

THE ARGUMENT FOR A
HYBRID RETALIATION LAW:
A COMPARATIVE LAW STUDY TO DEFINE
RETALIATION UNDER TITLE VII BY COMPARING
THE UNITED KINGDOM, INCLUDING THE
EUROPEAN UNION, AUSTRALIA, AND CANADA

I. INTRODUCTION

Since the enactment of Title VII and the enforcement of its retaliation provision, courts have long muddled the definition of adverse action. Title VII neither defines the term “discriminate” nor the phrase “terms, conditions, or privileges, of employment.”¹ Some circuits interpret adverse action very narrowly, stating that conduct must rise to the level of an “ultimate employment action,” while others adopt an extremely broad view, restricting anything that may deter a victim of discrimination from bringing a claim. This split in defining the term ‘adverse action’ creates confusion amongst victims and employers alike. Foreign countries have grappled with similar provisions and while no one country has adopted the ideal definition, we can create an appropriate law by combining aspects from the American, English, Canadian, and Australian models. Looking to foreign countries is beneficial, given their significant progress in other areas of employment law, namely paid pregnancy leave² (England) and protection of gay rights³ (Canada). Using the materially adverse American standard as a starting point, we select the best elements from each country to create a hybrid of retaliation law.

1. Civil Rights Act of 1964 § 701, 42 U.S.C. § 2000e (2000) (excluding these terms in the “Definitions” section of Title VII). *See also* MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW 269 (1988).

2. Marleen O’Connor-Felman, *American Corporate Governance and Children: Investing in Our Future Human Capital During Turbulent Times*, 77 S. CAL. L. REV. 1255, 1320 (2004).

3. *See* Credence Fogo, *Cabining Freedom: A Comparative Study of Lesbian and Gay Rights in the United States and Canada*, 6 CARDOZO J. INT’L & COMP. L. 425 (1998).

According to the statistics released by the EEOC, claims of Title VII employer retaliation in 2002 exceeded 20,000—more than double the amount received only ten years earlier.⁴ The potential of retaliation claims present serious risks for both employers and employees. Liability costs for unlawful reprisal are often substantial and the cost of losing one's job can be devastating to a complainant.⁵ The greater risk is that ambiguities still exist over what is prohibited in the name of retaliation claims under Title VII.⁶

As a result of globalization, and an increase in workforce mobility, international laws are becoming far more uniform. Legal globalization is trailing economic globalization.⁷ Not only are attorneys beginning to make arguments drawing from foreign law and receiving positive responses, but courts have begun citing foreign law in their decisions.⁸ International law is becoming so favorable in American courts that the Supreme Court cited to it in three recent major decisions—in either the

4. Henry M. Perowski & Edward A. Marshall, *Whistleblower, Retaliation and Traditional Employee Investigations: Reacting to the Problem Employee without Creating Additional Risk* (June 1, 2003), available at <http://www.agg.com/contents/publicationdetail.aspx?id=526>.

5. *Id.*

6. Courts apply Title VII standards when analyzing the anti-retaliation provisions of other anti-discrimination statutes. See *Krouse v. Am. Sterilizer Co.*, 126 F.3d 494, 500 (3d Cir. 1997) (“Accordingly, we analyze ADA retaliation claims under the same framework we employ for retaliation claims arising under Title VII.”); *Stewart v. Happy Herman’s Cheshire Bridge, Inc.*, 117 F.3d 1278, 1287 (11th Cir. 1997) (noting that the anti-retaliation provision under the ADA is similar to Title VII, and Title VII framework should be applied to ADA retaliation claims); *Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12, 16 (1st Cir. 1997).

This article focuses on retaliation claims brought under section 704(a) because Title VII serves as interpretive guidance for other provisions containing similar language. The Supreme Court has applied Title VII principles to ADEA claims and noted that “the substantive provisions of the ADEA ‘were derived in *haec verba* from Title VII.’” *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (quoting *Lorillard v. Pons*, 434 U.S. 575, 584 (1978)); see also *Brown v. Brody*, 199 F.3d 446, 456 (D.C. Cir. 1999) (stating that the standards used to evaluate Title VII claims are applied to claims under the ADA, ADEA and ERISA); *Newman v. GHS Osteopathic, Inc.*, 60 F.3d 153, 156-57 (3d Cir. 1995) (collecting cases which have concluded that Title VII analysis should apply to ADA claims).

7. Louis F. Del Duca, *Symposium on Emerging Worldwide Strategies in Internationalizing Legal Education*, 18 DICK. J. INT’L L. 411, 424 (2000).

8. Noah Leavitt, *Legal Globalization: Why U.S. Courts Should be Able to Consider the Decisions of Foreign Courts & International Bodies*, Findlaw, Oct. 16, 2003, available at http://writ.news.findlaw.com/commentary/20031016_leavitt.html. Immigration lawyers are citing decisions of the International Court of Justice and the International Covenant of Civil & Political Rights. *Id.* Criminal defense lawyers are citing decisions of the Constitutional Court of South Africa and the Inter-American Commission on Human Rights. *Id.*

However, it must be noted that recently Congress has been attempting to propose a bill that would automatically impeach Supreme Court Justices who cite foreign law in their opinions. See H.R. Res. 468, 108th Cong. (2003).

majority or the concurrence.⁹ In an attempt to clarify the current law and provide guidance to employers seeking to avoid retaliation liability, we look to foreign jurisdictions for direction. We examine legal authorities from England, Canada and Australia in an attempt to clarify the current state of U.S. law.

This note first presents an overview of the various circuits' interpretations of "adverse action" in part II, in an attempt to elucidate the current problems and confusion. Next, this note explores the laws of England, Canada and Australia, in sections III through V, and highlights the advantages of each country's laws. Part VI analyzes the advantages and disadvantages of the current circuit definitions of "adverse action," seeking to extract the benefits of each approach and discussing the parts that should be discarded. Finally, part VII will select the best aspects of each approach, both U.S. and foreign, and make a recommendation to the courts.

II. RETALIATION IN THE UNITED STATES UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

What constitutes retaliation in violation of anti-discrimination laws? Title VII prohibits discrimination under section 703(a)(1).¹⁰ Title VII also contains an anti-retaliation provision, section 704(a), which makes it unlawful for any employer to discriminate against its employees for engaging in protected employment practices, filing a complaint or participating in any manner in an investigation involving a Title VII violation.¹¹

9. H.R. Res. 468. The three cases are: (1) *Atkins v. Virginia*, 536 U.S. 304 (2002) (finding that execution of the mentally retarded should be prohibited). The court found that within the world community the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved. *Id.* at 316 n.21. The argument originally came from an amicus brief filed by the European Union. *Id.* (2) *Grutter v. Bollinger*, 539 U.S. 306 (2003). Justice Ginsburg and Justice Breyer in their concurrence stated that "[t]he Court's observation that race-conscious programs 'must have a logical end point' . . . accords with the International understanding of the office of affirmative action." *Id.* at 344. (3) *Lawrence v. Texas*, 539 U.S. 558 (2003). Justice Kennedy in the majority opinion drew lessons from a similar case decided by the European Court on Human Rights. *Id.* at 573. He found that since the European's Court ruling was authoritative in all European Council countries, then the U.S. should rethink its analysis of anti-sodomy laws. *Id.*

10. Civil Rights Act of 1964 § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (2000). This section provides, in relevant part, that:

[i]t shall be an unlawful employment practice 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 . . .

11. Civil Rights Act of 1964 § 704, 42 U.S.C. § 2000e-3 (2000).

All courts recognize the general analytical framework for a retaliation claim and have adopted a three-part test.¹² While courts have wrestled with divergent case law concerning each of the elements, this article will focus on the second element, namely *what constitutes an adverse employment action*.

A. Title VII of the Civil Rights Act of 1964

A closer examination of this three-step proof structure is helpful to understanding the provisions inadequacies. In order to establish a claim for retaliation under Title VII, plaintiffs must make out a prima facie case. The plaintiff must first prove that he or she has engaged in activity protected by Title VII.¹³ Under the participation clause, protection is afforded to employees who file discrimination charges, as well as employees who cooperate in proceedings initiated by others.¹⁴ The opposition clause protects employees' reasonable conduct that does not interfere with their job performance and does not violate employment policy or disrupt the workplace.¹⁵

The plaintiff must also prove that the employer took *adverse employment action* against him or her.¹⁶ Most courts evaluate what constitutes an adverse employment action on a case-by-case basis,¹⁷ and by using varying standards of review, they leave employers and employees guessing as to what might be considered adverse. This question, of whether the action complained of needs to be an "ultimate employment decision,"¹⁸ is the source of the circuit split, the focus of this note, and will be discussed later in greater detail.

12. A plaintiff must prove that (1) he/she has engaged in activity protected by anti-discrimination law; (2) the employer took adverse employment action against the plaintiff; and (3) a causal connection exists between that protected activity and the adverse employment action. See LITIGATING THE SEXUAL HARASSMENT CASE 11 (Matthew B. Schiffer & Linda C. Kramer eds., 2nd ed. 2000). The Sixth Circuit is the only circuit which has adopted a fourth element to this proof structure. See discussion *infra*.

13. *Id.*

14. *Id.* at 11-12.

15. *Id.* at 12.

16. *Id.* Adverse employment action is defined as "an employer's decision that substantially and negatively affects an employee's job, such as termination, demotion or pay cut." BLACK'S LAW DICTIONARY 42 (7th ed. 2000).

17. 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, 330 (2000).

18. ANDREW J. MAIKOVICH & MICHELE D. BROWN, EMPLOYMENT DISCRIMINATION: A CLAIMS MANUAL FOR EMPLOYEES AND MANAGERS 96 (McFarland & Co. 1989).

Finally, the plaintiff must prove that there was a connection between the employee action and the resulting employer action.¹⁹ Courts agree that in order to demonstrate a causal link, a plaintiff must show that the person who took the allegedly adverse action was aware that the plaintiff had engaged in an activity protected by the Act.²⁰

While courts have wrestled with divergent case law concerning each of the elements of a prima facie case of retaliation, this article will focus on the second element, namely *what constitutes an adverse employment action*.

B. The “Adverse Employment Action” Element

The adverse employment action element in a claim of retaliation varies widely among the U.S. Circuits. Some courts take a restrictive view, concluding that Title VII is intended to address only “ultimate employment decisions,”²¹ and is not intended to address every decision an employer may make which could have some tangential effect on an employee’s terms, conditions, or privileges of employment. Other courts take a much broader view and use a case-by-case approach. Still, most courts fall somewhere in between. Because of the lack of uniformity, the result is that one’s ability to prevail in a claim of retaliation may hinge on the jurisdiction in which he or she brings the claim.

For example, a complainant claiming that she received lower performance evaluations and found that her job duties were diminished in retaliation for filing a complaint would not likely prevail in the Fifth and Eighth Circuits. Unless she can demonstrate material harm to a term, condition, or privilege of employment, it is likely she will not prevail in the Second, Sixth, Seventh, and D.C. Circuits either. Of specific concern to employers and employees, is the employee’s ability to bring a retaliation claim under these factual circumstances and receive a different opinion depending on the jurisdiction.

19. *Id.*

20. Donna Smith Cude & Brian M. Steger, *Does Justice Need Glasses? Unlawful Retaliation Under Title VII Following Mattern: Will Courts Know When They See It*, 14 LAB. LAW 373, 380 (1998). Once the plaintiff establishes a prima facie case of retaliation, the burden shifts to the employer to articulate a legitimate, non discriminatory justification for its action or actions. *See id.* “Ultimately, the burden remains with the plaintiff to demonstrate, by a preponderance of the evidence, that the employer’s reason was pre-textual and that retaliatory animus motivated the employer’s actions.” *Kravetz, supra* note 17, at 320.

21. Uncontroversial examples of an ultimate employment action include hiring, granting leave, discharging, promoting, and compensating.

Summarily, the Fifth and Eighth Circuits take the more restrictive view – only ‘ultimate employment decisions’ such as firing, demotion, or a reduction in pay, are adverse actions sufficient to support a retaliation claim.²² The remaining circuits, except for the Ninth, extend the prohibition on adverse action to intermediate actions—although a second split appears among these courts. Some require that the adverse action *significantly* affect the terms and conditions of employment, while others have rejected that requirement, simply holding that they must *materially affect* the terms and conditions of employment.²³ Some courts have refused to decide the issue, consequently taking a case-by-case approach. Finally, the Ninth Circuit and the Equal Employment Opportunity Commission (EEOC) agree that there should be a deterrence test (whether the conduct would reasonably deter a complainant in engaging in EEOC protected activity), leaving employers and employees without guidance as to what employment actions might be considered unlawful.

In the wake of *Burlington Industries, Inc. v. Ellerth*²⁴ and *Faragher v. City of Boca Raton*,²⁵ a more complex question concerning the specifics of harassment and retaliation has arisen, specifically, whether retaliatory harassment, either by co-workers or by a supervisor, is actionable under section 704(a). It is now clear that employer knowledge is a requisite,²⁶ and most recently, the Supreme Court in *Suders v. Easton*²⁷ held that constructive discharge constitutes an adverse employment action within the meaning of Title VII.²⁸

1. Actions that are Ultimate Employment Decisions

The narrowest definition and hard line approach to the question is that actions rising to the level of “ultimate employment decisions” can only constitute adverse actions. The Fifth Circuit narrowly construes the

22. *Carpenter Builds Case Against Employer*, 13 CAL. EMP. L. LETTER (Ogletree, Deakins, Nash, Smoak, & Stewart, P.C.), July 21, 2003. See generally, Cude & Steger, *supra* note 20, at 373-75 (explaining the U.S. Circuits approaches to an adverse employment action claim).

23. *Murray v. Chicago Transit Auth.*, 252 F.3d 880, 888 (7th Cir. 2001) (stating the employer’s actions did not significantly affect the plaintiff’s job responsibilities and thus do not constitute the type of adverse action necessary to bring Title VII’s proscriptions into play).

24. 524 U.S. 742 (1998).

25. 524 U.S. 775 (1998).

26. See *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653, 657 (4th Cir. 1998) (explaining that knowledge by the employer of the plaintiff’s protected activity is “absolutely necessary” to establish causation in a retaliation case).

27. *Pa. State Police v. Suders* 124 S. Ct. 2342 (2004) (holding that constructive discharge constitutes an adverse employment action).

28. *Id.*

adverse action element by consistently holding that Title VII is intended to address only ultimate employment decisions such as hiring, granting leave, discharging, promoting, and compensating, and is not intended to address every decision an employer may make which could have some tangential effect on an employee's terms, conditions, or privileges of employment.²⁹ In *Mattern v. Eastman Kodak Co.*,³⁰ the Fifth Circuit reversed a ruling in the claimant's favor, holding that the complained of conduct lacked consequence, despite the fact that the plaintiff had complained of a denial of a pay increase, constant harassment by co-workers, and threats to fire her.³¹

The Eighth Circuit takes a restrictive view somewhat similar to the Fifth Circuit.³² It has explained that an adverse employment action is a "tangible change" in employment conditions that produces a material disadvantage.³³ This circuit has found that "changes in duties or working conditions that cause no materially significant disadvantage . . . are insufficient to establish the adverse conduct required to make a prima facie case."³⁴ Economic harm must be a factor in determining adverse action.³⁵ This circuit has found that conduct that disadvantages or interferes with an employee's capability to do his or her job as well as "papering" an employee's file with negative reports or reprimands are sufficiently adverse to sustain a retaliation claim.³⁶

29. See *Watts v. Kroger Co.*, 170 F.3d 505, 511-12 (5th Cir. 1999) (stating that the assignment of additional job duties did not impact salary, and thus did not constitute an ultimate employment decision).

30. 104 F.3d 702 (5th Cir. 1997).

31. *Id.* at 708.

32. Although the language of the Eighth Circuit's view seems to be dissimilar to the Fifth Circuit, in application they are both very restrictive views and therefore are grouped together.

33. *Brown v. Mo. State Highway Patrol*, 56 FED. Appx. 282, 285 (8th Cir. 2003) (explaining that termination, reduction in pay or benefits, changes in employment that significantly affect an employee's future career prospects meet this standard, but minor changes in working conditions or altering the employee's work responsibilities do not).

34. *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994) (holding that a secretary reassigned to another position who did not receive a reduction in pay, title or benefits, even though she had less duties, did not constitute an adverse action); *Flaherty v. Gas Research Inst.*, 31 F.3d 451, 457 (7th Cir. 1994) (holding a change in title did not constitute adverse action where pay, benefits, and responsibility remained the same). The trend of the Eighth Circuit is to hold that a "purely lateral transfer, that is, a transfer that does not involve a demotion in form or substance, cannot rise to the level of a materially adverse employment action." *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997) (quoting *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996)).

35. *Tademe v. Saint Cloud State Univ.*, 328 F.3d 982, 992 (8th Cir. 2003) (finding that failing to raise an employee's salary was not an adverse employment action because his salary was not decreased or affected in any way).

36. *Id.*

2. Actions that Materially Affect the Terms and Conditions of Employment

Between the strictest view and the more generous views, is the view of affecting the terms and conditions of employment. While most of these circuits define an adverse action as only those actions that have a *material* affect on the terms and conditions of employment, a split occurs among these circuits. Unlike the other circuits following this approach, the Fourth and D.C. Circuits hold that the conduct must *significantly* affect the terms and conditions of employment. While most circuits find that tangible employment actions are the same as adverse actions, the Third Circuit disagrees with the majority, and argues that tangible employment actions are distinct from adverse employment actions.³⁷

a) Materially Affect

The First, Second, Third, and Seventh Circuits hold that conduct which materially affects the terms and conditions of employment constitute adverse action and are actionable under Title VII.³⁸ An adverse ac-

37. The Supreme Court definition of tangible employment action closely parallels the restrictive meaning of adverse employment action supported by the Fifth and Eighth Circuits. *Ledgerber*, 122 F.3d at 1144-45 (requiring an ultimate employment decision with a material alteration in the terms or conditions of employment); see *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997) (equating adverse employment action only with ultimate employment decisions such as discharge, hiring, and compensation). According to the Third Circuit, circuits, including the Seventh Circuit, have confused the concept of "tangible employment action" and "materially adverse employment action," yet courts have failed to address the difference between them. *Suders v. Easton*, 325 F.3d 432, 434 n.1 (3rd Cir. 2003), *vacated*, Pa. State Police v. *Suders*, 124 S. Ct. 2342 (2004); see also *Herrnreiter v. Chicago Hous. Auth.*, 315 F.3d 742, 743 (7th Cir. 2002). "[C]ases paraphrase [42 U.S.C. § 703(a)(1)] either as a 'tangible employment action,' that is, 'a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits,' *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998), or as a 'materially adverse employment action,' *Traylor v. Brown*, 295 F.3d 783, 788 (7th Cir. 2002)."

38. *Demars v. O'Flynn*, 287 F. Supp. 2d 230, 245-46 (W.D.N.Y. 2003). See also *Guglietta v. Meredith Corp.*, 301 F. Supp. 2d 209, 214 (D. Conn. 2004). "A materially adverse change 'must be more disruptive than a mere inconvenience or an alteration of job responsibilities. . . .'" *Id.* (citing *Galabya v. New York City Bd. of Educ.*, 202 F.3d 636, 640 (2d Cir. 2000)); *Serrano-Cruz v. DFI Puerto Rico, Inc.*, 109 F.3d 23, 26 (1st Cir. 1997) (stating that "[c]ommon sense suggests that a job transfer without a reduction in salary and benefits may, under certain circumstances, be unacceptable to a reasonable person who is overqualified and humiliated by an extreme demotion, or under qualified and essentially 'set up to fail' in a new position"). *Jeffries v. Wal-Mart Stores, Inc.*, No. 99-4151, 2001 WL 845486, at *7 (6th Cir. July 20, 2001) (upholding a jury finding of retaliation and noting that the failure to promote constitutes adverse action under the circuit's materiality standard); *Byrd v. Stone*, No. 97-1841, 2000 U.S. App. LEXIS 441, at *10-11 (6th Cir. 2000) (receiving

tion is a material adverse change such as termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguishable title, a material loss of benefits, significantly diminished responsibilities, or other indices that might be unique to a particular situation.³⁹ All of the circuits hold that a mere inconvenience or an alteration in job responsibilities will not be found to be a material adverse change in employment.

The Seventh Circuit⁴⁰ found that not everything constituting adverse action must include economic harm. For example, an employee who was placed in a new department, with a desk outside her supervisor's office (situated like a receptionist) constituted an adverse employment action, despite no deduction in her salary.⁴¹ However, with regard to lateral transfers, where there has been no change in pay either, courts will not hold such behavior to constitute adverse actions.⁴²

a lower performance evaluation, which affected potential inclusion on the list of employees eligible for promotion, constituted material harm to a term, condition, or privilege of employment and stated a claim of retaliation). *But see* Primes v. Reno, 190 F.3d 765, 767 (6th Cir. 1999) (holding that receiving a lower performance evaluation did not comprise an adverse action).

39. Further, the Second Circuit district courts have found that reprimands, threats of disciplinary action, and excessive scrutiny do not constitute adverse employment action. *Guglietta*, 301 F. Supp. 2d at 216 (citing *Bennett v. Watson Wyatt Co.*, 136 F. Supp. 2d 236, 248 (S.D.N.Y. 2001) ("Plaintiff did not suffer an adverse employment action when she was given a negative performance evaluation")).

40. *Bernstein v. Bd. of Ed. of School District 200*, No. 98-3910, 1999 U.S. App. LEXIS 18702, at *8-9 (7th Cir. Aug. 6, 1999); *see also* *Smart v. Ball State Univ.*, 89 F.3d 437, 441 (7th Cir. 1996) (explaining that when an employee is fired, or suffers a reduction in benefits or pay, it is clear that an employee has been the victim of an adverse employment action. But an employment action does not have to be so easily quantified to be considered adverse for its purposes); *Rabinovitz v. Pena*, 89 F.3d 482, 488 (7th Cir. 1996) (finding that a lowered performance evaluation was not materially adverse because it did not alter his job responsibilities or his compensation); *Fortier v. Ameritech Mobile Comm. Inc.*, 161 F.3d 1106, 1112 n.7 (7th Cir. 1998) (finding no adverse action because plaintiff's salary did not change, he did not lose supervisory authority over any employees, and there is no evidence that the responsibilities left to plaintiff required less skill than his previous jobs). Due to the broad definition that the Seventh Circuit gives adverse action, the court can find that other actions by an employer are considered adverse action.

41. "[A]dverse job action is not limited solely to loss or reduction of pay or monetary benefits. It can encompass other forms of adversity as well." *Smart*, 89 F.3d at 441 (citing *Collins v. State of Illinois*, 830 F.2d 692, 703 (7th Cir. 1987) (finding an employee who was placed in a new department where her supervisors did not even know what her job entailed, having her office taken away from her, and being assigned to a desk outside her supervisor's office, where a receptionist would typically sit constituted an adverse employment action)).

42. *Smart*, 89 F.3d at 441. *See also* *Crady v. Liberty Nat'l Bank & Trust Co. of Ind.*, 993 F.2d 132, 135-36 (7th Cir. 1993) (finding that a change in title from assistant vice-president and manager of one branch of a bank to a loan officer position at a different branch did not by itself constitute an adverse employment action); *Sweeney v. West*, 149 F.3d 550, 557 (7th Cir. 2001) (finding that if they interpreted simple personnel actions as materially adverse, they would be sending employers the wrong message, that even the slightest nudge given to an employee can be the subject of

While other circuits have held employers liable for co-worker retaliatory harassment, no circuit had addressed whether a supervisor can be liable for retaliatory harassment until recently. The Sixth Circuit has specifically addressed this question,⁴³ holding that retaliatory harassment by a supervisor can be actionable.⁴⁴ The court modified the standard for proving a prima facie case of Title VII retaliation, making the Sixth Circuit unique in this regard as well. A plaintiff in the Sixth Circuit must now prove that: (1) she engaged in activity protected by Title VII; (2) this exercise of protected rights was known to defendant; (3) defendant thereafter took adverse employment action against the plaintiff, *or the plaintiff was subjected to severe or pervasive retaliatory harassment by a supervisor*; and (4) there was a causal connection between the protected activity and the adverse employment action or harassment.⁴⁵ While the other circuits have not rejected this revised proof structure, they have been reluctant to incorporate.

The Third Circuit splits from the others in its decision that a tangible employment action is distinct from that of a materially adverse employment action.⁴⁶ The Court of Appeals stated that they interpret a tangible employment action as being a narrower, more restricted category of actions occurring in the workplace.⁴⁷ "Retaliatory conduct, other than discharge or refusal to rehire is thus proscribed by Title VII only if it alters the employee's 'compensation, terms, conditions, or privileges of employment,' deprives her of 'employment opportunities or adversely affects his or her status as an employee.'"⁴⁸

a federal lawsuit, therefore deterring employers from documenting performance difficulties, fearing that they could be sued for so doing).

43. *Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 791 (6th Cir. 2000).

44. *Id.*

45. *See Canitia v. Yellow Freight Sys., Inc.*, 903 F.2d 1064, 1066 (6th Cir. 1990) (outlining previous standard for prima facie Title VII retaliatory harassment case before *Morris*).

46. *Suders v. Easton*, 325 F.3d 432, 434 n.1 (3d Cir. 2003), *vacated*, *Pa. State Police v Suders*, 124 S. Ct. 2342 (2004). Litigants, and oftentimes courts confuse the two; however, courts have yet to address the differences. *Id.*

47. *Id.*

48. *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300-01 (3d Cir. 1997) (holding that "Robinson's allegations that she was subjected to 'unsubstantiated oral reprimands' and 'unnecessary derogatory comments' following her complaint do not rise to the level of the adverse employment action required for a retaliation claim"). "[N]ot everything that makes an employee unhappy qualifies as retaliation." *Id.* *See also Williams v. Mahoning County Comm'rs*, 85 F.3d 257, 274 (6th Cir. 1996) (holding that a lateral transfer involving small indirect effect on employee's earnings from commissions "cannot rise to the level of a materially adverse employment action").

b) Significant Change

The Fourth and D.C. Circuits deviate from the material harm requirement, merely requiring a *significant* change in the terms and conditions of employment.⁴⁹ These circuits define an adverse employment action as a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits.⁵⁰ This broader requirement seems to include lateral job transfers without a reduction in pay.⁵¹

49. See *Bhella v. England*, 91 FED. Appx. 835, 847 (4th Cir. 2004) (citing *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998)) (emphasis added); see also *Forkkio v. Powell*, 306 F.3d 1127, 1131 (D.C. Cir. 2002) (“[r]eassignment with significantly different responsibilities . . . generally indicates an adverse action.”) (internal quotation marks omitted). Compare *Von Gunten v. Maryland*, 243 F.3d 858, 869 (4th Cir. 2001) (placing employee on administrative leave during investigation of complaint lodged against employee is not an adverse employment action) with *Karpel v. Inova Health Sys. Servs.*, 134 F.3d 1222, 1229 (4th Cir. 1998) (finding that a transfer to a smoking unit in response to protect activity is an adverse employment action).

50. *Bhella*, 91 FED. Appx. at 847. See *Paquin v. Fed. Nat’l Mortgage Ass’n.*, 119 F.3d 23, 32 (D.C. Cir. 1997) (finding that the withdrawal of a severance package was an adverse action if sufficient evidence that requires protected activity caused the withdrawal); see also *Cones v. Shalala*, 199 F.3d 512, 521 (D.C. Cir. 2000) (finding that a decision not to advertise a director’s position after the plaintiff filed a complaint is tantamount to a denial of a promotion and constitutes an adverse action). Compare *Crady v. Liberty Nat’l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993) (“A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation”), with *Flaherty v. Gas Research Inst.*, 31 F.3d 451, 457 (7th Cir. 1994) (a “bruised . . . ego” is not enough) and *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994) (reassignment to a less challenging, boring job is insufficient to show adverse action); see also *Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 886 (6th Cir. 1996) (demotion without change in pay, benefits, duties, or prestige is insufficient to show adverse action).

51. *Taylor v. Small*, 350 F.3d 1286, 1293 (D.C. Cir. 2003) (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998) (finding that formal criticism or poor performance evaluations are not necessarily adverse actions and they should not be considered such if they did not affect the employee’s position or salary)); see also *Peterson v. West*, 17 FED. Appx. 199, 201-02 (4th Cir. 2001) (affirming summary judgment for defendant because job duties were changed which did not affect the plaintiff’s official job title or pay, did not comprise an adverse employment action that could be characterized as an ultimate employment decision); *Von Guten*, 243 F.3d at 865 (stating that ultimate decisions are not the Fourth Circuit standard). But see *Elkins v. Pharmacy Corp. of Am.*, No. 00-1077, 2000 U.S. App. LEXIS 16002, at *6 (4th Cir. July 12, 2000) (noting that the adverse actions at issue, although affecting the terms and conditions of the plaintiff’s employment, did not comprise actionable ultimate employment decisions).

3. The Case-by-Case Approach to Adverse Employment Actions

Some courts hold that whether an employment action is adverse and therefore actionable is gauged by an objective standard. Specifically, the Tenth Circuit believes that instead of defining what an adverse employment action is, it should examine each claim on a case-by-case approach to see whether the challenged employment action reaches the level of "adverse."⁵² The Tenth Circuit's approach to adverse employment action is similar to the other circuits, because it requires that the employer's conduct be "materially adverse" to the employee's job status, yet it still evaluates each set of facts on an ad hoc basis.⁵³ Similarly to the Ninth Circuit, the Tenth Circuit has found that unless the adverse action is very closely connected to the protected act in terms of time, the plaintiff must rely on additional evidence to establish a retaliation claim.⁵⁴

The Eleventh Circuit believes that conduct that is not an ultimate employment decision therefore must meet some threshold level of substantiality and applies a case-by-case analysis.⁵⁵ To cross the threshold of substantiality the employment action must be serious to a reasonable person and tangible enough to alter the employee's compensation, terms, conditions, or privileges of employment.⁵⁶

52. *Demars v. O'Flynn*, 287 F. Supp. 2d, 230, 245 (W.D.N.Y. 2003). "There is no 'bright-line rule' for identifying an adverse employment action, rather, 'courts must pour over each case to determine whether the challenged employment action reaches the level of 'adverse.'" *Id.* (citing *Richardson v. New York State Dep't of Corr. Servs.*, 180 F.3d 426, 446 (2d Cir. 1999)).

53. *Meiners v. Univ. of Kansas*, 359 F.3d 1222, 1230 (10th Cir. 2004) (finding that an adverse action must amount to a significant change in employment status, such as "firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."); *see also Ferencich v. Merritt*, 79 FED. Appx. 408, 413 (10th Cir. 2003) (finding plaintiff's transfer to the courtroom clerk training position was at her request, and thus was not adverse).

54. *Meiners*, 359 F.3d at 1231. *See Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1179 (10th Cir. 1999) (finding that a six-week period between the protected activity and the adverse action could be sufficient, without additional evidence, to show causation but a three-month period is insufficient).

55. *Bass v. Bd. Of County Comm'rs, Orange County*, 256 F.3d 1095, 1118 (11th Cir. 2001).

56. *Stavropoulos v. Firestone*, 361 F.3d 610, 617 (11th Cir. 2004) (finding that actions Stavropoulos complained of did not affect her employment status because although the Board rated her negatively and voted to terminate her, other agents of the Board prevented her from being fired and she was able to remain in her position, with the same pay and benefits); *see also Gupta v. Fl. Bd. Of Regents*, 212 F.3d 571 587-88 (11th Cir. 2000). The court found that five out of seven claims filed by Gupta did not constitute an adverse action because they did not alter any terms, conditions or privileges of her employment. *Id.* The five claims rejected were: (1) being placed on the search committee for a position at the University's Boca Raton campus, preventing her from applying for that position; (2) being assigned to teach more credits than other professors and to teach on three

4. The EEOC's Deterrence Test

The EEOC is the agency charged with administering Title VII.⁵⁷ One of the EEOC's functions is to provide interpretive guidance of Title VII.⁵⁸ Courts, including the Supreme Court, routinely rely on the recommendations of the EEOC when deciding Title VII issues.⁵⁹ While the EEOC has issued a large number of official guidelines that interpret sections of Title VII, these guidelines do not have the force and effect of binding the courts.⁶⁰

In regard to "adverse employment action," the EEOC clearly supports a broader, more inclusive definition.⁶¹ The EEOC has argued that in assessing whether conduct constitutes an adverse action in a claim of retaliation, courts should determine whether the conduct would reasonably deter a complainant or others from engaging in Equal Employment Opportunity (EEO) activity.⁶²

Although courts usually defer to agencies, especially the EEOC, in interpreting regulations, a clear definition of an adverse employment action remains elusive and courts have been reluctant to adopt the EEOC's interpretation. The Ninth Circuit stands apart in adopting the EEOC's standard.⁶³ By adopting the EEOC standard, the Ninth Circuit construes adverse action broadly.⁶⁴

The EEOC compliance manual states that "an action is cognizable as an adverse employment action if it is reasonably likely to deter em-

different campuses; (3) not being assigned to teach a desired class; (4) the Dean's office intentionally delaying her visa application to the Immigration and Naturalization Service, and (5) the process involving her sexual harassment claim was terminated without notice after she missed a deadline. *Id.*

57. PLAYER, *supra* note 1, at 200.

58. *Id.*

59. Margery Corbin Eddy, Note, *Finding the Appropriate Standard for Employer Liability in Title VII Retaliation Cases: An Examination of the Applicability of Sexual Harassment Paradigms*, 63 ALB. L. REV. 361, 377 (1999).

60. PLAYER, *supra* note 1, at 200.

61. The EEOC does not explicitly define "adverse employment action," but sets out interpretive guidance to assist in interpreting the element.

62. EEOC Compliance Manual ¶ 8 "Retaliation" at 8008 (1998).

63. Vasquez v. County of Los Angeles, 349 F.3d 634, 646 (9th Cir. 2004).

64. Ray v. Henderson, 217 F.3d 1234, 1242-43 (9th Cir. 2000). Due to the decision in Ray, the Ninth Circuit has continued to broadly define adverse action. Little v. Windermere Relocation, Inc., 265 F.3d 903, 914 (9th Cir. 2001) (finding that a reduction in a monthly base salary from \$3000 to \$2000 constitutes an adverse action); Brooks v. City of San Mateo, 229 F.3d 917, 928-30 (9th Cir. 2000) (finding that use of the full ninety day period to process worker's compensation claim, participating in employee discussions regarding harassment, working with a friend of the alleged harasser, a disputed evaluation, and difficulty securing vacation time did not constitute adverse action).

ployees from engaging in protected activity.”⁶⁵ When determining whether an action is “relatively likely” to deter employees the Ninth Circuit has found that an act is not protected when it is too far removed in time from the act.⁶⁶ Further, although trivial annoyances are not actionable, more significant retaliatory treatment that is reasonably likely to deter protected activity is unlawful and prohibited.⁶⁷

The EEOC states that adverse actions, which occur after the complainant’s employment relationship with the employer has ended, such as negative job references, can be challenged.⁶⁸ The EEOC clearly states that there is no requirement that the adverse action materially affect the terms, conditions, or privileges of employment.⁶⁹ It should be noted that individuals who file discrimination charges with the EEOC or a state agency, as well as individuals who participate in EEOC or state investigations, are protected from retaliation regardless of the merits of the underlying claim.⁷⁰

C. Judicial Interpretation of Title VII Varies to the Detriment of Employees and Employers

The circuits vary greatly not only in their definition of adverse action, but also in their application. Even two circuits applying the same standard of review apply them differently to the facts, making it difficult to determine what conduct a circuit will find as protected. Specifically, depending on the circuit and the standard of review, courts differ on whether constructive discharge, negative job evaluations, or lateral transfers constitute adverse action.

65. EEOC Compliance Manual ¶8 “Retaliation” at 8008 (1998). *See also Vasquez*, 349 F.3d at 646. The manual constitutes, at least in part, a subjective standard because the manual says, “any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter *the charging party* or others from engaging in protected activity.” *Id.*

66. *Vasquez*, 349 F.3d at 647 (finding that the protected act occurred thirteen months prior to the alleged adverse action and that the plaintiff did not provide any evidence that there were any surrounding instances of retaliation). *But see Coszalter v. City of Salem*, 320 F.3d 968, 977-78 (9th Cir. 2003) (holding that a protected act which occurred three to eight months prior to the alleged adverse action can support an inference of retaliation when certain circumstances, such as inconsistent application of a policy, suggest that an employer had a retaliatory motive).

67. EEOC, Trends in Harassment Charges Filed with the EEOC During the 1980s and 1990s, available at <http://www.eeoc.gov/docs/retal.html> (last modified July 11, 2000).

68. EEOC Compliance Manual ¶8 “Retaliation” at 8008 (1998).

69. *Id.*

70. *Id.*

As a result of the recent trend in globalization,⁷¹ this note will now examine English, Canadian Human Rights, and Australian laws that protect similar conduct in an attempt to recommend a uniform definition of retaliation.⁷² Once this note has analyzed England's "treated less favorably" standard, Canada's "reasonable complainant standard," and Australia's Victimization Acts, one can begin to create an adequate retaliation standard. By combining an assortment of elements from the various laws, we will create a suggested interpretation.

III. ENGLISH DISCRIMINATION BY VICTIMIZATION

Under English law, retaliation in the workplace is referred to as discrimination by victimization.⁷³ Victimization provides a separate course of action for anyone treated less favorably because they brought a discrimination claim or did something else by reference to the legislation.⁷⁴ The Sex Discrimination Act of 1975⁷⁵ ("SDA") and the Race Relations Act of 1976⁷⁶ ("RRA") are the two acts under English law that provide victimization provisions.⁷⁷ The Acts define victimization as unlawful discrimination.⁷⁸ Victimization is only unlawful under discrimination law, which makes claims only viable within the scope of employment, education, and the provision of goods, services, facilities and housing.⁷⁹ The purpose of the victimization provision is to allow people to feel more comfortable in making complaints without fearing repercussions at work.⁸⁰

A. *Sex Discrimination Act of 1975 and Race Relations Act of 1976*

The English Sex Discrimination Act and Race Relations Act both outlaw discrimination on the grounds of (a) "race, colo[r], nationality, or

71. See *Lawrence v. Texas*, 539 U.S. 558, 568, 573, 576-77 (2003).

72. Retaliation is called victimization in England and Australia and "no-reprisal" in Canada.

73. GWYNETH PITT, *EMPLOYMENT LAW* 29 (Sweet & Maxwell 1992).

74. Michael Connolly, *Discrimination Law: Victimization*, 29 *INDUS. L.J.* 304, 304-05 (2000).

75. 1975, C 65, pt. I, § 4 (Eng.).

76. 1976, C. 74, pt I, § 2 (Eng.).

77. Connolly, *supra* note 74, at 304.

78. Sex Discrimination Act of 1975, C. 65 (Eng.); Race Relations Act of 1976, C. 74 (Eng.).

79. Evelyn Ellis, *Victimization of Applicants*, 142 *NEW L.J.* 1406 at *1 (1992). Title VII only contains provisions that protect employment, unlike the RRA and SDA, which cover other aspects, as mentioned above.

80. PITT, *supra* note 73, at 29. It has been argued that anti-victimization provisions should be expanded on a wider scale to include among other things, unfair dismissal cases. *Id.*

ethnic or national origins; (b) sex; and (c) marital status.”⁸¹ In comparison to Title VII, the SDA and the RRA protect on a similar basis of discrimination.⁸² However, the U.S. protects religion, which is not protected under English law, and England protects marital status while Title VII does not.⁸³ The Acts make victimization unlawful when an employee is treated ‘less favo[rably]’ because he or she: “(a) brings a proceeding[]; (b) gives evidence or information; (c) alleges a contravention or otherwise acts under the . . . Sex Discrimination or Race Relations Acts; or (d) intends to do any of these things.”⁸⁴ Under the Acts, if an employer victimizes an employee because he believes that the employee has done one of the above mentioned things, the employee is still protected under the Acts.⁸⁵ However, an employee who makes false or bad faith allegations against his employer will lose his protected status.⁸⁶

B. Elements of a Victimization Claim Under English Law

To prove a claim of victimization, a claimant must prove that her act caused the victimizer (employer) to treat her unfavorably.⁸⁷ Once a claimant proves that the employer has treated her less favorably, she must then show that this was “by reason that” claimant did the protected act.⁸⁸ Both elements are applied more favorably toward the employee rather than the employer.⁸⁹ A victimizer’s motive, whether conscious or unconscious, has been found to be irrelevant by the House of Lords, which is the final court of appeals on point of law in the United Kingdom.⁹⁰ Because motivation of the victimizer is irrelevant, courts should simply ask, “Did the defendant treat the employee less favorably be-

81. JOHN BOWERS, *BOWERS ON EMPLOYMENT LAW* 126 (6th ed. 2002).

82. See Civil Rights Act of 1964 § 704, 42 U.S.C. § 2000e-2 (2000).

83. Compare 42 U.S.C. § 2000e-2 with Sex Discrimination Act of 1975, C. 65 (Eng.) and Race Relations Act of 1976, C. 74 (Eng.).

84. Bowers, *supra* note 81, at 139. By including section (d), the SDA and the RRA have broadened the protection they offer by including a person who intends to engage in any of the acts protected under the law even if they have not decided whether they will or will not engage in doing a protected act.

85. *Id.*

86. *Id.*

87. See *Aziz v. Trinity Street Taxis, Ltd.* 1 Q.B. 463 at *10 (Eng. C.A. 1988) (available at lexisnexis.com); see also BOWERS, *supra* note 81, at 139.

88. Connolly, *supra* note 74 at 307.

89. *Aziz*, 1 Q.B. at *1.

90. *Nagarajan v. London Reg'l Transp.* [1999] IRLR 572 at *1 (finding that an employer’s “motivation did not have to be conscious or possess any malice, as long as it represented a significant factor in the employer’s decision); see also BOWERS, *supra* note 81, at 139. The House of Lords is the highest authority in England and is comparable to the United States Supreme Court.

cause of his knowledge of a protected act?”⁹¹ A claimant must also show she was victimized by an employer as a result of an allegation of a breach of the SDA or RRA.⁹²

In *Chief Constable of West Yorkshire Police v. Kahn*,⁹³ the court found that to determine whether an employee has been victimized, a court must compare the manner in which the complainant was treated and the way in which the comparator (another employee) would be treated under the same circumstances had they not filed a claim.⁹⁴ The employee must have been victimized ‘by reason that’ he did the protected act.⁹⁵ This comparison is known as the ‘but-for’ test.⁹⁶

Unlike U.S. law, England only requires that a claimant prove two elements of a victimization claim. These two elements, treated less favorably and by reason that, make it easier for a claimant in England to prove victimization. Once an English claimant proves that they were treated less favorably, the by reason that element is automatically proven.

1. “Treated Less Favo[]rably”

There are two competing theories when deciding whether a claimant was “treated less favo[]rably” by the defendant. To determine whether a claimant has been treated less favorably, a court must first choose a comparator.⁹⁷ The primary question courts consider is whether it should compare the claimant with a hypothetical person who has brought proceedings under the Acts or to someone who has not brought proceedings at all?⁹⁸ In *Aziz v. Trinity Street Taxis, Ltd.*,⁹⁹ the English

91. Connolly, *supra* note 74, at 307.

92. BOWERS, *supra* note 81, at 140.

93. I.C.R. 1169 at *2 (Eng. C.A. 2000) (holding that if the respondent became distressed because he thought he might not obtain a job that he wanted because his employer refused to provide a reference, an award of damages for his injury to feelings was appropriate). The court stated that the employee is more favored than the employer and applied its ruling to both the RRA and SDA since the statutory provisions are identical. *Id.*

94. *Id.* at *5. There are differing theories as to who the comparator should be, leaving the law in England undecided in this area. In victimization cases, courts are still able to choose which theory they would like to apply, because the Court of Appeals never overruled its previous decision in *Cornelius v. University College of Swansea*. (I.R.L.R. 141 (Eng. C.A. 1987)).

95. *Chief Constable*, I.C.R. 1169 at *2 (Eng. C.A. 2000).

96. *Id.*

97. Connolly, *supra* note 74, at 306.

98. *Id.* Because of the competing law of *Aziz* and *Cornelius* it appears that England courts are still determining which comparator to use.

99. [1989] Q.B. 463. *Aziz* is an Asian man who was a member of an association of taxicab operators. *Id.* at 463. *Aziz* wanted to have a third taxi cab and the association wanted to impose a

Court of Appeals found that the comparator should be a person who did not perform a protected act.¹⁰⁰ Therefore, the court should compare the claimant to someone that did not perform the specific act and who does not resemble the claimant by way of having filed a discrimination claim.¹⁰¹

The Court of Appeals previously held in *Cornelius v. University College of Swansea*,¹⁰² that the comparator should be anyone who had brought a proceeding under the Act, regardless of the conduct.¹⁰³ From these two cases, although they differ in opinion, *Aziz* is the leading authority, since it postdates *Cornelius*. To compare a claimant, however, under *Cornelius*, would make every victimization claim fail because an employer would be able to testify that he would have treated any other employee in the same manner that he treated the victim.¹⁰⁴ This would lead to an employee refusing to bring claims for victimization because he would lose in court under the *Cornelius* comparator but possibly win under *Aziz*.

2. “By reason that”

Once a claimant can prove that he was treated less favorably, he must then prove that he was treated this way “by reason that” he did the protected act.¹⁰⁵ In *Nagarajan v. London Regional Transport*,¹⁰⁶ the court found that it is irrelevant for purposes of liability whether a defendant was motivated by the RRA (or the SDA), when treating the claimant less favorably—known as the causative test.¹⁰⁷

fee on him. *Id.* *Aziz* thought he was being unfairly treated and secretly recorded conversations which he had with a number of association members. *Id.* He used the taped conversations when he made a complaint to the industrial tribunal. *Id.*

100. *Id.* at 463-64.

101. Connolly, *supra* note 74, at 306. Therefore, the correct comparator in *Aziz* would be a non-Asian member of the taxi company who had not made secret tape recordings. *Id.*

102. [1987] IRLR 141.

103. *Id.* at *8 (finding that the College’s decision would have not been different had someone else brought the proceeding or had they been under different circumstances as long as the subject matter was the same).

104. Connolly, *supra* note 74, at 306 (emphasis added). Following the findings of *Cornelius* allows employers to treat employees differently, and not be penalized for doing so. *Id.*

105. *Cornelius*, [1987] IRLR at *3.

106. [1999] 4 All ER 65. This court was applying the conscious motivation test, which was found to be bad law by the House of Lords.

107. *Nagarajan v. London Reg’l Transp.*, [1999] 4 All ER 65. *See also* Connolly, *supra* note 74, at 307. Although it is considered the correct approach, courts can still use the *Nagarajan* approach since it has not been overruled.

Once an employer is without a defense and the claimant has proven that he has received “less favorable treatment” under the causative test, the second element “by reason that” is only a formality, which makes the claimant’s success more probable.¹⁰⁸ The courts have no discretion to show sympathy to an employer who purposely victimized an employee because he performed a protected act.¹⁰⁹ The House of Lords has found that if a court was to give preference to a defendant when he was aware of the protected act, he would be applying bad law because that would be going back to the “conscious motivation test.”¹¹⁰

C. *The European Union and Its Impact on English Victimization Law*

The European Union (EU) has a direct impact on English victimization law because as a member of the EU, countries must apply the decisions and interpretations of EU legislation in their own country in order to establish uniformity among the members. EU decisions have significantly affected English victimization law, specifically victimization that arises post-employment. Although post-employment is only a part of victimization law, we are using it to illustrate the effect that the EU has had on employment law in England.

1. The European Union

The European Community¹¹¹ (EC), since being formed, passed Equal Treatment Directive 76/207 to encourage Member States to enact legislation providing men and women equal access to employment and safe working conditions.¹¹² EC directives are legislative instruments obligating member states to introduce them into law.¹¹³ Under Article 6 of

108. Connolly, *supra* note 74, at 307.

109. *Id.*

110. *Id.* The House of Lords recently found in *Relaxion Group v. Rhys-Hapur and D’Souza v. Lambeth London Borough* that former employees can file post-employment victimization claims. [2003] UKHL 33, at ¶33 (House of Lords 2003). It is unclear whether the House of Lords overturned any previous English decisions that found that post-employment victimization claims must be dismissed. *Id.*

111. The European Community, also known as the European Economic Community became effective in 1967 to encourage political, economical, and social co-operation. Today the European Community is known as the European Union and currently is made up of fifteen Member States. See *The European Union at a Glance*, at http://europa.eu.int/abc/index_en.htm (last visited Feb. 7, 2004).

112. Council Directive 76/207: [1976] O.J.L39/40 at *2—(European Union Legislation).

113. General Overview of EU Directives at <http://www.ul.com/hazloc/union.html> (last visited Nov. 23, 2003).

the Directive, a Member State is required to implement into its legal system protections to workers who have been refused employment references from their employer after their employment term has ended, in retaliation for bringing legal proceedings against the employer or corporation.¹¹⁴

2. The EU's Effect on English Law

The general rule under English law is that courts do not have the jurisdiction to hear claims arising post-employment.¹¹⁵ One exception to this general rule has been found in sex discrimination cases, but, interestingly, not in RRA cases.¹¹⁶ When the post-employment discrimination is the type of victimization under the SDA, the employment tribunal will be allowed to hear the claim.¹¹⁷ This general exception to post-employment claims was recognized in *Coote v. Granada Hospitality Ltd.*¹¹⁸ In this case, the Court of Appeals had refused to extend this exception in order to permit English tribunals the ability to exercise jurisdiction in a complaint of sex discrimination that arose post-employment.¹¹⁹ Therefore, if a claimant files a sex discrimination case after she had been dismissed or left her job voluntarily, a tribunal will dismiss her claim because it arose post-employment.¹²⁰

114. *Coote v. Granada Hospitality Ltd.*, [1998] ECR I-5199 at ¶15. *See also* Council Directive 76/207: [1976] O.J.L39/40 at *5.

115. Ashley Norman, *Sex, Lies and Employment Tribunals*, . . ., 152 NEW L.J. 514, 515 (2002).

116. *Id.* This exception was only recently expanded to include all discrimination cases, such as race, disability, religion, and sexual orientation. Charles Pigott, *Protecting Ex-Employees*, 153 NEW L.J. 7089, 1090-91 (2003). As of July 19, 2003 the RRA inserted a new section 27A which provides "that discrimination continues to be unlawful after the employment relationship has come to an end 'where discrimination arises out of and is closely connected to that relationship.'" *Id.* England has similarly added that provision to the SDA effective the same day. *Id.*

117. *Id.*

118. [1999] ICR 942 EAT. A woman complained of being refused a reference after she left her job because she had previously made a sex discrimination complaint against her employer while employed. *Id.* Since her sex discrimination complaint was filed prior to the end of her employment contract, the tribunal heard her complaint for victimization. *Id.*

119. *Id.*

120. For example, Mary was being sexually discriminated at work and was victimized for complaining to her boss about it. Soon after, she was fired because of her complaint or left voluntarily because she did not want to face any more discrimination. She then filed a complaint against her employer for sex discrimination and victimization. The tribunal will dismiss her case because it arose post-employment. If she had filed a sex discrimination case before she left or was dismissed, the court, applying the exception, would have allowed her to also file a victimization claim even though she filed it after she was dismissed or left voluntarily.

Decisions by the European Court of Justice (ECJ) must be followed by the member states to maintain a stable EU.¹²¹ If the Court of Justice makes a ruling on the interpretation of its legislation, it is the understanding of all member states that they must internally apply that decision in their own country.¹²² If a country is unable to interpret the treaties or laws of the EU, then it turns to the ECJ in order to determine what is the law. Since post-termination protection was the law of the EU in 1998, the Employment Appeal Tribunal (EAT) turned to the ECJ when it was uncertain of whether Directive 76/207 covered a claim of discrimination by victimization that occurred after termination of complainant. The ECJ decided that if complainants are not protected against discrimination by victimization after termination, under a member state's legislation, employees will be deterred from bringing discrimination actions against their employers, which would ultimately jeopardize the aim of the Equal Treatment Directive.¹²³

3. Case Law Directly Affecting UK Law

The current English victimization law has been shaped by both the English courts and the ECJ. Prior to *Coote*, English courts found that post-employment victimization was not a valid claim under the SDA or the RRA. Although English law did change after the English courts turned to the ECJ for its interpretation of an EU Directive, the decision only affected the interpretation of the SDA. The ECJ decision in *Coote* determined that victimization claims cannot end when an employee ceases to work for an employer and that an employee/employer relationship continues beyond that point.¹²⁴ More recently in *Relaxion*, the English House of Lords applied the *Coote* decision when deciding whether a victimization claim arising post-employment is actionable, when the victimization was filed in connection with a sex discrimination claim. Both decisions have helped make victimization claims more flexible for employees and have shown employers that just because an employee no longer works for them, they cannot treat them less favorably.

121. See The European Union at a Glance, Court of Justice: Upholding the Law, at www.europa.eu.int/abc/index3_en.htm#law (last visited Mar. 28, 2005).

122. *Id.*

123. See *Coote*, [1998] ECR I-5199; see also *Relaxion Group v. Rhys-Harper* [2003] UKHL 33 at ¶32; *D'Souza v. Lambeth London Borough Council* [2003] All ER (D) 258 at *3.

124. See *Coote*, [1998] ECR I-5199 at ¶12.

a) *Coote v. Granada Hospitality Ltd.*

*Coote v. Granada Hospitality Ltd.*¹²⁵ examines the EC's belief of equal treatment for men and women. Coote filed a sex discrimination case against her employer, Granada, claiming she was dismissed from her job for being pregnant.¹²⁶ Her case was settled and under mutual agreement with Granada, Coote left the company.¹²⁷ After leaving Granada, Coote failed to find other employment and blamed Granada for failing to provide potential employers with references.¹²⁸ As a result, she filed a complaint of victimization claiming that Granada failed to provide references for her due to her previous filing of a sex discrimination claim against the company.¹²⁹ After the tribunal dismissed Coote's discrimination case on the grounds that the SDA provided protection only when a claim for discrimination was brought during employment, she appealed to the EAT, a superior court of record dealing with appeals only on points of law from decisions of the Employment Tribunal (ET).¹³⁰

To determine whether the ET had properly dismissed the case, the EAT asked the ECJ for a ruling on the interpretation of Council Directive 76/207.¹³¹ The ECJ first observed that since Directives could not be used to impose obligations on people, it could not be used against private sector employers as well.¹³² The ECJ disagreed with the United Kingdom government, which argued that the Directive did not cover claims brought by an employee after the employment relationship has ended. It found that Article 6 of the Directive was implemented to provide protection to employees who were not receiving equal treatment.¹³³ Due to the ECJ decision, England now covers post termination victimization under the SDA.

125. *Id.*

126. *Id.* at *1.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* See Employment Appeal Tribunal, What is the EAT? at http://www.employmentappeals.gov.uk/info_frame.htm (last visited Mar. 28, 2005).

131. *Coote*, [1998] ECR I-5199.

132. *Id.*

133. See *Id.* at *8-9.

b) *Relaxion Group v. Rhys-Harper*

The ECJ decision in *Coote* has helped shape victimization law in England, but only with regards to sexual discrimination. The House of Lords took the decision of the ECJ in *Coote* and found in *Relaxion Group v. Rhys-Harper*¹³⁴ that the provisions of the SDA applied to both employees whose claims were heard prior to their dismissal, and to those employees who filed claims after they were dismissed from their jobs.¹³⁵ The court believes that if they were to find otherwise it would mean that “retaliatory action taken by an employer before the contract of employment ends is within the scope of the legislation, but retaliatory action taken later, is not.”¹³⁶

In *Relaxion*, Lord Nicholls of Birkenhead found that the proper interpretation of the SDA is that “once two persons enter into the relationship of employer and employee, the employee is intended to be protected against discrimination by the employer in respect of all the benefits arising from the relationship.”¹³⁷ If this is the purpose of the Act, then it would make no sense to draw a line at the exact moment when the contract of employment ends, protecting the employee against discrimination in respect to all benefits up to that point but in respect of none thereafter.¹³⁸ The House of Lords also looked at the intentions of Parliament when it enacted the SDA.¹³⁹ The court found that Parliament’s intention for passing the SDA was to ban discrimination and that it did not matter to Parliament whether the employee was employed today or yesterday because the employment relationship continued after employment.¹⁴⁰

Although the House of Lords found that a claim for discrimination by victimization after an employment contract was terminated could be

134. [2003] UKHL 33.

135. *See id.* at *8-9, *10.

136. *Id.* at *10 (finding that drawing such a strict line would mean that “an employee who asks for a reference before he retires from his employment is protected but the employee who asks for a reference the day after he left is not”).

137. *Id.*

138. *Id.* at *10-11.

139. *Id.*

140. *Id.* The court examined the intent and meaning of the word dismissal within the Act and looked at the steps Parliament took when passing the act, which gave Parliament the opportunity to keep the law under review. *Id.* There the court found that “when enacting this new form of legislation, Parliament intended to ban discrimination in respect of some of the benefits in respect to an employee’s employment but not others, with the distinction between the two categories being self-evidently capricious.” *Id.* at *11. In the end the court does not give a clear cut reason for finding Parliament’s intent to be such. *See id.*

heard by an English Court, it found that such a claim could only be brought under the SDA and not the RRA.¹⁴¹ Under the RRA, discrimination by victimization can only be filed during employment.¹⁴² Under section 4(2), a claim of victimization is explained as arising from a list of events which only occur during employment and the entire section is in the present tense, unlike the SDA.¹⁴³ If Parliament had intended to include post-termination claims of victimization it would have worded the statute in a similar manner as the SDA.¹⁴⁴ Therefore, the only exception English courts have been willing to make in the context of victimization is under sex discrimination legislation.

The English law of victimization under the SDA is now reasonably clear and strict, but there are still problems.¹⁴⁵ Although a claimant may win her claim of victimization, the remedies available to her are similar to those available in a discrimination claim.¹⁴⁶ Such remedies are extremely limited in scope because there is a ceiling on damages in discrimination cases, and because in most cases an injunction will be granted even when the claimant suffered a detriment that was continuous.¹⁴⁷ Because there are two tests competing with each other, defendants will still be able to argue that the *Cornelius* test should apply, and depending on the court, might win. This leaves victims wondering if they should even waste their time pursuing victimization suits under the provisions of the SDA and the RRA.

D. England's Comparator Standard Favors Victims but Creates Confusion

The United Kingdom uses a comparator test, in which the court compares the possible retaliatory treatment of the complainant with the expected treatment of another employee. The English approach to victimization law is unlike any approach the U.S. takes with regards to the Title VII retaliation provision. Under English law, the two elements of a victimization claim are applied favorably toward employees rather than employers, yet it does not create an automatic win for all employees. Although the English approach is favorable to employees, the creation of

141. See *D'Souza v. Lambeth London Borough Council*, [2003] All ER (D) 258 at *39.

142. *Id.* at *23, *44.

143. *Id.* at *23.

144. See *id.* at *46.

145. See generally Connolly, *supra* note 74.

146. Ellis, *supra* note 79, at 1407.

147. *Id.*

the competing comparator tests of *Aziz* and *Cornelius* creates confusion among both employees and employers as to what test will be applied in English courts. The creation of such confusion in England is similar to the U.S. circuit split because both countries make it difficult for employees and employers to determine what will constitute retaliation or victimization under the acts.

English victimization law, although favorable to employees, does have its flaws. England protects employees who file victimization claims post-employment, but it only goes as far as protecting those who filed under the SDA, while leaving employees who file under the RRA helpless even though they are being wrongfully victimized. Preventing an employee from filing a post-employment victimization under the RRA, is inadequate protection for employees because both the RRA and the SDA are interpreted under English law together due to the similar wording of both acts.

Despite the disadvantages to the English standard, there are advantages that may help guide us in our interpretation of Title VII. English courts compare the actions of the claimant with the actions of another employee who did not file a discrimination claim and who did not act in the same manner as the complainant. This approach benefits both the employer and the employee because it creates a clear cut rule, and does not keep the courts, as well as the employers and employees, guessing as to the standard of review.

The comparator approach allows for the courts to examine the actions of the claimant and that of another employee to determine whether an employer would have taken the same actions, despite the discrimination claim. Concise legal rules and sympathy toward victims, as well as allowing employers to know their boundaries should be kept in mind when determining the appropriate interpretation of Title VII.

IV. CANADIAN HUMAN RIGHTS LAW AND THE "NO-REPRISAL" PROVISION

The Canadian federal government enacted three major pieces of legislation to address concerns relating to human rights: the Canadian Bill of Rights, the Charter of Rights and Freedoms, and the Canadian Human Rights Act.¹⁴⁸ The Canadian Human Rights Act (CHRA), enacted in 1977, addresses complaints received from individuals or groups

148. M. NORMAN GROSSMAN, FEDERAL EMPLOYMENT LAW IN CANADA 208 (Carswell 1990).

concerned with discriminatory practices.¹⁴⁹ The Canadian Human Rights Act is enforced by the Canadian Human Rights Commission (CHRC),¹⁵⁰ which ensures that the CHRA works to the benefit of all Canadians, by “(1) providing effective and timely means for resolving individual complaints, (2) promoting knowledge of human rights in Canada and to encourage people to follow principles of equality and (3) to help reduce barriers to equality in employment and access to services.”¹⁵¹

*A. The Canadian Human Rights Act and
The Canadian Human Rights Commission*

The CHRA protects anyone living in Canada against discrimination in or by federal agencies, post offices, chartered banks, airlines, television and radio stations, and buses or railways that travel between provinces, in relevant part.¹⁵² It protects against discrimination on the basis of race, color, national or ethnic origin, religion, age, sex (including pregnancy), marital status, family status, physical or mental disability, pardoned criminal conviction, and sexual orientation.¹⁵³

In comparison to Title VII, the CHRA protects against a broader basis of discrimination, since Title VII only protects against discrimination on the basis of race, color, religion, sex, or national origin.¹⁵⁴ However, in the United States, additional statutes specifically protect against discrimination on the basis of age (ADEA) and disability (ADA). This note will only cover those basis of discrimination covered under Title VII. However, the CHRA also offers broader protection than Title VII because it protects a person against discrimination by any employer or *provider of a service* that falls within the elements mentioned above.¹⁵⁵ The CHRA is not specific to employment law, but specific to human rights.

Similar protections and support structures are used to promote equality in employment opportunities. Protection in the workplace for women, members of visible minorities, aboriginal people, and persons

149. *Id.* at 211.

150. Canadian Human Rights Commission, *About the Canadian Human Rights Commission* (Nov. 1998) 2 available at http://www.chrc.ccdp.ca/AboutCHRC_AproposCCDP/about.asp.

151. *Id.*

152. *Id.*

153. *See id.*

154. *See* Civil Rights Act of 1964 § 704(a), 42 U.S.C. §2000e-2(a) (2000).

155. *See* Canadian Human Rights Commission, *supra* note 150, at 3.

with disabilities are protected under the new (1995) Employment Equity Act.¹⁵⁶ The Act covers the federal public service, Crown corporations and federally-regulated private sector employers with 100 or more employees.¹⁵⁷ The Act serves to examine these workforces to determine whether any of the four groups is underrepresented.¹⁵⁸ The Commission serves to audit and determine the composition of Canada's work force and look at specified issues.¹⁵⁹ For comparison purposes, this note will not look into this Act in greater depth because it is not comparable to Title VII in its goals and means of achieving those goals.

B. Protection Under the Canadian Retaliation Provision

Canada's closest regulation to the United States' retaliation provision is the "no-reprisal" provision, "which prohibits employers from penalizing an employee in regard to terms and conditions of employment because. . .she has filed a complaint, or otherwise participated in proceedings under the act in question."¹⁶⁰ Despite the fact that "Canadian and provincial human rights laws *do* prohibit retaliatory conduct [similar to the United States'], however, such prohibitions are not set out in separate legislation,"¹⁶¹ as the United States sets out explicit whistleblower and retaliation legislation.

1. Canadian Human Rights Act

Critics have argued that "[r]egrettably, the no-reprisal provisions in the employment standards act have been largely ineffective in protecting employee complainants," but have been effective and very strict under human rights acts and the tribunals in protecting complainants.¹⁶² The Canadian Human Rights Act provides that "it is a discriminatory practice, directly or indirectly, (a) to refuse to employ or continue to employ

156. *See id.* at 13.

157. *See id.* Compare to Title VII, which defines "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." Civil Rights Act of 1964 § 701(b), 42 U.S.C. §2000e(b) (2000).

158. *See* Canadian Human Rights Commission, *supra* note 150, at 13.

159. *See id.* "Audits will look at issues such as how employers surveyed their workforces, measures adopted to provide improved opportunity to members of under-represented groups, and consultations with employees and unions." *Id.* at 13-14.

160. GEOFFREY ENGLAND, *INDIVIDUAL EMPLOYMENT LAW* 208 (Irwin Law 2000).

161. Eric A. Doden & Susan Rutherford, *Employment Practices Liability Insurance Coverage in Canada (Part One)*, 17 Can. J. Ins. 1, 18 (1999).

162. ENGLAND, *supra* note 160, at 208.

any individual, or (b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.”¹⁶³

The burden of proof structure is similar to the United States’ structure. First, the burden of proof lies with the party alleging the discriminatory conduct, the complainant.¹⁶⁴ The individual or group must prove that the responding party has committed one or more of the acts set out in the Canadian Human Rights Act.¹⁶⁵ “If such a level of proof can be achieved it raises a presumption in favo[r] of the complainant and the burden of proof then shifts to the responding party to lead evidence which . . . justifies its conduct within the terms of reference set out in the Act.”¹⁶⁶

The Canadian Human Rights Act further provides that “it is a discriminatory practice for a person against whom a complaint has been filed. . . , or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim.”¹⁶⁷ The Act provides that no one may threaten, intimidate or discriminate against an individual because she makes a complaint, gives evidence or assists in any way in respect of the initiation or prosecution of a complaint.¹⁶⁸ However, it is unclear, both statutorily and according to case law, what the Act means by no one may threaten, intimidate, or discriminate against an individual who has filed a complaint or assisted in the prosecution of a complaint.

It has been held that the test for liability is “whether a ‘reasonable person’ in the complainant’s position would ‘reasonably perceive’ the employer’s conduct to be retaliatory in nature.”¹⁶⁹ One tribunal explained the test as follows: in examining the reasonableness of the complainants’ fears, the courts must examine the particular difficulties that confront complainants, when they file a human rights complaint because many of them experience great fear and anxiety. This fear continues to

163. CANADIAN HUMAN RIGHTS ACT, R.S.C. 1985, c. H-6, s. 7. Under the Canadian Human Rights Act, discrimination rests on the basis of “race, colo[r], national or ethnic origin, religion, age, sex, marital status, family status, physical or mental disability, pardoned criminal conviction, [and] sexual orientation.” Canadian Human Rights Commission, *supra* note 150, at 3.

164. *See* GROSSMAN, *supra* note 148, at 216.

165. *See id.*

166. *Id.*

167. CANADIAN HUMAN RIGHTS ACT, R.S.C. 1985, c. H-6, s. 14.1.

168. *See* GROSSMAN, *supra* note 148, at 259.

169. ENGLAND, *supra* note 160, at 208 (citing *Entrop v. Imperial Oil, Ltd.*, 2000 Carswell Ont. 2525 (Ont. Ct. of Appeals 2000)).

have an ongoing relationship with the respondent.¹⁷⁰ This evidences Canada's leniency in protecting its complainants.

2. "Reasonable Human Rights Complainant" Standard

In *Entrop v. Imperial Oil Ltd.*,¹⁷¹ the Human Rights board applying an identical no-reprisal provision under Ontario Human Rights Law,¹⁷² held that an employer's actions amounted to acts of reprisal against an employee for having brought a human rights complaint.¹⁷³ In *Entrop*, the employer introduced an alcohol and drug policy that provided that employees in safety-sensitive occupations self-declare whether she has had substance abuse problems.¹⁷⁴ Pursuant to this policy, plaintiff disclosed that some years prior he had suffered from an alcohol problem; he was subsequently removed from his job and placed in a less desirable position.¹⁷⁵ He brought a claim in front of the Human Rights Commission, which properly found that his employer had discriminated against him on the basis of a handicap and that the policy violated the Human Rights Code.¹⁷⁶ The court specifically found that the employer's actions, consisting of aggressive monitoring of employee's work performance and pressuring him to withdraw his complaint, amounted to reprisal against the employee for having brought a human rights complaint.¹⁷⁷

*Layzell v. Ontario (Human Rights Commission)*¹⁷⁸ held that the Human Rights Commission properly refused to refer employee's complaints to the Board of Inquiry.¹⁷⁹ The court noted that threats to move Layzell from guidance counseling to classroom teaching, and a later transfer to another school, were not proper grounds for judicial review of the Commission's refusal of referral.¹⁸⁰ Complainant alleged that in transferring her to another school, her salary and benefits decreased,

170. *Entrop v. Imperial Oil Ltd.*, 2000 Carswell Ont. 2525 (Ont. Ct. of Appeals 2000).

171. 2000 Carswell Ont. 2525 (Ont. Ct. of Appeals 2000).

172. Section 8 of the Ontario Human Rights Code, "Every person has a right to claim and enforce his or her rights under this Act, to institute and participate in proceedings under this Act and to refuse to infringe a right of another person under this Act, without reprisal or threat of reprisal for so doing." R.S.O. 1990, c. H.19, s. 8.T.

173. *Entrop*, 2000 Carswell Ont. at ¶137.

174. *Id.* at ¶7.

175. *Id.* at ¶11.

176. *Id.* at ¶31.

177. *Id.* at ¶20.

178. No. 5448, 2003 ON. C.LEXIS 4675,*2-3.

179. *Id.* at *10.

180. *Id.* at *2-3, *8, *10.

later ceased, and caused her great stress.¹⁸¹ The court was reluctant to review the evidence, but eventually found that the evidence presented reasonably could lead the Commission to conclude that the offer and transfer was a bona fide attempt to accommodate complainant, and, therefore, did not constitute illegal reprisal.¹⁸²

In *Jones v. Amway of Canada, Ltd.*¹⁸³ the court found that despite Jones' termination after filing her discrimination claim, the Board's finding was sustainable.¹⁸⁴ The court stated that although there is generally no need to prove intent under human rights law, they could not find a breach of the no-reprisal provision without an intent to perpetrate the prohibited conduct.¹⁸⁵

C. Canada's "Reasonable Complainant" Standard Offers Some Guidance

Under Canada's no-reprisal provision, similar to England's standard of review, the court must determine whether a reasonable person would perceive the employer's conduct to be retaliatory in nature. Although quite broad and seemingly flexible, the standards are actually unfairly and unnecessarily overbroad for employers. Although it may seem to benefit employees in its flexibility and vagueness, it may actually be harming complainants in that it is difficult to determine what would happen to a non-complainant in a similar situation. Further, this standard might allow courts to practice manipulation of the standard and furthermore provide little to no guidance to later courts, employees, or employers.

It is clear from the case history that even a standard, such as Canada's reasonable complainant standard, has its flaws. It is difficult to perceive how a direct termination post filing of a discrimination claim, as were the facts in Jones, can be found not to be reprisal under human

181. *Id.* at *3.

182. *Id.* at *10.

[W]e do not see any unfairness to the applicant in what happened that taints the process. Fundamentally, the applicant is owed a duty of fairness in the procedures adopted. She is entitled to be informed of the substance of the case against her. She is entitled to be allowed an opportunity for making responding representations or submissions. She has fully and amply taken advantage of those opportunities.

Id. at *17-18.

183. 159 O.A.C. 331 (2002).

184. *Id.* "There is . . . nothing incorrect or unreasonable about the Board's finding that the onus was on appellant to prove an intent on the part of respondents." *Id.* at ¶11.

185. *Id.*

rights law. Terminating an employee after the filing of a discrimination claim, would almost certainly be considered retaliatory under all of Title VII's differing standards.

However, despite these drawbacks, Canada's indeterminate standard has its advantages and may help guide us in our interpretation of Title VII. The Canadian courts recognize that one must consider a person's vulnerability and fear in bringing a discrimination claim and consider what fears a person in a reasonable complainant's position might have. This benefits complainants in being more sympathetic to the victim and not overly employer focused. Sympathy to victims is certainly a goal to have in mind while reworking an appropriate interpretation of Title VII. We would want to take away from this approach the advantages of a reasonable person standard and consider that both England and Canada follow a similar approach which the United States has failed to consider.

V. AUSTRALIAN VICTIMIZATION LAW

Under Australian law, retaliation in the workplace is referred to as victimization. Victimization is unlawful in Australia because it wants to preserve the integrity of its anti-discrimination laws.¹⁸⁶ They also believe a person should feel that she can file a claim without suffering any adverse consequences because she complained of discrimination.¹⁸⁷ In Australia, anti-discrimination law exists at both the federal and state level.¹⁸⁸ Under federal law there are four Acts that prohibit certain forms of discrimination and they are all administered by the Human Rights and Equal Opportunity Commission.¹⁸⁹ Although there are four

186. Key Concepts in Discrimination Law [2002] HotTopic 5 at http://www.austlii.edu.au/au/other/hiac/hot_topic/2002/5/1.html (last visited Feb. 5, 2004) [hereinafter Key Concepts in Discrimination Law].

187. *Id.*

188. Although the federal government has enacted discrimination laws, many states have taken it upon themselves to expand on the law presently in place.

189. Phillips Fox, *Discrimination in Employment, Australia Find Law*, available at <http://www.findlaw.com.au/article/176/htm> (last visited Mar. 5, 2004). The four Acts are: Race Discrimination Act of 1975 (RDA); Sex Discrimination Act of 1984 (SDA); Disability Discrimination Act of 1992 (DDA); and Human Rights and Equal Opportunity Act of 1986. *See also What do New South Wales Anti-discrimination Laws Say?* available at <http://www.lawlink.nsw.gov.au/abd.nsf/pages/cwlaws> (last visited Mar. 5, 2004). ("The Anti-Discrimination Act 1977 (New South Wales) is one of many anti-discrimination laws which operate in Australia. Every state or territory has its own anti-discrimination law. . . and there are also federal laws that apply across the country.") Under the RDA, SDA, and DDA, individuals who have a victimization complaint can file one with the Commission. The Human Rights and Equal Opportunity

federal laws that prohibit discrimination this note will only focus on two—the Race Discrimination Act of 1975¹⁹⁰ and the Sex Discrimination Act of 1984.¹⁹¹

*A. The Race Discrimination Act of 1975
and The Sex Discrimination Act of 1984*

In the employment context, discrimination is prohibited on the basis of the employee's sex, race, or physical or mental disability under Australian federal law, while most states in Australia prohibit other forms of discrimination in employment.¹⁹² The Race Discrimination Act of 1975¹⁹³ (RDA) and the Sex Discrimination Act of 1984¹⁹⁴ (SDA) are two acts under Australian law that provide victimization provisions. Someone is victimized if he is "badly treated because they [sic] made, or intended to make, or it is suspected that they [sic] will make, a complaint of unlawful discrimination, or that they [sic] will help someone else in relation to a discrimination complaint."¹⁹⁵ Under Australian law, vilification is a type of victimization. A person can be found guilty of vilification if she treats another person in a derogatory or less favorable way due to certain characteristics that they might exhibit or because of their class or status.¹⁹⁶

Commission, Complaints, available at http://www.humanrights.gov.au/info_sheet.html (last visited Mar. 5, 2004). The Commission then assesses the complaint to make sure that it can investigate the allegations under the laws which the Commission has responsibility. *Id.* After reviewing all relevant information the Commission then reviews the complaint to determine if it should be terminated or if it is suitable for "conciliation." *Id.* Conciliation is where the two parties of the complaint are brought together to try and resolve the matter. *Id.* If a complaint cannot be conciliated it will be terminated by the President of the Commission giving the complainant the opportunity to take the matter to the Federal Court of Australia within twenty-eight days of the complaints termination. *Id.*

190. p IV s 26 (Austl.).

191. p IV s 94 (Austl.).

192. Fox, *supra* note 189, at *2. For the purposes of this note we will not be examining physical or mental disability under the DDA because Title VII does not cover disabilities.

193. p IV s 26 (Austl.).

194. p IV s 94 (Austl.).

195. Key Concepts in Discrimination Law, *supra* note 186, at *6.

196. Fox, *supra* note 189, at *2. Vilification is defined differently across Australia, but the most common definition among the states is inciting racial hatred. *Discrimination Based on Religion and Religious Vilification in Australian States and Territories*, available at http://www.hreoc.gov.au/racial_discrimination/Erace/docs/paperd.html (last visited Mar. 30, 2005). Race vilification is prohibited by the Australian federal government under the RDA, while vilification on the grounds of race, homosexuality, HIV/AIDS, or transgender is unlawful under the New South Wales Anti-Discrimination Act. Key Concepts in Discrimination Law, *supra* note 186, at *6. In Victoria, another Australian province, religious vilification is unlawful. *Id.*

1. The Race Discrimination Act of 1975

Unlike English law, the RDA and the SDA are not similar in content. The RDA has two provisions which prevent a person from being victimized. First, a person cannot hinder, obstruct, molest, or interfere with a person exercising or performing any of the powers or functions referred to in this Act.¹⁹⁷ If a person is found to have committed one of these acts then a thousand dollar penalty will be imposed.¹⁹⁸ If a corporation commits the unlawful act then they will be penalized by a five thousand dollar fine.¹⁹⁹ Second, if a person acts in a way to discriminate against another person by refusing to hire her, dismissing her, prejudicing her or intimidating her because she made, or proposed to make a claim to the Commission a person has violated the victimization law.²⁰⁰ Under the RDA, vilification is unlawful if a person does an act in public that is likely to offend, insult or humiliate another person or if the act is done because of someone's race, color or national or ethnic origin.²⁰¹

2. The Sex Discrimination Act of 1984

The Australian Sex Discrimination Act provides protection to employees by preventing a person from committing an act of victimization against another person.²⁰² A person is found to have committed an act of victimization against a third party if the employee being victimized has been subjected to or threatened to be subjected to any detriment on the ground that the other person: "(a) makes a complaint under the Human Rights and Equal Opportunity Commission Act; (b) proposes to bring or has brought a proceeding under the Acts . . . [or] (e) has appeared or proposes to appear as a witness in a proceeding."²⁰³ If a person is found guilty of victimizing another person, the Act imposes a penalty of \$2500 or a prison sentence for three months or both if the circumstances war-

197. Race Discrimination Act of 1975, p IV s 27 (1) (Austl.).

198. *Id.*

199. *Id.*

200. *Id.* The RDA also protects employees who are being threatened by another person. *Id.* The RDA also specifically covers any person who has furnished or proposes to furnish any information or documents to a person exercising their rights under the Act or if a person has attended or plans to attend a conference under this Act. *Id.*

201. *Id.* at p IV s 18C.

202. Sex Discrimination Act of 1984, p IV s 94 (Austl.).

203. *Id.* There are other protections that the Act covers such as (1) furnishing any information, or producing any documents to perform a power or function under the Act, (2) planning to attend a conference held under the Act, (3) asserting or proposing to assert any rights of a person under the Acts, or (4) making an allegation that a person has done an act that is unlawful. *Id.*

rant a severe penalty.²⁰⁴ If a corporation is found guilty of victimizing a person the penalty is ten thousand dollars and no prison sentence.²⁰⁵ The only defense to the SDA is if the accuser brought false allegations that were not made in good faith.²⁰⁶

B. Australia's Victimization Statutes: Can They Help?

Australia's victimization statutes are not like any of the other statutes examined in this note. Because Australia feels very strongly about preventing victimization, the imposition of a fine and the possibility of jail time when found guilty of victimization is harsh. At the same time, it may not be harsh enough because the fines are negligible. Corporations that are found guilty of victimizing an employee are imposed with a small fine, which may allow them to victimize another employee because the cost of doing so is miniscule. A five thousand dollar fine to a corporation is not enough to have a deterrent effect; similarly, a one thousand dollar fine will not deter individuals.

Despite this drawback to Australia's victimization law, imposing a fine on a person and possibly subjecting them to a jail sentence will serve as deterrence against victimization in the workplace. The United States could stand to follow this type of punishment structure for retaliation, even though the fines are negligible because it may serve some deterring effect.

VI. THREE APPROACHES TO TITLE VII'S RETALIATION PROVISION: IS THERE A BETTER WAY?

After looking at Title VII, England's "treated less favorable" standard, Canada's "reasonable complainant" standard and Australia's victimization statutes, we can conclude that no one country that has a definitive and completely satisfactory solution. The United States, as well as the foreign approaches, have many drawbacks, however the U.S. would benefit from pulling the advantages from each of the laws in creating a uniform hybrid of retaliation law.

204. *Id.* Unlike the U.S., Australia takes victimization law very seriously which is evidenced by imposing fines and possible prison time on anyone who violates the Australian SDA.

205. *Id.*

206. *Id.*

*A. Ultimate Employment Action is Overly Restrictive
and Burdens Victims*

The intent of Congress in passing the retaliatory provision was to protect victims and encourage employees to bring discrimination claims without fear of retaliatory conduct.²⁰⁷ The ultimate employment decision view is overly restrictive and burdens victims, and thus does not follow the intent of Congress. Furthermore, it is not the majority view among circuits because only the Fifth Circuit has currently adopted this position. By applying this approach, courts are not following the intent of Congress and, therefore, are coming to their own conclusions about Title VII.

With the increase in retaliation claims, this view would keep excessive and frivolous retaliation claims out of court, thereby not unduly burden the already congested judicial system. Also, it would allow employers to act freely in maintaining their workforce without fear that every decision they make could be scrutinized by the courts. Courts should not make employer decisions by substituting their own judgment for that of the employer. Under this view, employers, when reprimanding their employees, do not have to fear that courts will step in to make decisions for them.

Despite the many benefits to employers under the ultimate employment view, the purpose of retaliation protection is for the benefit and protection of victims. Allowing employers more leeway in their employment decisions and reducing the number of employee claims filed does not further the intent of Title VII. The result of this view would be an increase in retaliatory conduct and a decrease in the number of retaliatory claims brought by victims. Any action that is not a direct and clear termination or demotion would not be actionable, leaving employees out in the cold.

*B. Case-by-Case Approach is Overly Broad Because
it Does Not Establish Any Boundaries*

The case-by-case approach is too flexible and does not resolve the question of what constitutes a retaliation claim. Although it encourages

207. Civil Rights Act of 1964, H.R. 7152, 88th Cong. § 5 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2359. This Act is intended to prohibit withholding, denying, interfering, or depriving of rights and privileges or attempts to do so, or the intimidating, threatening, or coercing of any person with a purpose of interfering with those rights or privileges. *Id.*

employee claims and is supported by the EEOC, it would unduly burden the court system as well as employers. This approach would only add to the present confusion existing among U.S. courts. The EEOC points to the need for flexibility in effectuating the purpose of the statute and courts are strongly encouraged to defer to the interpretations of the EEOC. Despite the great deference we are expected to give to the EEOC, this view contravenes the intentions of Congress.

Under this approach, courts will be further burdened. Employer decisions will be made by the court, leaving them unable to run their own business according to ordinary practice. Courts will also serve as the legislative body, contrary to the provisions of the Constitution. This leaves employers still wondering what constitutes a retaliation claim and increases the number of frivolous claims brought, which is inefficient to the already overburdened system.

In summation, the uncertainty of judicial resolution, the increased cost to employees and employers and the increased likelihood of frivolous claims make this approach inefficient. To accept this approach would run counter to the purpose of Title VII without resolving the uncertainty of the adverse action element.

C. "Materially Adverse Affect" Approach is the Best Among the Circuits but Leaves Much to be Desired on a Global Level

This approach has relatively few drawbacks, however, the advantages do not necessarily make it the best option. Being flexible enough to handle various factual situations while restrictive enough for consistent application, makes this approach deceitful. The requirement that the retaliatory conduct be materially adverse to the terms and conditions of employment as it is currently defined is the intermediate view among the circuits. Although being the majority view and the best compromise, it is not the sole answer.

Similar to the ultimate employment decision view, this approach will prevent courts from interfering with employer business decisions but allow courts to interfere in business when employers are found to have victimized employees. However, unlike the ultimate employment decision, it does not overly preclude victims from bringing retaliation claims. Unlike the case-by-case approach, this interpretation will not cause a flood of litigation and overburden the court system with frivolous claims, but allows for possible victims who have legitimate claims to be heard. This approach appropriately stabilizes the amount of claims in the judicial system.

Consistent with the intent of Title VII, this view favors victims without overly disadvantaging employers. The definition of prohibited retaliatory conduct will be elucidated while the vague areas will be minimized, thus making victims more comfortable in bringing both discrimination claims as well as retaliation claims. Employers and employees alike are more aware of the restrictions placed on them creating a more predictable work environment.

This approach causes minor drawbacks. While it is easy to favor the increased determinability of court decisions, the definition of the standard remains unpredictable. Currently, eight circuits apply this approach, however two circuits have created a further split, defining adverse action as a significant change in terms and conditions. Further, even among the six circuits which agree on a definition of adverse action, if given similar facts, each can have contrary holdings.

Despite the many advantages and relatively few drawbacks to this approach, this definition of adverse action remains unsatisfactory. The circuits would benefit from pulling from foreign jurisdictions in an attempt to clarify existing law and the uncertainties associated with it. Foreign law has been more clearly settled, and, thus, would best aid American courts in attempting to answer this question.

VII. ONLY BY COMBINING THE LAWS OF THE U.S., ENGLAND, CANADA AND AUSTRALIA CAN WE FORMULATE A SATISFACTORY RETALIATION PROVISION IN THE U.S.

A. Proposed Legislation

In order to establish an appropriate standard we must combine several aspects from the United States., England, Canada and Australia. Using the United States' materially adverse standard as a starting point, we select elements from the foreign jurisdictions in order to create a hybrid of retaliation law.

The "materially adverse" standard serves as an appropriate base for molding an acceptable law. This standard creates a stable basis for employers and employees because it is flexible in its definition and allows for application to various factual situations. This serves to benefit employees, but also helps employers because it prevents courts from interfering with the operation of their businesses. This standard will cause a clear definition to surface, while minimizing the vague application of the law.

1. England's Comparator and Canada's Reasonable Complainant Standards

England's approach sets out a clear two step approach in determining whether the conduct was victimization. This clarifies what is needed in order to establish a claim. The two step approach favors employees because once the first step is proven, the second step is automatically proven, making it easy for victims. Since Congress's intent in passing Title VII was to protect victims and promote employees freely bringing claims, the ease of the English and Canadian approach and the clarity of the elements would further the intent of Congress.

England's comparator standard, similar to Canada's "reasonable complainant" approach, should be followed among the U.S. courts. The U.S. currently looks at the action the employer took, whereas England's approach looks at what the employee did and compares it to another employee who has not filed a discrimination claim. Similar to Canada, this benefits employees without severely harming employers because it is able to consider a victim's fear, anxiety or any other specific facts that cannot be preconceived.

2. Australia's Criminal Penalties

Australia's statutes take the protection a step further by imposing criminal liability against employers or corporations for victimization.²³³ While this standard may initially seem overly harsh against employers, such a law would discourage employers from taking questionable retaliatory actions. This would benefit employees and serve the intent of Title VII.

Only by combining elements from the various courts and jurisdictions, both domestic and foreign, can employees be protected against retaliation and victimization; employees will then feel safe to file claims in the workplace against possible discrimination or harassment creating a more pleasant work environment.

3. EEOC's Meritless Discrimination Claim Protection

Rejecting the stance of England's victimization provision, but following the EEOC's advise, meritless discrimination (but valid retalia-

208. Current U.S. whistleblower law imposes criminal penalties. *See* Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1513 (2000) (imposing criminal penalties if there is intent to retaliate).

tory) claims should be protected. For example, if an employee perceives discrimination in the workplace and files a claim, regardless of whether discrimination can actually be proven, the employer may still take retaliatory action against that employee for filing a discrimination claim. While this may encourage employees to file unjustified claims, an employee should still be protected against unjust retaliation in the workplace.

4. Post-Termination Protection

An ideal provision should further protect post-termination retaliation. This provision would protect against negative job references from former employers. If an employee were to be terminated or constructively discharged, an employer would still be able to harm the employee by writing negative job references or refusing to write any recommendation at all. These types of actions should be protected against because the relationship created between employer and employee continues even after they no longer work together.

B. Advice to the Supreme Court

The Supreme Court should review a case, if given the chance, in order to determine what constitutes an adverse action under Title VII. Without a Supreme Court ruling, employers and employees, as well as American courts, will never have a definitive rule as to what constitutes adverse action under Title VII's retaliation provision. Whether or not the Supreme Court cites to foreign law, it should still consider it in its analysis of what constitutes an adverse action. Only by considering a reasonable complainant standard, a comparator standard and criminal fines, can the intent of Congress be enforced.

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