. v. Williams*, 534 U.S. 184, 195-201 (2002) (defining what constitutes a major life activity and concluding that a plaintiff is not disabled merely because the plaintiff cannot perform specific skills necessary for the plaintiff’s job).

46. *Hyland*, *supra* note 7, at 274.

47. See *Katz & Kabat*, *supra* note 7, at 14-15 (discussing the standards various Circuits use); *Tod F. Schleier, Recent Cases and Developments in the Law of Retaliation, in EMPLOYMENT DISCRIMINATION AND CIVIL RIGHTS ACTIONS IN FEDERAL AND STATE COURTS* 207, 214-219 (A.L.I.-A.B.A. eds., 2002) (discussing the split in the Circuits); *Joel A. Kravetz, Deterrence v. Material Harm: Finding the Appropriate Standard to Define an “Adverse Action” in Retaliation Claims Brought Under the Applicable Equal Employment Opportunity Statutes*, 4 U. PA. J. LAB. & EMP. L. 315, 321-55 (2002) (discussing the standards applied in each Circuit); *Linda M. Glover, Title VII Section 704(a) Retaliation Claims: Turning a Blind Eye Toward Justice*, 38 HOUS. L. REV. 577, 594-609 (2001) (discussing the standards that different Circuits apply).

48. *Hilt-Dyson*, 282 F.3d at 465.

49. *Id.*; *Ribando v. United Airlines, Inc.*, 200 F.3d 507, 510 (7th Cir. 1999).

50. *Hilt-Dyson*, 282 F.3d at 465 (quoting *Crady v. Liberty Nat’l Bank & Trust Co. of Indiana*, 993 F.2d 132, 136 (7th Cir. 1993)); *Ribando*, 200 F.3d at 510 (quoting *Crady*, 993 F.2d at 136).

51. *Spears*, 210 F.3d at 853.

52. *Hilt-Dyson*, 282 F.3d at 466; *Smart v. Ball State Univ.*, 89 F.3d 437, 441 (7th Cir. 1996).

shoulder.⁵³

However, due to the unique set of circumstances in each Title VII case, the Seventh Circuit has refrained from providing a list of material adverse employment actions.⁵⁴ Some possible examples of material adverse employment actions in the Seventh Circuit are: termination, demotion, material decrease in pay or benefits, and a material decrease in status, prestige, or responsibilities.⁵⁵ Although a material adverse employment action does not have to be “quantifiable in terms of pay or benefits,”⁵⁶ actions that cause economic harm to a plaintiff are more likely to be considered materially adverse employment actions.⁵⁷ Some cases in the Seventh Circuit take a narrow view of an adverse employment action and require that the action be “accompanied by some other action, such as a job loss or demotion.”⁵⁸ Generally, some actions are insufficient alone to constitute a materially adverse employment action, such as poor performance evaluations⁵⁹ or the denial of a discretionary bonus.⁶⁰ However, other actions alone may constitute an adverse employment action, such as an employer encouraging employees to act adversely to another employee.⁶¹

53. *Smart*, 89 F.3d at 441.

54. *Hilt-Dyson*, 282 F.3d at 465. See *Knox v. Ind.*, 93 F.3d 1327, 1334 (7th Cir. 1996) (stating that “adverse actions can come in many shapes and sizes”).

55. *Hilt-Dyson*, 282 F.3d at 465-66 (quoting *Ribando*, 200 F.3d at 510); *Rabinovitz v. Pena*, 89 F.3d 482, 488 (7th Cir. 1996). See also *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1086 (7th Cir. 2000) (stating that “an ‘adverse employment action’ alters the ‘terms or conditions’ of one’s employment”); *Baker v. Henderson*, No. 99-2660, 2000 WL 767846, at *6 (7th Cir. 2000) (stating that “a dramatic downward shift in skill level required to perform job responsibilities can constitute [an] adverse employment action”); *Crady*, 993 F.2d 132 (indicating that changing an employee’s title to a less impressive title or a significant reduction in responsibilities might be a material adverse employment action). But see *Stutler*, 263 F.3d at 702 (noting that “a lateral transfer without a loss in benefits does not constitute an adverse employment action”); *Hoffman-Dombrowski v. Arlington Int’l Racecourse, Inc.*, 254 F.3d 644, 654 (7th Cir. 2001) (finding that “changing [an employee’s] schedule, secretly videotaping her” and reprimanding her for allowing unauthorized persons in her office were not materially adverse employment actions); *Ribando*, 200 F.3d at 511 (finding that a letter expressing concern about the employee put in the employee’s personnel file did not constitute an adverse employment action); *Flaherty v. Gas Research Inst.*, 31 F.3d 451, 456-558 (7th Cir. 1994) (finding that a lateral transfer and change in title was not an adverse employment action).

56. *Hilt-Dyson*, 282 F.3d at 466.

57. See *Schobert v. Ill. Dep’t of Transp.*, 304 F.3d 725, 733 (7th Cir. 2002) (noting that a material adverse employment action can be non-economical).

58. *Krause v. City of La Cross*, 246 F.3d 995, 1000 (7th Cir. 2001) (concluding that a letter of reprimand is not an adverse employment action by itself); See *Katz & Kabat*, *supra* note 7, at 13-14 (stating that *Krause* applies the ultimate employment decision standard used by some Circuits).

59. *Spears*, 210 F.3d at 854 (holding that “a poor performance rating does not in itself constitute an adverse employment action”); *Sweeney*, 149 F.3d at 556 (noting that the Circuit does not conclude that a negative performance evaluation alone constitutes an adverse employment action). See also *Krause*, 246 F.3d at 1000 (holding that a letter of reprimand alone is insufficient to qualify as an adverse employment action).

60. *Rabinovitz*, 89 F.3d at 488-89 (concluding that the denial of a bonus alone is not an adverse employment action when a bonus is not automatic).

61. See *McKenzie v. Ill. Dep’t of Transp.*, 92 F.3d 473, 485 (7th Cir. 1994) (indicating

F. Unique Aspects of Retaliation Claims

It is not uncommon for a plaintiff to bring both a discrimination claim and a retaliation claim.⁶² For example, a plaintiff may allege in one claim that his or her employer discriminated against her, and then bring a separate retaliation claim if the employer retaliated against her because she filed a charge of discrimination. If it is later determined that the plaintiff's discrimination claim is deficient because her employer did not engage in unlawful discrimination, the plaintiff can still pursue her retaliation claim.⁶³ However, the plaintiff must show that she reasonably, and in good faith, believed that she was challenging conduct that violated Title VII.⁶⁴ Furthermore, the Seventh Circuit has held that if a plaintiff bases her claim on an incorrect belief that she is a member of a class protected under Title VII, then the plaintiff cannot have a reasonable belief that she is challenging conduct that is a violation of Title VII.⁶⁵

The Seventh Circuit recognizes that the adverse action, in the retaliation context, taken against the employee need not be an employment action.⁶⁶ For instance, an employee complains about discrimination and is contemplating filing a complaint. Her employer visits her house during the night and throws a brick through her window, in effect, sending her a message. This scenario would fall within the retaliation section of the Title VII.⁶⁷ In this sense, a retaliation claim is broader than a discrimination claim, because it is not limited to situations where there is an adverse employment action.⁶⁸ Practitioners should remember this aspect of retaliation caselaw because courts continue to refer to the adverse action required for retaliation claims as an adverse employment action.⁶⁹

that in theory if an employer orders co-workers to shun a fellow employee it could possibly constitute a material adverse employment action).

62. *E.g.*, *Oest v. Ill. Dep't of Corr.*, 240 F.3d 605, 606-07 (7th Cir. 2001) (noting that the plaintiff alleged that her employer discriminated against her based on race and that her retaliated against her for filing a charge with the EEOC).

63. *Fine v. Ryan Int'l Airlines*, 305 F.3d 746, 752 (7th Cir. 2002); *Dey*, 28 F.3d at 1458.

64. *Fine*, 305 F.3d at 752; *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 706-07 (7th Cir. 2000); *Pasqua v. Metro. Life Ins. Co.*, 101 F.3d 514, 518 (7th Cir. 1996); *Dey*, 28 F.3d at 1458.

65. *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 707 (7th Cir. 2000).

66. *Herrnreiter*, 315 F.3d at 746 (noting that "shooting a person for filing a complaint of discrimination would be an effective method of retaliation"); *Schobert*, 304 F.3d 733 (noting that brick-throwing and tire-slashing are methods of retaliation); *Aviles v. Cornell Forge Co.*, 183 F.3d 598, 606 (7th Cir. 1999) (finding that giving a false report to police about an individual pursuing a discrimination claim is a retaliatory action). Compare 42 U.S.C. § 2000e-2(a) (making specific reference to employment action such as hiring and firing an employee) with 42 U.S.C. § 2000e-3(a) (containing broader language prohibiting all acts of discrimination taken against an employee in retaliation).

67. *Schobert*, 304 F.3d at 733. See *Herrnreiter*, 315 F.3d at 746 (indicating that shooting a person for filing a complaint would be a form of retaliation).

68. *Herrnreiter*, 315 F.3d at 746. See *supra* note 66 (comparing actions prohibited under the discrimination and retaliation sections of Title VII).

69. *E.g.*, *Haywood v. Lucent Techs., Inc.*, 323 F.3d 524, 531 (7th Cir. 2003)

Recently, the Seventh Circuit ruled on an issue limited solely to the retaliation section of Title VII. In *Twisdale v. Snow*,⁷⁰ an employee participated in an internal discrimination investigation on the side of the employer, and sought protection under Title VII's anti-retaliation provisions.⁷¹ The section states that an employer shall not retaliate against an employee that "participated in any manner in an investigation."⁷² A literal reading seems to suggest that the section protects an employee whose actions assist her employer.⁷³ The *Twisdale* court rejected this interpretation, stating, "[p]erverse and absurd statutory interpretations are not to be adopted in the name of literalism."⁷⁴ Consequently, the Court held that the employee was not protected under Title VII.⁷⁵ The court noted that Title VII was created for the protection of those that are discriminated against and those that assist them, not employees who assist their employer in investigating a claim.⁷⁶

Special issues can arise when retaliation is threatened before an employee complains about discrimination or if an employee waits too long to complain about retaliation. The Seventh Circuit has ruled that a retaliation claim can be based on anticipatory retaliation when the employer threatens retaliation.⁷⁷ Plaintiffs generally cannot base a retaliation claim upon employer conduct that occurred after the employee was terminated.⁷⁸ However, post-termination conduct by an employer can be the basis for a claim if the conduct "impinges on [the plaintiff's] future employment prospects or otherwise has a nexus to employment."⁷⁹

II. THE CHALLENGES AND PITFALLS FOR RETALIATION CLAIMS NOW AND IN THE FUTURE

Discrimination in the workplace can take a variety of forms, thus it is difficult to fashion hard and fast rules that will adequately guide courts in all situations. Additionally, the type of conduct sufficient to invoke the ire of Title VII protection or constitute actionable retaliation is a continually evolving concept. As social and cultural norms change, the definition of

(indicating that a plaintiff must show that she suffered an "adverse employment action" to establish a prima facie case for retaliation). See also *Rogers*, 320 F.3d at 754-55 (referring to an adverse employment action); *Stutler v. Ill. Dep't of Corrs.*, 263 F.3d 698, 702-03 (7th Cir. 2001) (referring to an adverse employment action).

70. 325 F.3d 950 (7th Cir. 2003).

71. *Twisdale*, 325 F.3d at 952.

72. 42 U.S.C. § 2000e-3(a) (2000).

73. *Twisdale*, 325 F.3d at 953.

74. *Id.* at 953.

75. *Id.* at 952-53.

76. *Id.*

77. *Beckel v. Wal-Mart Assocs., Inc.*, 301 F.3d 621, 624 (7th Cir. 2002). But see *Johnson*, 272 F.3d at 501 (holding that "it is not actionable retaliation [if an employer] discipline[s] an employee for 'filing a frivolous charge against the employer'").

78. *Koelsch*, 46 F.3d at 709.

79. *Veprinsky*, 87 F.3d at 891. But see *Ishkhanian v. Forrester Clinic S.C.*, No. 02 C 9339, 2003 WL 21479072, at *2 (N.D. Ill. June 25, 2003) (noting that *Veprinsky* does not make it clear whether an action must have a nexus to employment).

acceptable conduct may change as well. Consequently, Title VII caselaw must adapt to changing social norms. For example, in the Title VII discrimination context, one consideration when determining whether a plaintiff has established a hostile work environment claim is the social context in which the conduct occurred.⁸⁰ The retaliation section of Title VII includes only general language precluding “discrimination” against those that oppose unlawful conduct or participate in a complaint.⁸¹ The courts have struggled with interpreting this section and often disagree with each other.⁸² The retaliation section is a unique beast because of its special language and purpose. Thus this section has been a challenge for the Seventh Circuit, and its nuances may present pitfalls for the unwary practitioner.

A. *Mirror Image of Discrimination Principles*

Courts historically utilized many of the same principles and concepts, such as the *McDonnell Douglas* burden shifting procedure for retaliation and discrimination claims.⁸³ In *Stone v. City of Indianapolis Public Utilities*,⁸⁴ the Seventh Circuit announced that the same four prima facie elements used for discrimination claims should be applied to retaliation claims.⁸⁵ Prior to *Stone*, for a prima facie case, a plaintiff had to show that: (1) she engaged in a protected activity, (2) she suffered an adverse employment action, and (3) there was a causal nexus between adverse action and the protected activity.⁸⁶ *Stone* removed the causation element from a plaintiff’s prima facie case in a retaliation claim.⁸⁷

Since the prima facie elements are the same for both discrimination cases and retaliation cases, one might presume that caselaw relating to each type of action is interchangeable. Such a presumption is encouraged by the fact that other discrimination statutes, such as the ADA, utilize the Title VII principles and the same elements for a prima facie case.⁸⁸ Also, retaliation is a subset of discrimination. Consequently, it is common for courts to apply ADA and ADEA case law interchangeably with Title VII discrimination and retaliation claims and vice-versa.⁸⁹ However, one must be cautious when

80. *Hilt-Dyson*, 282 F.3d at 463.

81. 42 U.S.C. § 2000e-3(a) (2000).

82. See *supra* note 47 and accompanying text (discussing the split among the Circuits).

83. *Haywood*, 323 F.3d at 529, 531 (applying the *McDonnell Douglas* burden shift analysis to a Title VII discrimination claim and a retaliation claim).

84. 281 F.3d 640 (7th Cir. 2002).

85. *Stone*, 281 F.3d at 644 (defining a prima facie case for retaliation).

86. *McClendon v. Ind. Sugars, Inc.*, 108 F.3d 789, 796 (7th Cir. 1997).

87. *Stone*, 281 F.3d at 644.

88. See 42 U.S.C. § 12117(a) (2000) (adopting the remedies, rights, and procedures of Title VII for ADA claims); *Pernice v. City of Chicago*, No. 99 C 4441, 2000 WL 224639, *3 (N.D. Ill. Feb. 22, 2000) (noting that Title I of the ADA “explicitly adopts the remedies, rights and procedures of Title VII”).

89. E.g., *Haywood*, 323 F.3d at 531-32 (citing *Crady*, an ADEA case, in ruling on Title VII claims); *Spearman*, 231 F.3d at 1084-86 (citing *Silk v. City of Chicago*, 194 F.3d 788 (7th Cir. 1999), an ADA case, in ruling on Title VII claims).

one applies case law from other types of claims in the retaliation context.

Beware, things may not be as simple as they seem. The Seventh Circuit recently sent out a warning in dicta in *Herrnreiter v. Chicago Housing Authority*.⁹⁰ *Herrnreiter* addressed a discrimination claim and cited retaliation cases for new law concerning the material adverse employment action element.⁹¹ The Court noted that it did not intend to imply that an adverse employment action in the discrimination context is identical to an adverse action in the retaliation context,⁹² because the adverse action in the retaliation context is actually the broader of the two.⁹³ The Court found that some cases incorrectly presume that the adverse actions required for discrimination and retaliation claims are the same⁹⁴ and hypothesized that the courts disregarded any distinction between retaliation and discrimination claims in order to simplify matters.⁹⁵ *Herrnreiter* criticized this simplification and called for a more liberal standard for retaliation claims because it only takes a minor adverse action on the part of an employer to dissuade co-workers from coming forward to support an employee complaining about discrimination.⁹⁶

B. What Remains of the Causation Element?

In *Stone*, the Seventh Circuit concluded that a plaintiff need not show a causal connection between the adverse employment action and the plaintiff engaging in the protected activity.⁹⁷ Some Seventh Circuit cases, however, disregard *Stone* on the causation element,⁹⁸ but otherwise accept *Stone*'s general authority.⁹⁹ What is the significance then of the volumes of caselaw elaborating on the causation element? The causation element is still an important aspect in proving a Title VII claim under the direct method.¹⁰⁰

One common issue addressed in relation to the former causation element is whether a temporal separation between the protected activity and the adverse action allegedly taken against the employee in retaliation precludes or advances a showing of causation.¹⁰¹ A consideration of the time

90. 315 F.3d 742 (7th Cir. 2002)

91. *Herrnreiter*, 315 F.3d at 745.

92. *Id.*

93. *Id.* at 745-46. *But see* *Murray v. Chicago Transit Auth.*, 252 F.3d 880, 890 (7th Cir. 2001) (equating the analysis for the retaliation claim with the analysis employed for the adverse employment action element of the discrimination claim).

94. *Herrnreiter*, 315 F.3d at 745-46.

95. *Id.* at 746.

96. *Id.*

97. *See supra* notes 84-87 and accompanying text. *See also* Justin P. O'Brien, *Weighing Temporal Proximity in Title VII Retaliation Claims*, 43 B.C. L. REV. 741, 748 (2002) (indicating that the causation element is the most widely litigated element and the lynchpin of a retaliation claim).

98. *See Rogers*, 320 F.3d at 755 (mentioning cases that disregard *Stone*).

99. *Id.*

100. *See Haywood*, 323 F.3d at 531 (requiring a casual connection between a protected activity and an employment action to establish a prima facie case for retaliation under the direct method).

101. *Velasco*, 246 F.3d at 1018; *Oest*, 240 F.3d at 616; *Sweeney*, 149 F.3d at 556-57;

between the protected action and the adverse action is still relevant for the pretext issue. As previously mentioned, to prove pretext a plaintiff must show that the employer's reason is unworthy of credence.¹⁰² The shorter the period of time between the protected activity and the alleged retaliation, the more likely it is that the employer is not telling the truth. Therefore, although the causation element caselaw is no longer directly on point, the analysis in those cases could still be instructive when analyzing the pretext issue.¹⁰³ The Seventh Circuit has cautioned against placing too much emphasis on timing arguments in the pretext context because it can lead to impermissible speculation as to the employer's motive,¹⁰⁴ but timing is still a valid consideration for the pretext inquiry.

C. *The Competing Interests*

The law governing retaliation claims must be balanced, taking into consideration the interests of employees and employers. An employer must be able to function, manage its employees and discipline or discharge its employees without constantly fearing liability.¹⁰⁵ If, for instance, an employee is not meeting the legitimate expectations of her employer, the employer should not be required to retain the employee simply because she has complained about discrimination. Unfortunately, the retaliation section of Title VII may serve as a crutch for such poor workers because employers will hesitate to risk potential liability.

The employees' interests must also be considered as well. Employers are made up of human beings and often perceive a complaint against them as an attack; it is human nature to seek revenge when one is attacked. Employers must be inhibited from utilizing their power over employees to further such intentions. The retaliation provision must encourage employers and employees to adjudicate disputes concerning employment discrimination in accordance with the provisions of Title VII. Retaliation continues to occur in the workplace, despite Title VII. Studies have shown only a small percentage of women who experience sexual harassment report it and most women who do not report it fear retaliation.¹⁰⁶ Additionally, studies have shown that a significant percentage of women that voice their complaints meet reprisals of some sort, such as denial of promotions or lower performance evaluations.¹⁰⁷

D. *Proposals for the Future*

The Seventh Circuit should strive to ensure that the law in the

McClendon, 108 F.3d at 796-97; *Dey*, 28 F.3d at 1458.

102. *Supra* note 37 and accompanying text.

103. *See, e.g., Alexander v. Wis. Dep't of Health & Family Servs.*, 263 F.3d 673 (7th Cir. 2001) (using the timing of the employer's actions in analyzing pretext discrimination).

104. *See Sanchez*, 188 F.3d at 747 n.4 (noting that speculation of an employer's timing is insufficient alone to create an issue of fact).

105. *Hyland*, *supra* note 7, at 274.

106. *Marshall*, *supra* note 18, at 586-87.

107. *Id.* at 587.

retaliation context is more clearly defined. Discrimination is a vague, illusive concept. Retaliation and discrimination comes in all shapes and sizes, but if the law on retaliation has more concrete boundaries, employers and employees alike will benefit. Employers need to be able to spend less time and effort considering the ramifications of disciplining or terminating an employee. Employers will also be more reluctant to take retaliatory actions against an employee if they know with a degree of certainty, that they cannot defend themselves in court.

Clarity in the law will also lessen the filing of meritless claims by plaintiffs, also benefiting employers and employees. Employers benefit because they do not need to address meritless suits. Plaintiffs benefit because they do not waste time pursuing meritless claims and risk paying filing fees and risk being billed for costs if the case is dismissed. Litigation as a whole decreases when the law is clear, because the employer better understands which conduct is proscribed.¹⁰⁸

Clarity is especially essential in the Title VII discrimination and retaliation context because of the emotional aspects of such cases. A person's job is closely connected to all aspects of her life. It affects her income and free time and indirectly impacts her family and outside activities. A person often sees her job as part of who she is as a person. Thus, when a person is disciplined or demoted or fired there is going to be an emotional component. That emotion can lead plaintiffs to sue without regard to the merit of their claim. Where the law is unclear in the Title VII context and thus plaintiffs are offered even an outside chance of success, the emotional reaction by plaintiffs may drive them to file suits. Retaliation claims are often even more emotionally charged situations because not only has the employer allegedly taken some adverse action against the employee, the employer has also taken a second adverse action against the employee and in the plaintiff's eyes has figuratively thumbed its nose at the plaintiff's initial complaint.

One aspect of the caselaw that should be clarified is what is a similarly situated employee. The "similar" within the element verbiage can make a prediction by employers or employees as to what is a similarly situated employee a risky venture. The caselaw, which tends to expand "a similar employee" to "an employee that is similar in material aspects" does little to clear up the vagueness of the element. Although the rules envision similarly situated employees and not necessarily employees in the exact same position, some efforts should be made to tighten up the rule. The rules can try and address common factors, such as job description, type of work, work location, title and supervisor. At the very least efforts could be made to isolate situations where an employee is almost always going to be a similarly situated employee and thus clarify the amorphous concept of a similarly situated employee.

In regards to material adverse employment actions, courts in the Seventh Circuit currently refrain from providing a "laundry list" of material

108. Jahnke, *supra* note 7, at 126 n.174.

adverse employment actions partly because the number is potentially limitless.¹⁰⁹ However, one way to clarify the material adverse employment action element would be to weigh in on the employment actions mentioned as examples. For example, it is safe to say that a termination, demotion, and a denial of a promotion are material adverse employment actions.¹¹⁰ A material reduction in wages, salary, or benefits usually also constitute a material adverse employment action. One needs a creative imagination to construct a fact pattern in which a termination does not constitute a material adverse employment action. Yet such a determination is technically still open. In this situation, a court would be justified in creating a limited exception based on the unusual facts. More problematic actions that come to mind are transfers, alterations in working conditions, alterations in job responsibilities and loss of prestige or change of title.

If the Seventh Circuit intends to carve out a specific definition for the adverse employment action element in the retaliation context, it should be created anew and applied exclusively in the retaliation context. The rule should not build upon past definitions. Title VII speaks in general language about prohibiting discrimination, and courts interpret Title VII's language as providing the elements for the *prima facie* case. The Seventh Circuit has held that adverse employment action must be material, and has held that the scope of what is an adverse employment action in the retaliation is broader than in the discrimination context. If the definition for an adverse action in the retaliation context is melded into the discrimination claim definition, courts will be put in a quandary. For a retaliation claim, courts will have to determine what kind of an employment action is material, yet not as material as a discrimination claim, but is sufficiently severe to dissuade persons from exercising their rights under Title VII.

Clearly the concerns articulated in *Herrnreiter* are important.¹¹¹ The retaliation section is not a carbon copy of the anti-discrimination section. It has unique language and serves a unique purpose. Therefore, the procedures of Title VII discrimination claims should not be blindly applied in the retaliation context for the sake of simplicity. The anti-retaliation section is the guardian for the anti-discrimination section, which is the heart of Title VII. Thus, the courts must ensure that the anti-retaliation section serves its purpose. If the courts engage in a cookie-cutter approach for retaliation claims, the courts will not be able to take into consideration the special concerns and interests surrounding each claim.

Finally, as the caselaw in the Title VII retaliation context is clarified one additional simple suggestion would be to notify prospective plaintiffs

109. *Knox*, 93 F.3d at 1334.

110. *Hilt-Dyson*, 282 F.3d at 465-66 (stating that "materially adverse actions may include 'termination of employment, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation'"); *Worth*, 276 F.3d at 265 (stating that "there is no question that termination constitutes an adverse action under Title VII").

111. See *Herrnreiter*, 315 F.3d at 746 (discussing concerns associated with applying the same set of rules for both types of discrimination claims).

about Title VII. An effort by the courts should be made to create handbooks that explain the general aspects of Title VII law and which offers some way that the readers can be made aware of changes in the law. The handbook might also warn plaintiffs that if they are unsuccessful, they could be charged for the defendant's costs. Such costs may not be negligible, particularly for an out-of-work *pro se* plaintiff, and can become substantial if, for example, several depositions are taken and transcripts are ordered. These handbooks would be helpful to limit the amount of Title VII discrimination and retaliation claims. If employees are made aware that their situation is not sufficient for a claim then they will be less likely to sue for discrimination or to include a retaliation claim in their action. Even if the handbook limited the number of claims included in each Title VII case, they would be useful because the courts and opposing parties would have fewer issues to address. The handbook will help employees make an informed decision as to whether to file discrimination, or a retaliation claim, and may persuade them not to contact an attorney and embroil both sides in a lawsuit.

III. CONCLUSION

Title VII retaliation claims are a unique breed. They are closely related to discrimination claims and adopt many of the same rules and procedures that are used for discrimination claims. However, a retaliation claim is unique in several ways and practitioners must understand those differences. There has been movement in the Seventh Circuit toward unifying retaliation and discrimination claims for the sake of simplicity, but there are also indications that the Seventh Circuit may take a step back from the cookie cutter approach. Title VII caselaw needs to be clarified and addressed apart from Title VII discrimination so that the unique aspect of retaliation claims can be addressed. Although the anti-discrimination section of Title VII is more well known, the anti-retaliation section must not be forgotten. It serves as an important guardian to ensure that the anti-discrimination section of Title VII operates as intended and thus provides the workplace protections that we have all come to expect in a civilized and enlightened society.