Burlington Northern & Santa Fe Railway v. White: Was a New Standard Needed?

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Virtually everywhere the Supreme Court’s recent decision in Burlington Northern & Santa Fe Railway Co. v. White is being characterized as a major change. And not without reason: the decision does overturn the law in several circuits. At least in the near future this also should result in a greater number of retaliation cases, as well as retaliation cases that survive summary judgment.

What I want to argue here, however, is that the Court made certain errors and missed an opportunity to base its decision on related case law, all of which would have made the decision much easier, as well as one with less potential to confuse the lower courts, the bar, and litigants. Thus, after reviewing the decision, including its facts and holdings, in section I below, I offer in section II commentary on the ruling, followed by some thoughts on the consequences of the decision. In connection with these latter two sections there are recommendations for the way in which White, and the case law covering retaliation generally and related subjects, should be applied and interpreted in the future.

I. The White Decision

A. The Facts of the Case

Sheila White worked for the railway as a track laborer beginning in June 1997. Soon after she started a co-worker who had been a forklift operator chose to transfer. White got his job. In September 1997, White complained that her supervisor had made insulting remarks and suggested that a woman should not be a forklift operator. After an investigation the railway suspended White’s supervisor. At the same time, however, the railway transferred her back to track laborer, telling her that fairness required that a “more senior man” should have the “less arduous and cleaner” forklift operator job.3

White filed a charge with the Equal Employment Opportunity Commission.4 She claimed the transfer constituted unlawful gender-based discrimination and retaliation for

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3 Id. at 2409.

4 Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., requires a plaintiff to file a charge with the EEOC prior to suing in court. See § 2000e-5 (setting forth time limits for filing a charge and filing suit after EEOC dismisses charge). The requirement is not a “jurisdictional prerequisite,” but rather in the nature of a statute of limitations, Zipes v. TWA, 455 U.S. 395
her complaint. Not long afterwards White got into a disagreement with a different supervisor. The railway suspended her for insubordination. She filed a grievance, prevailed in the process and was reinstated, with full backpay. Nonetheless she filed another charge with the EEOC alleging that the suspension was retaliatory.\footnote{White, 126 S. Ct. at 2409.}

B. White’s Lawsuit

White sued in federal court, claiming that the job transfer and suspension violated Title VII of the Civil Rights Act of 1964. The jury found in her favor on both claims.\footnote{Interestingly, the jury’s verdict only awarded White $43,500 in compensatory damages, arguably not enough to warrant an appeal both to the Sixth Circuit and the Supreme Court. In any Title VII case, however, the prevailing plaintiff can be awarded an attorney’s fee, which can exceed the amount of the judgment.} The railway appealed, and a panel of three judges from the United States Court of Appeals for the Sixth Circuit reversed. The full appellate court, however, reinstated the jury verdict, prompting the railway to petition the Supreme Court to hear the case.

C. The Supreme Court Ruling

1. Legal Background to the Court’s Decision

The Supreme Court took the case because it presented an opportunity to resolve a conflict among the federal appellate courts in interpreting Title VII’s anti-retaliation section. That section makes it illegal “for an employer to discriminate against any of his employees . . . because he has opposed” any employment practice made unlawful by Title VII “or because he has made a charge, testified, assisted, or participated” in a related investigation, proceeding, or hearing.\footnote{42 U.S.C. § 2000e-3(a).}

The issue dividing the courts was what constituted illegal “discrimination” under this section. According to the Supreme Court, on one side of the divide were courts who “insisted upon a close relationship between the retaliatory action and employment.”\footnote{White, 126 S. Ct. at 2410.} Anyone interested in finding out which states are included in which circuits can consult the map located online at http://www.uscourts.gov/courtlinks/.

\footnote{Id. at 2410 (citing White v. Burlington N. & Santa Fe Ry., 364 F.3d 789, 795 (6th Cir. 2004; Von Gunten v. Maryland, 243 F.3d 858, 866 (4th Cir. 2001); Robinson v. Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997)).}
discrimination to include only “ultimate employment decisions,” such as decisions to hire, fire, or grant leave, and decisions relating to promotions or pay.\textsuperscript{10}

On the other side were courts using a broader definition of discrimination. The Seventh Circuit, for example, required a plaintiff to show only that the purported retaliation “would have been material to a reasonable employee” – in other words, that it would likely have dissuaded a reasonable employee from taking action protected by the statute, such as opposing discrimination, filing a charge, or testifying at a hearing.\textsuperscript{11} The standards applied by the D.C. and Ninth Circuits were similar.\textsuperscript{12}

2. The Issues Before the Court

   a. Employment-Related Retaliation

So the Court saw its task as deciding whether the anti-retaliation provision forbade only employment-related discrimination, or whether other employer action could also constitute unlawful retaliation. Because the railway (as well as the United States, which had submitted a brief as a friend of the court) argued that the Court should read the anti-retaliation provision in conjunction with Title VII’s basic anti-discrimination provision, the Court’s first move was to compare the language of the two.

Title VII’s basic anti-discrimination section states that it is unlawful for an employer 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.”\textsuperscript{13} The anti-retaliation section is worded somewhat differently, however; specifically, what the Court noticed was that it did not contain the language italicized above. Instead, it simply states that it is unlawful for an employer “to discriminate” against an employee for having undertaken protected activity.\textsuperscript{14}

The question for the Court thus became whether it was significant that the limiting words appearing in the basic provision were absent from the anti-retaliation provision. There is a natural presumption that where words differ, it is because Congress intended there to be a difference.\textsuperscript{15}

\textsuperscript{10} Id. at 2410 (citing \textit{Mattern v. Eastman Kodak Co.}, 104 F.3d 702, 707 (5th Cir. 1997); \textit{Manning v. Met. Life Ins. Co.}, 127 F.3d 686, 692 (8th Cir. 1997)).

\textsuperscript{11} \textit{See Washington v. Ill. Dep’t of Revenue}, 420 F.3d 658, 662 (7th Cir. 2005).

\textsuperscript{12} \textit{See White}, 126 S. Ct. at 2410-11 (citing \textit{Rochon v. Gonzales}, 438 F.3d 1211, 1217-18 (D.C. Cir. 2006); \textit{Ray v. Henderson}, 217 F.3d 1234, 1242-43 (9th Cir. 2000)).


\textsuperscript{14} \textit{See} 42 U.S.C. § 2000e-3(a).

\textsuperscript{15} 126 S. Ct. at 2412 (citing \textit{Russello v. United States}, 464 U.S. 16, 23 (1983)).
In addition, the Court perceived a difference in purpose between the two sections, as well as a difference in the means necessary to achieve such purposes. The basic section’s aim, in the Court’s eyes, is “a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status.”\footnote{126 S. Ct. at 2412 (citing \textit{McDonnell Douglas Corp. v. Green}, 411 U.S. 792, 800-01 (1973)).} The anti-retaliation section, on the other hand, “seeks to ensure [the basic provision’s aim] by preventing an employer from interfering (through retaliation) with an employee’s efforts to . . . advance enforcement of [Title VII’s] basic guarantees.”\footnote{\textit{Id.}} The Court summed up its characterization of the difference as follows: “The substantive section seeks to prevent injury to individuals based on who they are,” while the “anti-retaliation provision seeks to prevent harm to individuals based on what they do.”\footnote{\textit{Id.}}

These different purposes suggested to the Court that the basic section and the anti-retaliation section should prohibit different types of employer conduct, due to what the Court felt was necessary to secure the sections’ respective aims. “To secure the first objective,” the Court wrote, “Congress did not need to prohibit anything other than employment-related discrimination,” for equal employment opportunity arguably could be achieved by eliminating employment-related discrimination only.\footnote{\textit{Id. at 2412.}} By contrast, because an employer can retaliate against an employee by doing things that aren’t directly related to the workplace, the anti-retaliation section arguably had to outlaw more than just firings, pay cuts, and the like.\footnote{\textit{Id. (citing \textit{Rochon}, 438 F.3d at 1213).}} Indeed, “Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses,” and this could be thwarted if employees felt inhibited from complaining by reason of any form of retaliation.\footnote{\textit{Id. at 2414} (citing \textit{Mitchell v. Robert DeMario Jewelry, Inc.}, 361 U.S. 288, 292 (1960)).}

After this analysis, the Court concluded that both the sections’ language and their different purposes supported a conclusion that the “anti-retaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment.”\footnote{\textit{Id.}}

\textbf{b. Materiality}

Having decided that the anti-retaliation section prohibited more than just economic harm, the Court turned to the question of how severe the employer’s conduct must be in order to justify a claim. The answer was that not every action could give rise to a claim. Rather, because “[t]he anti-retaliation provision protects an individual . . . from retaliation that produces an injury or harm,” and its purpose was to ensure a reasonable person would feel comfortably complaining about discrimination, the Court...
held that “a plaintiff must show that a reasonable employee would have found the challenged action materially adverse.”23 In that regard, “materially adverse” meant something that “‘well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.’”24

The Court found support for its distinction between material and immaterial adversity in case law concerning sexual harassment. These cases made clear, in an oft-quoted statement, that Title VII does not set forth a “‘general civility code for the American workplace.’”25 Similarly, “petty slights” and “minor annoyances” were unlikely to deter anyone from complaining about discrimination.26

The Court went on to explain that its new standard used the likely reaction of a “reasonable employee” because the analysis should be objective – meaning, in this case, that the same materiality threshold would be applied to every claimant-employee’s case. The alternative, a subjective standard, would allow each claimant to assert that under the circumstances she faced, her employer’s retaliation would have deterred her, regardless of its seriousness and regardless of whether it would have deterred an ordinary person. The Court considered a subjective alternative to be judicially unmanageable, as it would require gauging every individual claimant’s feelings.27

Finally, the Court held that a retaliatory act’s factual context would most likely make a difference in a close case. For example, refusing to invite a subordinate to lunch could be trivial and immaterial – but if event was a regular training lunch on which professional advancement depended, it could be material.28

Applying this reasoning to the facts of the case, the Court held that there was sufficient evidence to support a jury verdict for White on the ground that the railway’s actions were materially adverse. Even though, as the railway pointed out, both forklift operator and track laborer duties fell within the same job description, there was clear evidence from context that the former were regarded as superior – cleaner and easier – to the latter. In addition, although the railway ultimately reinstated White after suspending her, the Court concluded that an indefinite suspension with no backpay guarantee “could well act as a deterrent.”29

The rule announced in this case, then, appears to be this: Anything – not just decisions relating to job security, hours, or pay – can constitute unlawful retaliation if

23 Id. at 2415.
24 Id. at 2415 (quoting Rochon, 438 F.3d at 1219 (quotation omitted)).
25 Id. at 2415 (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998)).
26 Id.
27 Id. at 2415.
28 Id. at 2415-16.
29 Id. at 2416-17.
under the circumstances it would likely have deterred a reasonable person from complaining about discrimination.

II. Commentary

The rather tedious breakdown of the Court’s reasoning is necessary, I think, to understand the missteps this decision made. My purpose here is not simply to pick on the Court, but rather to use this commentary to relate this decision to existing case law, in order to assess the possible development of the law. In any event, if several of the terms the Court uses which I quote above – for example, “employment-related discrimination” and “terms and conditions of employment” – seem vague and ill-defined, it’s only because in White the Court never made clear exactly what they encompass. In fact, in the way the Court used them – especially with respect to how the Court has used them in the past, in other cases – they are at times downright confusing. My hope is that in the commentary that follows I can work through these issues, explaining terms as they have been used before by practitioners in the field, and by the end propose a plausible future for this legal issue.

The Court’s first error comes in the way it understands and uses the phrase “terms and conditions of employment.” Plainly the Court is trying to demarcate a category of employer conduct that, for lack of a better term, comprises the economics of an employment relationship – by which I mean an employee’s rate of pay; rank, pay grade, or wage rate; and job security – rather than its more human aspects.

But this is not in accord with the way the phrase “terms and conditions” has been used by the Court in other cases. Indeed, “terms and conditions of employment” has been extended to all aspects of the employer-employee relationship, whether economic or no; and it was in the landmark sexual harassment case, Meritor Savings Bank, FSB v. Vinson,30 that this broader usage most notably arose. In deciding in that case that an employee could bring a gender discrimination claim based not on economic harm, but rather on a hostile work environment resulting from sexual harassment, one of the Court’s most significant pronouncements was that Title VII’s basic provision “is not limited to ‘economic’ or ‘tangible’ discrimination. The phrase ‘terms, conditions, or privileges of employment’ evinces a congressional intent ‘to strike at the entire spectrum of disparate treatment of men and women’ in employment.”31

More recent decisions confirm that all hostile work environment sexual harassment claims are founded upon this more expansive definition of “terms and conditions” of employment. In Harris v. Forklift Systems, Inc., the Court held that a plaintiff may bring a sexual harassment claim under Title VII when “the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of . . . employment.”32 So it was in establishing the

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31  Id. at 58.
now-familiar “severe or pervasive” standard that the Court removed all doubt as to how the phrase “terms of conditions of employment” ought to be used in employment discrimination law:

This standard, which we reaffirm today, takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury. As we pointed out in

Meritor,

“mere utterance of an . . . epithet which engenders offensive feelings in an employee,” does not sufficiently affect the conditions of employment to implicate Title VII. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive – is beyond Title VII’s purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim’s employment, and there is no Title VII violation.

But Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees’ psychological well-being, can and often will detract from employees’ job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII’s broad rule of workplace equality.

What everyone ought at a minimum to understand from all this is that a hostile work environment sexual harassment claim is legally grounded in an assertion that the alleged ridicule, insult, or unwelcome advances giving rise to the claim were sufficiently severe or pervasive to alter the terms or conditions of employment – and, not least because since 1991 a Title VII plaintiff can recover for emotional distress, that economic harm, while certainly acceptable proof, is not a necessary element of such a claim.

Thus, all the Court’s wrangling in

White

over the linguistic difference between what the Court called the substantive and anti-retaliation provisions was a waste of time, because the supposedly limiting language referring to “terms and conditions” already had been interpreted to extend beyond economic harm. More than that, however, the Court’s focus on the statutory text, to the exclusion of previous interpretations, led to a missed opportunity. Apparently the Court looked to sexual harassment case law for support in

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Id. at 21-22 (citations omitted).

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See, e.g., Nestor v. Pratt & Whitney, 466 F.3d 65, 67 n.1 (“The Civil Rights Act of 1991, 42 U.S.C. § 1981a, authorizes the award of compensatory or punitive damages to a successful Title VII plaintiff who was the victim of intentional discrimination.”).
distinguishing materially from immaterially adverse retaliation. But had the Court reread those cases more closely, it could have saved itself a great deal of trouble. For there would have been no need to compare the two sections of Title VII and the first holding on an apparent difference in the language.35

Even within the opinion the Court gets itself into trouble right away, with its next move, which was to establish as law the new “materially adverse” standard. Having just spent several pages pledging fidelity to statutory text alone, and then breaking down the two provisions to a difference in one phrase, the Court proceeds to get itself out of a jam by making up a standard. What happened of course was this: The Court began (and ended) the first part of its analysis with the statutory text.36 The specific result that that enterprise produced was that literally anything could be considered retaliation. For indisputably there is nothing in the anti-retaliation section’s wording that modifies the word “discriminate”: “It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice,” etc.37 So if the Court had stopped there, the least act of retaliatory discrimination could give to a claim; the boss’s decision to discard the remainder of his lunch in a complaining

35 Nor, for that matter, would there have been any reason to issue a decision that arguably undercut everyone’s understanding of what Title VII’s basic provision encompasses. In that regard, it is hard to believe that the Court would stand firm on its statement in White that the basic provision’s purpose was to ensure equal opportunity by prohibiting only economic discrimination. What would the Court do with a claim arising from a company’s decision to suspend without pay, but with a promise of reinstatement, all its African-American employees, due to an issue with its orders and accounts receivable? Before answering this question, remember that presumably the White Court felt that the plaintiff’s suspension (with reinstatement and backpay) did not affect “terms or conditions” in the narrow, economic sense – otherwise its essential holding would be dicta. How about a railway that assigned track laborer duties, as opposed to forklift operator duties, based on race? Despite what White may suggest, there is no way any court would rule that the company’s decision in either of my hypothetical cases was lawful under Title VII’s substantive provision. Nor should it, of course; but White may inadvertently have created an argument in that company’s defense. Similarly, I do not think it would be idle to suggest that White’s questionable reasoning undermines the basis for racial and sexual harassment case law. Indeed, White strongly suggests that Title VII does not prohibit what we might call discriminatory harassment, i.e. harassment of one person due to his race or sex, but which did not manifest itself as harassment of an economic, racial, or sexual nature. Imagine, for example, a group of employees constantly making fun of a minority co-worker in virtually every conceivable way every day, but without alluding to his or her race or sex. According to White, prohibiting such harassment is unnecessary to effectuate the substantive provision’s purpose, because it does not relate to the economic terms and conditions of employment. I’ve relegated this point to a footnote because the situations considered here sound far-fetched – but that’s only because the Court should back away from applying its reasoning in White any further than it already has applied it.

36 It is rare nowadays to read an opinion from the Court’s conservative wing that doesn’t open with something like “We begin our analysis with the statutory text.” See, e.g., United States v. Gonzales, 520 U.S. 1, 4 (1997) (“Our analysis begins, as always, with the statutory text.”). No doubt this has much to do with these justices’ purported disdain for judge-made law. But almost every case that makes it to the Supreme Court is going to require some interpretive effort. After all, the issues the Court spends most of its time deciding are issues on whose outcome the lower courts have disagreed. And in a common law jurisdiction like ours, recognizing that interpretation matters is critical if situations like the one I’ve described above are to be avoided.

37 42 U.S.C. § 2000e-3(a) (emphasis added).
employee’s wastebasket, rather than her neighbor’s, could constitute actionable retaliation.38 No doubt the Court was alarmed, and justifiably so, by the prospect of the district courts being overrun with such picayune claims. It therefore inserted the “material adversity” standard into the analysis in order to preclude such a possibility. But it did so for a reason arising out of policy concerns: on the basis of its conclusion that the purpose of the anti-retaliation provision, to ensure employees are undeterred in exercising rights, would be served by such a standard. The material adversity standard does not come from the actual text of Title VII.

Had the Court seen earlier how closely related sexual harassment case law was, the way out would have been clear, and there would have been no need to make up the material adversity standard. Sexual harassment cases can only proceed if there is a showing that the harassment was “severe or pervasive.”39 That standard could have, and should have, in order to prevent confusion, been adopted and applied to this context. There would have been less of a need for courts to create a body of law defining “material adversity” in various contexts, for there already exists a body of law defining severe or pervasive in sexual and racial harassment cases, as district courts have had to rule on motions for summary judgment filed by defendants claiming that no reasonable jury could conclude the plaintiff’s allegations amounted to severe or pervasive harassment.40 Granted, the law connected to the “severe or pervasive” standard will not in its entirety be perfectly applicable to retaliation cases, because many of the cases in which that standard was applied were cases in which the conduct complained of consisted of sexual or racial comments or unwelcome sexual advances. But insofar as the White’s Court’s aim was to draw a line between trivial, isolated retaliatory incidents and severe incidents, or incidents which taken together constitute an actionable harm, that case law already exists. In its decisions on sexual harassment the Court has already distinguished “simple teasing, offhand comments, and isolated incidents,”41 which Title VII does not reach, from something severe enough to constitute an actionable change in the employee’s work environment.

38 This might sound absurd, but only until one reconsidered the dictionary definition of discrimination. The word, used nowadays most often to denote harmful racial bias, in its abstract sense can mean nothing more than “to distinguish” one thing from another. Am. Heritage Coll. Dictionary 397 (3d ed. 1997).

39 See Francis v. Chem. Banking Corp., 62 F. Supp. 2d 948 (E.D.N.Y. 1999), aff’d, 213 F.3d 626 (2d Cir. 2000) (granting summary judgment for the defendant on the ground that alleged harassment was insufficiently severe or pervasive).

40 See, e.g., Blackwell v. S.K.O. Auto. Group, Inc., No. 01-2326-JWL, 2002 WL 1156361, at *4 (D. Kan. May 15, 2002) (holding that five racist comments made by co-workers over the course of plaintiff’s six months of employment were insufficiently severe or pervasive to establish a hostile working environment); Weston v. Pennsylvania, No. CIV. A. 98-3899, 2001 WL 1491132, at *12 (E.D. Pa. Nov. 20, 2001) (holding that four incidents over a three-and-a-half-year period were “at best . . . sporadic and isolated incidents of harassment, not pervasive conduct”) (citations omitted); Bonora v. UGI Utils., Inc., No. CIV. A. 99-5539, 2000 WL 1539077, at *4 (E.D. Pa. Oct. 18, 2000) (holding that “the conduct was not sufficiently pervasive because plaintiff complains of less than ten incidents over the course of approximately two years”).

Indeed, before *White* was decided, a majority of the circuit courts – including all of the circuits except for those two at the furthest extreme which had held retaliation encompassed only “ultimate employment decisions”42 – already had held that plaintiffs could bring claims of “retaliatory harassment.” Those decisions clearly would have been most sensible way for the *White* Court to reach its result without undue analysis of Title VII’s text or announcing the birth of a new line of cases.

In *Jensen v. Potter*, for example, the Third Circuit held that the plaintiff could bring a claim of retaliatory harassment, and further, that the “usual hostile work environment framework applies equally to Jensen’s claim of retaliatory harassment.”43 Turning to the question of whether the plaintiff’s particular allegations concerned conduct harsh enough to warrant a lawsuit, the *Jensen* court felt that the severe or pervasive standard was a perfect fit:

> [T]he severe or pervasive standard . . . is especially crucial in the retaliation context. When one employee makes a charge under Title VII against another, some strain on workplace relationships is inevitable. Sides will be chosen, lines will be drawn, and those who were once the whistleblower’s friends may not be so friendly anymore. But what the statute proscribes is retaliation, not loyalty to an accused coworker or a desire to avoid entanglement in workplace controversy. . . .

For example, at her deposition, Jensen frequently stated that coworkers subjected her to the silent treatment. A cold shoulder can be hurtful, but it is not harassment.

Mere expressions of opinion are also not retaliatory. For example, Jensen overheard [a co-worker] discussing a petition to bring [the alleged harasser] back and that [he] shouldn’t have to apologize for anything. . . . [I]f [the co-worker] wanted to start a petition, he had every right to do so.

Nonetheless, the record contains evidence of harassment that a jury might well find severe or pervasive. First, [a co-worker] berated Jensen with retaliatory insults two to three times per week for 19 months, and the significance of these remarks lies in their pounding regularity. Jensen also testified to an unspecified number of threats by [another co-worker] and at least four incidents of property damage to her vehicle. These incidents’ severity and the insults’ frequency combine to raise a material question of fact as to whether retaliatory harassment “permeated” the workplace and changed the terms or conditions of Jensen’s employment.44

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42 See n.10 above.
43 435 F.3d 444, 449 (3d Cir. 2006).
44 *Id.* at 452 (citations and quotations omitted). Interestingly, *Jensen*’s author was then-Judge Alito, now, of course, a Supreme Court justice as well as the author of *White*’s concurrence – which
This is precisely the analysis the *White* Court ought to have undertaken. Had it done so, there never would have been a need to parse the Title VII’s basic provision in comparison to the anti-retaliation provision, nor establish a new “materially adverse” standard.

Justice Alito, in his concurrence, also made a persuasive point about how the materially adverse standard “leads logically to perverse results.” The Court’s stated reason for adopting the standard was to ensure that employees are not deterred by the threat of retaliation from undertaking protected activity. But as Justice Alito pointed out, a reasonable employee subjected to the most severe form of discrimination would not be easily deterred from complaining; thus he would only consider proportionately harsh retaliation to be materially adverse, at least in the way the Court defined that term.\(^{45}\) This problem too could have been avoided by adopting the objective severe or pervasive standard, because such a standard should be applied consistently to different plaintiffs in different contexts, regardless of such plaintiffs’ varying incentives to act.

III. What the Future Holds

As I noted above, one of the outcomes of this new decision is that there may need to be created a new body of law on what constitutes materially adverse retaliation. The alternative, of course, is simply to recognize that there are useful similarities between “materially adverse” retaliation, “retaliatory harassment,” and “severe or pervasive” harassment. But if that does not happen, there will be new case law created largely in decisions ruling on employer motions for summary judgment. Those employers will argue that the facts alleged by the plaintiff could not be considered materially adverse, and it will up to the district courts to decide whether a reasonable jury could reach such a conclusion.

At least in the short term, what seems very likely is that there will be a greater number of cases in which district court judges deny summary judgment – in other words, more cases will go the jury for a decision. This clearly will be the case in those jurisdictions in which the law perforce has to change, such as the Fifth and Eighth Circuits, in which formerly only “ultimate employment decisions” constituted actionable retaliation. But it also is likely to take place in other jurisdictions as well, simply because of the sense one gets from *White*’s tone that it is lowering the standard a plaintiff must meet. Moreover, it would not be surprising if some judges simply decided that the question of material adversity itself, given the *White* Court’s admonition that it depends on context – the individual persons involved, the specific workplace, and the facts of the case – is always a question of fact for a jury to decide in all but the most frivolous cases.

\(^{45}\) *White*, 126 S. Ct. at 2420-21 (Alito, J., concurring).
This in turn should produce a greater number of cases, as attorneys representing plaintiff and potential plaintiffs come to understand the relative strength of retaliation claims.\textsuperscript{46}

As is often the case with Supreme Court decisions, the rulings are applied by lower courts in analogous, but not identical, contexts. In a case notable for our purposes not least because the defendant was a university, \textit{Zelnik v. Fashion Institute of Technology, State University of New York}, the Second Circuit held that a retired professor could not prove a violation of his First Amendment rights because the university’s supposed conduct in retaliation for his free speech – denial of emeritus status – was not severe enough to have deterred a similarly situated individual from exercising his rights.\textsuperscript{47}

In other cases the courts have begun the process of creating, case by case, by reviewing individual claims and their factual background, a body of law regarding what ought to be considered materially adverse and what should not be. In \textit{Grosso v. Federal Express Corp.}, for instance, one of the most recent cases on this issue after \textit{White}, the court held that the employer’s reassigning the plaintiff, a courier, to a new truck was not materially adverse where the trucks were not significantly different. But the employer also reassigned the plaintiff to a different route he characterized as a “back buster” and as one that did not require knowledge and experience. The court concluded that this was analogous to White’s reassignment to the track laborer job and therefore held that this could constitute materially adverse retaliation.\textsuperscript{48}

At all events, the analysis of alleged retaliation would be greatly aided if the courts of appeals highlighted the similarity between non-economic retaliation, retaliatory harassment, and discriminatory harassment. This is particularly true of situations not involving job reassignment, as in \textit{Grosso}, in which the closest analogue is \textit{White}, but rather situations involving manifestations of co-worker hostility, as in \textit{Jensen}. Instead of simply thinking about instances of such conduct to determine whether it might deter a reasonable employee, or just leaving all such issues to the jury, the courts should look to determine whether such conduct could constitute harassment, which is, as the courts have made clear, another form of discrimination. As it is discrimination that Title VII prohibits, it is to be hoped that this connection is drawn soon.

\textsuperscript{46} It’s worth noting here also that in many employment lawyers’ experience, between a claim brought under Title VII’s substantive provision and the anti-retaliation provision, it is the retaliation claim that employers should worry about more. Frequently jurors will disbelieve that race or sex was the motivating factor for an employer’s decision, and yet conclude that an employer took action against an employee because that person complained about discriminatory conduct.

\textsuperscript{47} 464 F.3d 217, 227 (2d Cir. 2006).