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## Retaliation Backlash

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# RETALIATION BACKLASH

Alex B. Long\*

*Abstract:* Until fairly recently, the narrative regarding employment retaliation plaintiffs has been that the federal courts—and the Supreme Court in particular—are generally sympathetic to employees claiming illegal workplace retaliation. This narrative has changed drastically over the past few years, to the point that there has been a backlash among courts to the initial wave of plaintiff success. In this respect, the evolution of retaliation law largely tracks the evolution of disability law. This Article argues that the evolution of these areas of the law illustrates a simple but fundamental point about the interpretation of statutes regulating the workplace at present: unless the text of the statute strongly supports a reading that limits the discretion traditionally afforded to employers under the employment at-will doctrine, courts, as a general rule, will not adopt that reading, nor will they apply the statute in that manner.

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*“[T]he court cited its own age-old quote: ‘[T]his Court does not sit as a “super-personnel department,” second guessing whether’ the employer’s decision was prudent. That’s poetry, right?”*

—Employment defense lawyer<sup>1</sup>

## INTRODUCTION

One of the more enduring narratives regarding employment discrimination law is that the federal courts are hostile to discrimination claims.<sup>2</sup> In example after example, the Supreme Court and lower courts have adopted and applied narrow readings of employment discrimination statutes that have made it more difficult for plaintiffs to survive summary judgment, let alone prevail at trial.<sup>3</sup> Thus, it is now almost an article of

1. Lehr Middlebrooks & Vreeland, P.C., *How Can I Demote Thee? Let Me Count the Complaints*, ALA. EMP. L. LETTER, Mar. 2013 (second alteration in original).

2. See, e.g., Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL’Y REV. 103, 104–05 (2009) (noting the perception that courts are biased against employment discrimination plaintiffs); Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 830 (2011) (“[R]eports of judicial hostility to, and backlash against, employment discrimination statutes are legion in the academic literature.”).

3. See Tristin K. Green, *Racial Emotion in the Workplace*, 86 S. CAL. L. REV. 959, 983 (2013) (discussing, for example, how the “stray remarks” doctrine narrows the reach of discrimination law); L. Camille Hebert, *Conceptualizing Sexual Harassment in the Workplace as a Dignitary Tort*, 75

faith among employment law scholars that federal courts have little patience with employment discrimination suits.

Until fairly recently, the narrative regarding retaliation plaintiffs stood in sharp contrast. Here, the narrative for some time was that the federal courts—and the Supreme Court in particular—are generally sympathetic to employees claiming illegal workplace retaliation.<sup>4</sup> In contrast to the Supreme Court’s generally restrictive interpretations of the anti-discrimination language in federal statutes, the narrative has traditionally been that the Court has taken a more pragmatic approach when interpreting the anti-retaliation language in federal statutes governing the workplace.<sup>5</sup>

This narrative concerning retaliation law had at least some basis in reality for over fifteen years. But the Supreme Court’s 2013 decision in *University of Texas Southwestern Medical Center v. Nassar*<sup>6</sup> represented a dramatic departure from the general trend favoring retaliation plaintiffs. In *Nassar*, the Court held that Title VII’s anti-retaliation provision employs a demanding “but-for” standard of causation rather than the more liberal “motivating factor” standard employed by some lower courts.<sup>7</sup> And while prior Supreme Court retaliation decisions were almost uniformly pro-plaintiff on the surface, the decisions have not had the sort of liberalizing effect on lower court retaliation decisions one might expect. Instead, lower courts seem to have responded to the Court’s pro-plaintiff decisions by taking a stricter approach to retaliation cases and making it more difficult for plaintiffs to survive summary judgment.<sup>8</sup>

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OHIO ST. L.J. 1345, 1347 n.11 (2014) (noting how lower courts have interpreted Supreme Court decisions so as to reduce employer liability for supervisor harassment); Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 85 (2011) (discussing the courts’ narrow conception of the concept of intent in discrimination cases).

4. See Frank C. Morris, Jr., *Oral Discomfort: Supreme Court Holds that Verbal FLSA Complaints Suffice*, LAB. & EMP. PRAC. ACT NOW ADVISORY (Epstein, Becker & Green P.C., Washington, D.C.), Mar. 25, 2011, at 2, [http://www.ebglaw.com/content/uploads/2014/06/43644\\_Act-Now-Advisory-Oral-Discomfort.pdf](http://www.ebglaw.com/content/uploads/2014/06/43644_Act-Now-Advisory-Oral-Discomfort.pdf) [<https://perma.cc/477D-QPEG>] (“[E]mployers should be on notice that the Supreme Court and, therefore, the lower courts are extremely receptive to retaliation claims and unlikely to dismiss them on technical grounds.”); Abigail Rubenstein, *High Court Poised to Shape Landscape for Retaliation Suits*, LAW360 (Apr. 22, 2013), <https://www.law360.com/articles/434764/high-court-poised-to-shape-landscape-for-retaliation-suits> [<https://perma.cc/8XLU-Z6Q4>] (“[T]he high court has often shown itself sympathetic to plaintiffs claiming retaliation in recent years, attorneys say.”).

5. See *infra* note 49 and accompanying text.

6. \_\_\_ U.S. \_\_\_, 133 S. Ct. 2517 (2013).

7. *Id.* at 2532–33.

8. See *infra* notes 67–123 and accompanying text.

Statutory anti-retaliation provisions exist in large measure to help ensure that those who have been discriminated against or who have information about such discrimination are not deterred from coming forward for fear of retaliation by their employers.<sup>9</sup> The recent trend toward more restrictive interpretation and application of anti-retaliation provisions has led to some concern that the underlying purposes of these provisions are being hindered.<sup>10</sup>

At least two questions emerge from this reassessment of retaliation law. The first is whether the increasingly restrictive approach of federal courts to retaliation claims is reflective of increased hostility to such claims. In other words, has the prevailing attitude of the federal judiciary become less sympathetic to the complaints of retaliation plaintiffs? The second question is, if there has been an attitudinal shift, why? Why are more federal courts more hostile to retaliation claims than in the recent past?

In this Article, I posit that while the initial successes enjoyed by retaliation plaintiffs created something of a false sense of optimism, there has, in fact, been a general shift in the judiciary's approach to retaliation claims. The shift that has taken place bears a striking resemblance to the judicial backlash that occurred following implementation of the Americans with Disabilities Act.<sup>11</sup> The Article further posits that some of the same reasons that contributed to the disability backlash are contributing to the current retaliation backlash.

To provide the background necessary to evaluate this argument, Part I of the Article discusses the elements of a standard employment retaliation claim. Part II examines the evolution of retaliation claims in the federal judiciary, from the initial boom time for retaliation plaintiffs to the leaner times in more recent years. This Part examines how the judicial backlash toward retaliation claims has made it more difficult for retaliation plaintiffs to prevail. Part III explores the similarities between the courts' treatment of disability discrimination claims and retaliation claims and suggests that the same concerns that drove the initial American With

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9. See *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 68 (2006) ("The antiretaliation provision seeks to prevent employer interference with 'unfettered access' to Title VII's remedial mechanisms." (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997))); Craig Robert Senn, *Redefining Protected "Opposition" Activity in Employment Discrimination Cases*, 37 *CARDOZO L. REV.* 2035, 2079 (2016) ("The purpose and policy behind these provisions is simple: to encourage employee complaints or reports of inappropriate workplace conduct.").

10. See Senn, *supra* note 9, at 2080 (arguing that "[t]he current definition of protected opposition activity clearly frustrates antiretaliation law's purpose and policy"); Sandra F. Sperino, *Retaliation and the Reasonable Person*, 67 *FLA. L. REV.* 2031, 2069 (2016) ("If the underlying purpose of retaliation law is to encourage people to complain about discrimination, then the current majority rules fail to accomplish this for a wide swath of potential retaliatory conduct.").

11. See Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 U.S.C. & 47 U.S.C.); *infra* Part III.

Disabilities Act (ADA) backlash—most notably, concerns over intruding upon employer discretion—are driving the retaliation backlash. Finally, Part IV argues that the evolution of these areas of the law illustrate a simple but fundamental point about the interpretation of statutes regulating the workplace at present: unless the text of the statute strongly supports a reading that limits the discretion traditionally afforded to employers under the employment at-will doctrine, courts, as a general rule, will not adopt that reading, nor will they apply the statute in that manner. In light of this reality, this Article suggests several possible legislative revisions to the anti-retaliation provisions contained in Title VII and other workplace laws.

## I. RETALIATION CLAIMS: THE PRIMA FACIE CASE AND BACKGROUND

Courts have articulated the framework for retaliation claims in a variety of ways. But however the prima facie case is stated, a retaliation plaintiff will always need to prove the following elements: (1) that the employee engaged in protected conduct; (2) that the employer’s retaliatory action was materially adverse; and (3) that there is a causal connection between the protected conduct and the retaliatory action.<sup>12</sup>

### A. *Protected Conduct*

To establish a prima facie case, an employee must first show that the employee engaged in protected conduct.<sup>13</sup> Title VII’s anti-retaliation provision lists two types of protected activity: opposition conduct and participation conduct.<sup>14</sup>

#### 1. *Opposition Conduct*

First, an employer is prohibited from retaliating against an employee because the employee “has opposed any practice made an unlawful employment practice by [Title VII].”<sup>15</sup> This portion of the anti-retaliation provision, known as the opposition clause, most obviously applies when an employee somehow communicates to the employer the employee’s belief that the employer has engaged in unlawful discrimination and

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12. *Davis v. Dallas Area Rapid Transit*, 383 F.3d 309, 319 (5th Cir. 2004); Sperino, *supra* note 10, at 2037.

13. *Davis*, 383 F.3d at 319.

14. 42 U.S.C. § 2000e-3(a) (2012).

15. *Id.*

objects to the employer's conduct.<sup>16</sup> But the opposition clause may apply in other instances as well.

In *Crawford v. Metropolitan Government of Nashville*,<sup>17</sup> the Supreme Court further elaborated upon the meaning of the opposition clause. *Crawford* involved an employee who had allegedly been retaliated against after participating in an employer's internal investigation into allegations of sexual harassment. When, during the internal investigation, the employee was asked whether she had ever observed any inappropriate conduct on the part of the organization's human resource director, the employee described several instances of such conduct.<sup>18</sup> The Court concluded that the employee had engaged in protected opposition conduct when she provided "an ostensibly disapproving account of sexually obnoxious behavior toward her by a fellow employee."<sup>19</sup> In doing so, the Court rejected the Sixth Circuit Court of Appeals' view that the opposition clause "demands active, consistent 'opposing activities'" before conduct is protected.<sup>20</sup> Nor, under the Court's holding, must the employee actually instigate or initiate a complaint to be protected.<sup>21</sup> Instead, less demonstrable forms of opposition may be protected, provided they are still "resistant" or "antagonistic" to an employer's actions.<sup>22</sup>

Importantly, courts have also not interpreted the language of the opposition clause literally. The opposition clause protects an employee who opposes "any practice made an unlawful employment practice." Read literally, an employee would only be protected where the employer's practice was actually illegal. However, recognizing the impracticability of such a standard, courts have consistently only required that an employee have a reasonable belief that that the employer's actions are unlawful.<sup>23</sup>

## 2. *Participation Conduct*

Title VII also prohibits an employer from retaliating against an employee "because he has made a charge, testified, assisted, or

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16. *Crawford v. Metro. Gov't of Nashville*, 555 U.S. 271, 276 (2009).

17. 555 U.S. 271 (2009).

18. *Id.* at 274.

19. *Id.* at 276.

20. *Id.* at 275 (quoting *Crawford v. Metro. Gov't of Nashville*, 211 F. App'x 373, 376 (6th Cir. 2006)).

21. *Id.* at 277.

22. *Id.* at 276 (brackets omitted).

23. *See Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 271 (2001) (per curiam) (referencing lower court's standard and assuming it applied). This "reasonable belief" standard is discussed in greater detail *infra* section II.B.

participated in any manner in an investigation, proceeding, or hearing under [Title VII].”<sup>24</sup> This clause of Title VII’s anti-retaliation provision, known as the participation clause, most obviously applies when the victim of discrimination files a formal charge of discrimination with the Equal Employment Opportunity Commission (EEOC).<sup>25</sup> But the clause also applies when an employee participates as a witness in a formal proceeding under Title VII.<sup>26</sup>

Title VII’s participation clause is broader than its opposition clause in at least two respects. First, it contains the “in any manner” language, which courts have characterized as being “exceptionally broad” in scope.<sup>27</sup> Given the broad protection afforded by the clause, courts have held, for example, that the provision protects such action as helping a coworker file a discrimination complaint.<sup>28</sup> In addition, unlike the opposition clause, courts have typically not imposed any type of reasonableness requirement. Thus, the participation clause protects those who were not only wrong or unreasonable in their belief that an employer engaged in illegal conduct, but also those who made charges that were defamatory or malicious.<sup>29</sup>

#### B. *Material Adversity*

A retaliation plaintiff must also prove that the employer’s retaliatory action was materially adverse. Title VII’s anti-retaliation provision prohibits an employer from “discriminat[ing] against” an employee who has engaged in protected activity.<sup>30</sup> The Supreme Court has explained that this means that a retaliation plaintiff must establish that the employer’s actions “would have been materially adverse to a reasonable employee or job applicant.”<sup>31</sup>

When the Court settled on this standard in *Burlington Northern & Santa Fe Railway v. White*<sup>32</sup> in 2006, it had several competing standards from which to choose. One option would have been to extend a remedy

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24. 42 U.S.C. § 2000e-3(a) (2012).

25. *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1313 (6th Cir. 1989).

26. *See Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1186 (11th Cir. 1997) (concluding clause applied when witness testified in a deposition).

27. *See, e.g., Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998, 1006 n.18 (5th Cir. 1969).

28. *E.g., Eichman v. Ind. State Univ. Bd. of Trs.*, 597 F.2d 1104, 1107 (7th Cir. 1979).

29. *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 582 (6th Cir. 2000).

30. 42 U.S.C. § 2000e-3(a) (2012).

31. *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 57 (2006).

32. 548 U.S. 53 (2006).



only to an employee who suffered an adverse *employment* action, meaning a material change in the terms and conditions of employment.<sup>33</sup> Another, more restrictive approach would have limited retaliation claims to situations in which the employee suffered an ultimate employment action, “such as hiring, granting leave, discharging, promoting, and compensating.”<sup>34</sup>

Instead, relying on both the statutory language and the purposes underlying anti-retaliation provisions, the Court settled on the more expansive “materially adverse” standard.<sup>35</sup> Under this approach, an employer’s retaliatory action is actionable when it “could well dissuade a reasonable worker from making or supporting a charge of discrimination.”<sup>36</sup> The Court observed that, unlike Title VII’s anti-discrimination provision, Title VII’s anti-retaliation language was not limited in scope to employer actions that impacted the terms and conditions of employment.<sup>37</sup> Indeed, the Court noted that there might be some forms of employer retaliation having no impact on the terms and conditions of employment that would be just as effective in deterring employees from reporting unlawful discrimination or engaging in other forms of protected activity.<sup>38</sup> As the primary purpose of anti-retaliation provisions is to preserve employees’ “unfettered access to statutory remedial mechanisms,” it made sense to define actionable retaliation in terms of employer conduct that interferes with such access.<sup>39</sup>

Thus, the Court held that employer retaliation is actionable where it would have been materially adverse to a reasonable employee.<sup>40</sup> Importantly, the Court elaborated on this idea by noting that materiality must be judged by the particular circumstances of the employee in question. As an example, the Court noted, “[a] schedule change in an employee’s work schedule may make little difference to many workers, but may matter enormously to a young mother with school-age children.”<sup>41</sup> The Court recognized that, given the differences in workplaces, it made little sense to establish a laundry list of prohibited forms of employer conduct: “[t]he real social impact of workplace

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33. *Id.* at 60.

34. *Id.* (quoting *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997)).

35. *Id.* at 57.

36. *Id.*

37. *Id.* at 62.

38. *Id.* at 64.

39. *Id.* (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997)).

40. *Id.* at 57.

41. *Id.* at 69.

behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.”<sup>42</sup> In other words, “[c]ontext matters.”<sup>43</sup> Thus, not only did the Court reject a retaliation standard tied to employer actions impacting the workplace, it adopted a standard that requires courts to consider what might be material to the employee in question.

### C. *Causal Connection*

Finally, a retaliation plaintiff must also establish a causal connection between the protected activity and the employer’s action.<sup>44</sup> Specifically, a retaliation plaintiff must establish that the protected activity was a “but-for” cause of the employer’s adverse action.<sup>45</sup> Where the adverse action follows the protected activity closely enough in time, courts sometimes permit temporal proximity to serve as a proof of the causal connection.<sup>46</sup> But where close temporal proximity is lacking, a plaintiff may be required to introduce other evidence to satisfy the causal connection requirement.<sup>47</sup>

## II. THE RISE AND FALL OF RETALIATION LAW

By and large, plaintiffs who have brought statutory employment retaliation claims have fared quite well before the Supreme Court.<sup>48</sup> As a result, the common perception has been that, contrary to the Court’s discrimination decisions, the Court’s retaliation decisions have had “a pro-employee tilt.”<sup>49</sup> The Court’s 2013 decision in *University of Texas*

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42. *Id.*

43. *Id.*

44. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 2517, 2525 (2013).

45. *Id.*

46. *See Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) (per curiam) (noting this approach by some courts).

47. *See id.* at 273 (“The cases that accept mere temporal proximity between an employer’s knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be ‘very close.’” (quoting *O’Neal v. Ferguson Constr. Co.*, 237 F.3d 1248, 1253 (10th Cir. 2001))).

48. *See Alex B. Long, Employment Retaliation and the Accident of Text*, 90 OR. L. REV. 925, 926 (2011) (discussing plaintiffs’ successes).

49. Deborah L. Brake, *Retaliation in the EEO Office*, 50 TULSA L. REV. 1, 37 (2014); *see also* Michael J. Zimmer, *A Pro-Employee Supreme Court?: The Retaliation Decisions*, 60 S.C. L. REV. 917, 918 (2009) (stating that the Court has been “pro-employee” in its retaliation decisions); Kimberly A. Pathman, Note, *Protecting Title VII’s Antiretaliation Provision in the Wake of University of Texas Southwestern Medical Center v. Nassar*, 109 Nw. U. L. REV. 475, 491–92 (2015) (referring to the Court’s pro-employee reputation in retaliation cases).

*Southwestern Medical Center v. Nassar*, which holds retaliation plaintiffs to a demanding causation standard,<sup>50</sup> effectively shattered this perception. What's more, as this Part discusses, lower courts have increasingly held retaliation plaintiffs to demanding standards with respect to other aspects of a plaintiff's prima facie case.<sup>51</sup> Thus, some of the initial optimism that arose from the Supreme Court's early retaliation decisions has increasingly given way to a sense that courts are undermining the purposes of statutory anti-retaliation provisions. This Part examines the federal courts' evolving approach to employment retaliation claims.

### A. Retaliation Boom

The Supreme Court's first meaningful foray into interpreting the anti-retaliation provisions contained in Title VII and related statutes was in 1997 in *Robinson v. Shell Oil Co.*<sup>52</sup> There, the Court held that the term "employees" in Title VII's anti-retaliation provision referred not just to current employees but to former employees as well.<sup>53</sup> That conclusion, while reasonable, seemed far from obvious.<sup>54</sup> Nonetheless, in a unanimous opinion authored by Justice Thomas, the Court relied heavily on the text of the statute—with a brief nod to the underlying purpose of anti-retaliation provisions<sup>55</sup>—to provide an expansive reading of the statute.<sup>56</sup>

*Robinson* set the stage for a run of victories by employment retaliation plaintiffs asserting statutory claims before the Court over the next two

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50. *Nassar*, 133 S. Ct. at 2525.

51. See Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 908 (2008) (discussing lower courts' strict approach when deciding whether an employer's retaliation is actionable); Lawrence D. Rosenthal, *A Lack of "Motivation," or Sound Legal Reasoning? Why Most Courts Are Not Applying Either Price Waterhouse's or the 1991 Civil Rights Act's Motivating-Factor Analysis to Title VII Retaliation Claims in a Post-Gross World (but Should)*, 64 ALA. L. REV. 1067, 1068 (2013) (discussing lower courts' handling of causation issues); Sperino, *supra* note 10, at 2035–36 (discussing lower court opinions involving the issue of the reasonableness of an employee's belief that employer conduct was unlawful).

52. 519 U.S. 337 (1997). The seminal employment discrimination case, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), originally involved claims of discrimination and retaliation, but the retaliation claim had dropped from the case by the time it reached the Supreme Court. *Id.* at 797.

53. *Robinson*, 519 U.S. at 346.

54. There was a circuit split at the time. *Id.* at 340.

55. See *id.* at 346 (explaining that the plaintiff's textual arguments were persuasive in light of the purpose of anti-retaliation provisions to maintain unfettered access to statutory remedial mechanisms).

56. *Id.* at 340–46.

decades.<sup>57</sup> In 2005, for example, the Court held that Title IX prohibited employment retaliation, despite the fact that the statute contained no express prohibition on retaliation.<sup>58</sup> In 2006, the Court decided *Burlington Northern & Santa Fe Railway v. White*, which, as discussed, chose an expansive standard for actionable retaliation from among a range of more restrictive options. Other similar decisions followed, with the high-water mark perhaps being the Court's 2011 decision in *Thompson v. North American Stainless, LP*.<sup>59</sup> In *Thompson*, the Supreme Court held that Title VII affords a remedy not just to those who engage in protected activity, but also to those who are retaliated against because *another* employee has engaged in such activity.<sup>60</sup>

On the surface, these decisions seemed to create a pro-employee environment in the courts for retaliation plaintiffs. Commentators took notice and frequently characterized the Supreme Court as being sympathetic to the plight of the victims of workplace retaliation or at least of having taken a less formalistic, more pragmatic approach to the interpretation of statutory anti-retaliation provisions than it had anti-discrimination provisions.<sup>61</sup> Defense lawyers also took note. Speaking in

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57. See, e.g., *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1 (2011) (holding that making an oral complaint of unlawful conduct is protected conduct under the Fair Labor Standards Act's anti-retaliation provision); *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170 (2011) (holding that firing an employee due to the protected activity of employee's fiancée amounts to unlawful retaliation); *Crawford v. Metro. Gov't of Nashville*, 555 U.S. 271 (2009) (holding that employee engaged in protected activity when she participated in employer's internal investigation of sexual harassment allegations); *CBOCS W., Inc. v. Humphries*, 553 U.S. 442 (2008) (holding that 42 U.S.C. § 1981 provides for a retaliation cause of action for an individual who suffers for retaliation for attempting to assist another); *Gomez-Perez v. Potter*, 553 U.S. 474 (2008) (holding that the anti-retaliation provision of the federal sector provision of the Age Discrimination in Employment Act provides a remedy for retaliation victims); *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53 (2006) (holding that a retaliation plaintiff need not show an adverse employment action in order to make out a prima facie case of retaliation under Title VII); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) (holding that Title IX prohibits recipients of federal education funding from retaliating against an individual who complains about unlawful sex discrimination, despite the absence of any express statutory prohibition on retaliation). The two notable exceptions to this trend are *University of Texas Southwestern Medical Center v. Nassar*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 2517, 2525 (2013), which held that a Title VII retaliation plaintiff must satisfy the demanding "but for" causation standard, and *Clark County School District v. Breeden*, 532 U.S. 268, 271 (2001) (per curiam), which held that the plaintiff's internal complaints of discrimination were not protected because no reasonable person could believe that employer's actions were unlawful.

58. *Jackson*, 544 U.S. at 179.

59. 562 U.S. 170 (2011).

60. *Id.* at 178.

61. Deborah L. Brake, *Retaliation in an EEO World*, 89 IND. L.J. 115, 126 (2014) (summarizing the scholarship in the field as concluding that the Court had taken a more pragmatic approach in the case of retaliation cases than in discrimination cases); David L. Hudson, Jr., *Back at Ya: Employee Retaliation Claims Pay Big Before the High Court*, ABA J., June 1, 2011, at 21 ("The high court

2012, one employment defense lawyer opined that “unquestionably, retaliation is the greatest challenge for employers today.”<sup>62</sup>

One likely result of all of these pro-plaintiff retaliation decisions was a dramatic increase in the number of retaliation claims. In 2009—coming shortly on the heels of a string of victories for retaliation plaintiffs before the Supreme Court—retaliation claims became the most common individual charge filed with the EEOC.<sup>63</sup> Between 1997 and 2012, the number of individual charges of retaliation in violation of federal law filed with the EEOC more than doubled.<sup>64</sup> This stands in sharp contrast with the number of statutory discrimination claims involving various forms of discrimination (most notably race, sex, and age), which have stayed relatively constant or increased only slightly during this same time period.<sup>65</sup> Thus, it is fair to say that prior to 2013, the narrative regarding employment retaliation cases was one of employee success.<sup>66</sup>

### B. *Retaliation Backlash*

While retaliation plaintiffs were generally enjoying success in front of the Supreme Court, there was cause for concern among plaintiffs’ lawyers who were paying attention. Lower courts were often taking a more restrictive approach to retaliation claims.<sup>67</sup> To be sure, some restrictive rules had already started to develop prior to the spate of Supreme Court

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continues to be a favorable forum for employees who allege retaliation from their employers.”); Richard Moberly, *The Supreme Court’s Antiretaliation Principle*, 61 CASE W. RES. L. REV. 375, 381–82 (2010) (observing that the Court’s approach in retaliation cases “typically has led to enhanced employee protection as compared to other types of employment-law cases”).

62. Scott Flander, *The Trouble with Retaliation*, HUM. RESOURCE EXECUTIVE, June 16, 2012, at 19.

63. David Long-Daniels & Peter N. Hall, *Risky Business: Litigating Retaliation Claims*, 28 ABA J. LAB. & EMP. L. 437, 437 (2013).

64. *Charge Statistics (Charges Filed with EEOC) FY 1997 Through FY 2017*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> [<https://perma.cc/EUZ3-94TR>].

65. For example, in 1997, 29,199 charges of race discrimination were filed with the EEOC. In 2015, that number was 31,027. *Id.* Two notable exceptions to this trend of relative stability in the number of discrimination charges are religion claims, which have more than doubled, and color claims, which have more than tripled. *Id.*

66. *See* Long-Daniels & Hall, *supra* note 63, at 448 (stating that given then-recent Supreme Court decisions, “the law has shifted to favor plaintiffs who assert retaliation claims” and has made it easier for plaintiffs to survive summary judgment).

67. *See* Brake & Grossman, *supra* note 51, at 908–09 (discussing early lower court decisions following *Burlington Northern* in which courts took a strict approach to the question of material adversity).

retaliation decisions.<sup>68</sup> But as the Court began to interpret statutory anti-retaliation provisions in a way that tended to benefit employees, the lower courts were sometimes narrowing the scope of the provisions. And in 2013, the win streak that retaliation plaintiffs had enjoyed in front of the Court came to a dramatic halt. This section examines the reversal of fortune for retaliation plaintiffs.

### 1. *Protected Conduct*

One of the most significant limitations lower courts have placed on retaliation claims is the demanding standard they often impose regarding whether an employee who opposed employer conduct had a reasonable belief that the conduct was unlawful. As discussed, in order for an employee's conduct to be protected under the opposition clause, the employee must have a reasonable belief that the conduct being opposed is actually unlawful.<sup>69</sup> In *Clark County School District v. Breeden*,<sup>70</sup> the Supreme Court assumed, without deciding, that this was the proper interpretation of Title VII's opposition clause.<sup>71</sup> Numerous lower courts had already adopted this same interpretation by the time *Breeden* was decided,<sup>72</sup> but *Breeden* undoubtedly led to the uniform adoption of the reasonableness requirement when assessing whether opposition conduct is protected.<sup>73</sup>

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68. For example, lower courts were already well on their way toward establishing the bright-line rule that an employee who files an internal complaint of discrimination is protected from retaliation, if at all, by the narrower opposition clause rather than the more expansive participation clause by the time the Supreme Court started considering retaliation cases more frequently. See Vasconcelos v. Meese, 907 F.2d 111, 113 (9th Cir. 1990); Booker v. Brown & Williamson Tobacco Co., 879 F.2d 1304, 1313 (6th Cir. 1989); Laughlin v. Metro. Wash. Airport Auth., 952 F. Supp. 1129, 1134 (E.D. Va. 1997); Shinwari v. Raytheon Aircraft Co., 25 F. Supp. 2d 1206, 1210 (D. Kan. 1998); Morris v. Bos. Edison Co., 942 F. Supp. 65, 70 (D. Mass. 1996).

69. See *supra* note 23 and accompanying text.

70. 532 U.S. 268 (2001) (per curiam).

71. *Id.* at 271.

72. See, e.g., Moyo v. Gomez, 40 F.3d 982, 985 (9th Cir. 1994); Payne v. McLemore's Wholesale & Retail Stores, 654 F.2d 1130, 1140 (5th Cir. 1981).

73. See Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 83 (2005) ("Since *Breeden*, courts have required plaintiffs bringing retaliation claims under the opposition clause to demonstrate a good faith, reasonable belief that the underlying conduct amounted to unlawful discrimination."); Moberly, *supra* note 61, at 447 (stating *Breeden* "paved the way for courts uniformly to adopt the reasonable-belief standard for a broad range of statutes"). Professor Lawrence D. Rosenthal has noted that there were at least some courts that, prior to *Breeden*, merely required that a plaintiff have a subjective, good faith belief that the conduct was unlawful, not that the belief also be objectively reasonable. Lawrence D. Rosenthal, *To Report or Not to Report: The Case for Eliminating the Objectively Reasonable Requirement for Opposition Activity Under Title VII's Anti-Retaliation Provision*, 39 ARIZ. ST. L.J. 1127, 1135–36 (2007).

While *Breedon* accelerated the trend toward adoption of the “reasonable belief” rule, the decision also laid the groundwork for the adoption of a restrictive interpretation of this concept by lower courts. *Breedon* involved an employee who complained about a single incident of sexual harassment. Specifically, the plaintiff, her supervisor, and others were assigned the task of reviewing job applications. The supervisor read aloud a crude comment contained in one of the applications, which prompted the supervisor and another male employee to chuckle.<sup>74</sup> Relying upon its past sexual harassment decisions, the Court noted that this conduct did not qualify as the type of severe or pervasive behavior necessary to support a sexual harassment claim.<sup>75</sup> Indeed, the Court concluded, no reasonable employee could believe that the conduct actually violated Title VII; thus, the plaintiff’s opposition to her supervisor’s behavior was unprotected from retaliation.<sup>76</sup>

Standing alone, *Breedon* represents something of a mixed bag for retaliation plaintiffs. In contexts outside of the employment discrimination realm, courts have sometimes required that the conduct complained of must *actually* be illegal before a plaintiff is entitled to protection.<sup>77</sup> In this respect, *Breedon*’s “reasonable belief” standard is decidedly more pro-plaintiff than it might have been. At the same time, given employees’ relative lack of knowledge of employment discrimination law, *Breedon* perhaps presents a closer case on the issue of whether a reasonable employee could believe that the conduct in question was unlawful than the Court’s per curiam opinion lets on.<sup>78</sup> But following *Breedon*, not only have lower courts required that retaliation plaintiffs reasonably believe that the conduct they are opposing is unlawful, they have often imposed a demanding standard of reasonableness.<sup>79</sup>

In determining whether a retaliation plaintiff’s belief that an employer’s conduct was unlawful under federal employment law when the plaintiff opposed the employer’s conduct, courts often hold these non-

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74. *Breedon*, 532 U.S. at 269.

75. *Id.* at 271.

76. *Id.*

77. Rosenthal, *supra* note 73, at 1135 n.37.

78. See Brake, *supra* note 73, at 82 (criticizing *Breedon*).

79. See Brake, *supra* note 61, at 138 (“Not surprisingly, since *Breedon* itself involved a sexual harassment complaint, the reasonable belief requirement has spawned a now-sizeable body of cases in which internal complaints about harassment are unprotected because the underlying conduct was not severe or pervasive enough to be actionable.”); Moberly, *supra* note 61, at 447–48 (“Despite this seemingly employee-friendly standard, however, lower courts often have applied the reasonable-belief requirement to narrow, rather than broaden, retaliation protection.”).

lawyer plaintiffs to a demanding standard.<sup>80</sup> Courts have held that it was unreasonable for individuals to believe that an unlawful hostile work environment could be created when a co-worker referred to another individual as a “stupid mother fucking nigger” and a “stupid ass nigger” in the employee’s presence during a lunch break;<sup>81</sup> when, in the company break room, a co-worker referred to two black individuals as “black monkeys” and suggested they be put “in a cage with a bunch of black apes and let the apes f—k them”;<sup>82</sup> and when the EEOC issued a for-cause determination on the employee’s sexual harassment complaint after her manager made comments about the size of the employee’s breasts in the presence of others.<sup>83</sup>

Importantly, existing precedent often works against a retaliation plaintiff in at least two ways. First, once a decision concluding that an employee’s belief that she was opposing unlawful conduct was not reasonable under a given set of facts, retaliation plaintiffs are often forced to try to distinguish their facts from those of the adverse precedent. For example, *Butler v. Alabama Department of Transportation*<sup>84</sup> is the decision involving the co-worker who referred to another individual as a “stupid mother fucking nigger” and a “stupid ass nigger” in the plaintiff’s presence during a lunch break.<sup>85</sup> The plaintiff claimed she was subsequently retaliated against after reporting the statements to her immediate supervisor.<sup>86</sup> According to the Eleventh Circuit Court of Appeals, the plaintiff’s belief that she had reported unlawful conduct to her supervisor was “not even close” to objectively reasonable.<sup>87</sup> Thus, *Butler* sends a clear message to would-be plaintiffs (and their lawyers) that their retaliation claims will be dead on arrival unless the conduct in question is significantly more egregious than that in *Butler*.

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80. See Brake, *supra* note 73, at 89 (criticizing the approach of courts and noting “that most people lack the legal expertise to ascertain” what qualifies as sexual harassment); Matthew W. Green, Jr., *What’s So Reasonable About Reasonableness? Rejecting a Case-Law Centered Approach to Title VII’s Reasonable Belief Doctrine*, 62 U. KAN. L. REV. 759, 794 (2014) (noting the strict standard to which plaintiffs are held despite the fact “that most persons . . . are unfamiliar with Title VII case law”); Alex B. Long, *The Troublemaker’s Friend: Retaliation Against Third Parties and the Right of Association in the Workplace*, 59 FLA. L. REV. 931, 955 (2007) (stating “courts appear to hold an employee to the standard of what a reasonable labor and employment attorney would believe, rather than what a reasonable employee would believe”).

81. *Butler v. Ala. Dep’t of Transp.*, 536 F.3d 1209, 1210 (11th Cir. 2008).

82. *Jordan v. Alt. Res. Corp.*, 458 F.3d 332, 336 (4th Cir. 2006).

83. *Henderson v. Waffle House, Inc.*, 238 F. App’x 499, 503 (11th Cir. 2007).

84. 536 F.3d 1209 (11th Cir. 2008).

85. *Id.* at 1210.

86. *Id.* at 1211.

87. *Id.* at 1213.



The difficulty retaliation plaintiffs often face in attempting to distinguish prior precedent also illustrates the second obstacle prior precedent imposes upon plaintiffs. In reaching their decisions as to the reasonableness of an employee's belief as to the unlawfulness of the conduct, courts often rely heavily on precedent actually defining unlawful conduct. The retaliation plaintiff who complains about a co-worker openly using two racist slurs on one occasion must grapple with the decisional law explaining when a discrimination claim involving a hostile work environment exists under Title VII. Thus, the plaintiff will be forced to explain how she could reasonably have believed the conduct was unlawful when decisional law is clear that, generally, a single offensive utterance does not create a hostile work environment and that "a racially derogatory remark by a co-worker, without more, does not constitute an unlawful employment practice."<sup>88</sup>

Of course, by directly linking the reasonableness of an employee's belief to existing discrimination precedent, courts essentially require employees to be versed in the nuances of Title VII's hostile-environment law and other discrimination theories. Indeed, at least one court has been explicit about this reality, explaining several times in an opinion (that was subsequently reversed) that an employee who was "versed in the relevant law" could not have reasonably believed that the conduct complained of was unlawful.<sup>89</sup> This approach is particularly problematic in light of the fact that previous studies have shown that employees are not, in fact, versed in employment law and frequently overestimate the protection afforded to them by law.<sup>90</sup>

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88. *Little v. United Techs.*, 103 F.3d 956, 961 (11th Cir. 1997); *see also Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 284 (4th Cir. 2015); *O'Leary v. Accretive Health, Inc.*, 657 F.3d 625, 631 (7th Cir. 2011); *Jordan v. Alt. Res. Corp.*, 458 F.3d 332, 336 (4th Cir. 2006); *King v. Piggly Wiggly Ala. Distrib. Co., Inc.*, 929 F. Supp. 2d 1215, 1231 (N.D. Ala. 2013) (concluding, in light of *Butler*, that retaliation plaintiff lacked an objectively reasonable belief that being called "boy" by another employee at work was unlawful). *But see La Grande v. DeCrescente Distrib. Co., Inc.*, 370 F. App'x 206, 212 (2d Cir. 2010) (concluding factual issue existed regarding whether plaintiff could reasonably believe that a hostile work environment existed on the basis of two isolated instances).

89. *Howell v. Corizon, Inc.*, No. 12-0272-WS-N, 2013 WL 6068346, at \*8 (S.D. Ala. Nov. 18, 2013), *aff'd in part, rev'd in part sub nom. Howell v. Corr. Med. Servs.*, 612 F. App'x 590 (11th Cir. 2015) (per curiam). In reversing the decision, the Eleventh Circuit Court of Appeals concluded that "[a]lthough it is a close call," the defendant's conduct was "sufficient to render objectively reasonable Plaintiff's good faith belief that she was opposing an unlawful employment practice." *Howell*, 612 F. App'x at 591.

90. *See Rachel Arnow-Richman, Mainstreaming Employment Contract Law: The Common Law Case for Reasonable Notice of Termination*, 66 FLA. L. REV. 1513, 1558, 1558 n.236 (2014) (citing numerous articles purporting to establish that employees mistakenly believe they enjoy something close to "just cause" protection from firing).

While many labor and employment lawyers could explain why these forms of behavior were not actually unlawful, it is counter-productive to the goals of anti-discrimination law to hold that an employee, confronted with these situations, was unreasonable in believing that the conduct was unlawful and thus unprotected from employer retaliation.<sup>91</sup> Compounding the problem is the fact that employer policies and existing law strongly encourage employees to report suspected unlawful conduct. Supreme Court precedent gives employers an affirmative defense to a charge of unlawful harassment where they adopt effective anti-discrimination policies and internal reporting mechanisms for employees who believe they have observed unlawful discriminatory conduct.<sup>92</sup> The end result is a situation in which the average employee, unaware of the subtleties of federal employment law, may run the risk of being fired or otherwise retaliated against with impunity when the employee mistakenly concludes that a single instance of sexual harassment or the single use of a racial epithet is unlawful and decides to complain.

## 2. *Material Adversity*

Lower courts have also increasingly taken a strict view regarding the material adversity standard developed in *Burlington Northern & Santa Fe Railway v. White*. According to *Burlington Northern*, an employer's retaliatory action is "materially adverse" where it might dissuade a

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91. See Green, *supra* note 80, at 787 (explaining that holding employees to a demanding standard "has the potential to deter complaints, undermining the informal resolution of claims and avoidance of harm principles that gave rise to the reasonable belief standard").

92. In *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998), the Supreme Court recognized an affirmative defense whereby employers could avoid strict liability for a supervisor's harassment of an employee if no tangible employment act was taken against an employee if the employer can establish: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Ellerth*, 524 U.S. at 765. The first prong of the affirmative defense is typically thought of as requiring an effective anti-harassment policy. *Matvia v. Bald Head Island Mgmt.*, 259 F.3d 261, 268 (4th Cir. 2001). Sometimes these policies encourage employees to report sexual harassment and other forms of discrimination that is not, in fact, unlawful under federal law. See Brake, *supra* note 61, at 118. Moreover, an employee who fails to report possible discrimination or who delays in doing so may be precluded from bringing a discrimination claim against the employer. This is true even where the employee delays reporting in an attempt to gather evidence so that her employer is more likely to believe her or so that the employee can better understand the nature of the offending conduct. See *Matvia*, 259 F.3d at 269 (applying this principle in the case of an employee who waited before reporting). Thus, employees face strong incentives to report objectionable conduct, even though it might not amount to unlawful conduct. Given the state of retaliation law, employees may face a classic catch-22: report possible discrimination and risk retaliation, only to be told that they have no retaliation claim, or not report and be told that they have no discrimination claim.

reasonable employee from engaging in protected activity.<sup>93</sup> Yet, as Professor Sandra Sperino has explained, “lower courts routinely dismiss cases by ruling that certain consequences, such as threatened termination or negative evaluations, would not dissuade a reasonable person from filing a discrimination complaint.”<sup>94</sup>

There are at least two noteworthy aspects to these lower court decisions. The first is that courts often seem to disregard the Supreme Court’s instruction that materiality must be judged from the perspective of the individual plaintiff in question and within the context of the specific workplace in question. In *Burlington Northern*, the Court specifically cautioned against the “simple recitation of the words used or the physical acts performed” in deciding whether an employer’s adverse action qualifies as materially adverse.<sup>95</sup> Thus, while recognizing that certain seemingly minor retaliatory actions will ordinarily not be actionable, the result might change depending on the specific circumstances of the individuals involved, the nature of the workplace, or other relevant considerations.<sup>96</sup> As an example, the Court cited the possibility that a schedule change “might be inconsequential to many workers but could dissuade a working mother from submitting a complaint.”<sup>97</sup>

Yet lower courts have sometimes ignored the Supreme Court’s admonition that “context matters” and established bright-line rules regarding what qualifies as a materially adverse action.<sup>98</sup> According to Professor Sperino, “[i]n case after case, appellate courts determine that a certain action does not constitute an adverse action without mentioning any of the individual circumstances of the plaintiff or his workplace.”<sup>99</sup> Thus, some lower courts, while ostensibly applying *Burlington Northern*’s materiality standard are, in fact, establishing adverse precedent for retaliation plaintiffs by ignoring a crucial facet of the opinion.

The second noteworthy aspect of the decisions is that they sometimes take an unrealistic view of what is likely to dissuade an employee from complaining about unlawful discrimination. As Professor Sperino has detailed, in recent years courts have held that a host of seemingly serious forms of employer retaliation are not actionable. These include

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93. See *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 57 (2006).

94. Sperino, *supra* note 10, at 2033.

95. *Burlington N.*, 548 U.S. at 69 (internal citations omitted).

96. *Id.*

97. Sperino, *supra* note 10, at 2040 (citing *Burlington N.*, 548 U.S. at 69).

98. See *id.* at 2058 (discussing the approach of lower courts).

99. *Id.* at 2060.

threatening to fire the employee, providing negative evaluations or disciplinary notices, threatening the employee with suspension or discipline, and falsely reporting poor performance.<sup>100</sup> Lower courts increasingly expect employees to have little concern over the possibility that they might, for example, receive a poor performance evaluation in retaliation when deciding whether to complain about unlawful discrimination.<sup>101</sup> In reaching these kinds of conclusions, courts often characterize the employer actions in question as the sorts of “petty slights, minor annoyances, and simple lack of good manners” the Court identified in *Burlington Northern* as not being actionable.<sup>102</sup> Thus, one sees decisions like one from a district court in Louisiana that concluded that allegedly giving an employee a poor evaluation and subjecting the employee to a seemingly constant barrage of retaliatory actions are the sorts of “normal irritations and tribulations of the work place” that employees should expect to endure when complaining about their employers’ possibly illegal conduct.<sup>103</sup>

### 3. *Causation*

Finally, lower courts have also used Supreme Court retaliation decisions to tighten the causal connection requirement in retaliation cases.

#### a. *Mere Temporal Proximity*

In *Breedon*, the Court held that the plaintiff had failed to demonstrate a sufficient causal connection between her protected act of filing a discrimination charge with the EEOC and the employer’s adverse action, which occurred twenty months later.<sup>104</sup> The Court noted that some lower court decisions had accepted “mere temporal proximity between an employer’s knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a *prima facie*

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100. *Id.* at 2036.

101. *See* *Wilson-Robinson v. Our Lady of the Lake Reg’l Med. Ctr., Inc.*, No. 10-584, 2012 WL 5940912, at \*5–7 (M.D. La. Nov. 27, 2012) (concluding that employer’s act of providing a rating of “poor” on employee’s evaluation was not materially adverse).

102. *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 68 (2006).

103. *Wilson-Robinson*, 2012 WL 5940912, at \*7. Most of the alleged retaliatory acts—such as failing to send the plaintiff emails and meeting with the plaintiff on a weekly basis—seem fairly minor standing alone. When stacked on top of each other, however, they begin to look more material. In addition, others—such as changing the employee’s work schedule—are potentially more material even standing alone. *Id.*

104. *Clark Cty. Sch. Dist. v. Breedon*, 532 U.S. 268, 273–74 (2001) (per curiam).

case.”<sup>105</sup> However, the decisions that relied solely on temporal proximity “uniformly hold that the temporal proximity must be ‘very close.’”<sup>106</sup>

*Breeden’s* use of the phrase “mere temporal proximity” has had a significant impact in influencing lower courts. Prior to *Breeden*, that phrase had been used in federal employment retaliation cases roughly sixty times.<sup>107</sup> Following *Breeden*, the phrase has been used over 1,900 times in federal decisions,<sup>108</sup> typically in cases in which the plaintiff loses on the causation issue.<sup>109</sup> And when lower courts observe that a plaintiff is relying upon “mere temporal proximity” in order to establish the causal link, they now also almost invariably add that such proximity must be “very close.”<sup>110</sup> As applied by lower courts, the phrase “very close” means, in fact, very close.<sup>111</sup> Under the specific facts of a case, a gap of one month between protected activity and adverse action has been held to be too long.<sup>112</sup> The Eighth Circuit has held that a gap of two weeks was “sufficient, but barely so, to establish causation.”<sup>113</sup> The Third Circuit Court of Appeals has held that anything over ten days requires supplemental evidence of causation.<sup>114</sup>

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105. *Id.* at 273.

106. *Id.*

107. Using the search (retaliation & “mere temporal proximity” & DA(bef 4/23/2001))—to capture cases before the day *Breeden* was decided—in the Federal Cases database in Westlaw yielded sixty-two decisions as of April 13, 2018.

108. Using the search (retaliation & “mere temporal proximity” & DA(aft 4/23/2001)) in the Federal Cases database in Westlaw yielded 1,976 decisions on April 13, 2018. Not all of these are employment retaliation cases, but most are.

109. *See, e.g.*, *Penley v. McDowell Cty. Bd. of Educ.*, 876 F.3d 646, 656–57 (4th Cir. 2017) (affirming summary judgment against employee); *Townsend v. United States*, 282 F. Supp. 3d 118, 132 (D.D.C. 2017) (dismissing retaliation claim).

110. Using the search (retaliation & “mere temporal proximity” /p “very close” & DA(aft 4/23/2001)) in the Federal Cases database in Westlaw yielded 1,223 decisions on April 13, 2018. Not all of these are employment retaliation cases, but most are.

111. In one recent decision, a federal district court surveyed the decisional law and noted that “[c]ourts have found seventeen days, fifteen days, and ten days to be sufficiently close to establish a causal connection.” *Crain v. Schlumberger Tech. Co.*, 187 F. Supp. 3d 732, 741–42 (E.D. La. 2016) (footnotes omitted). Relying on this, the court found eleven days to be sufficiently close to establish a *prima facie* case. *Id.*

112. *Hardy v. Pepsi Bottling Co.*, No. 14-CV-4007 (VEC), 2016 WL 1301181, at \*10 (S.D.N.Y. Mar. 31, 2016); *Wilson v. Ark. Dep’t of Human Servs.*, No. 4:15CV00466 SWW, 2015 WL 9244650, at \*4 (E.D. Ark. Dec. 15, 2015). *But see* *Treglia v. Town of Manlius*, 313 F.3d 713, 721 (2d Cir. 2002) (holding that *prima facie* retaliation case was established where approximately one month had elapsed between protected activity and adverse employment action).

113. *Smith v. Allen Health Sys., Inc.*, 302 F.3d 827, 833 (8th Cir. 2002).

114. *Blakney v. City of Philadelphia*, 559 F. App’x 183, 186 (3d Cir. 2014).

b. *Nassar and But-For Causation*

The other Supreme Court decision that is starting to have a similar limiting effect on the causation requirement is *University of Texas Southwestern Medical Center v. Nassar*, decided in 2013. The case presented the question of what causation standard Title VII employs. The Fifth Circuit Court of Appeals had held below that a Title VII retaliation plaintiff was only required to show that retaliation was a motivating factor in the employer's action. Thus, as long as the employer was motivated, at least in part, to retaliate against the plaintiff for engaging in protected conduct, the causation requirement was satisfied.<sup>115</sup> On appeal, the Supreme Court held that "Title VII retaliation claims must be proved according to traditional principles of but-for causation."<sup>116</sup> This requires proof on the plaintiff's part "that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer."<sup>117</sup>

*Nassar's* adoption of a but-for causation standard obviously subjects Title VII retaliation plaintiffs to a heightened causation standard, thus making it more difficult for retaliation plaintiffs to establish the requisite causal link between protected conduct and an employer's adverse action.<sup>118</sup> But the decision has had another effect on some lower court decisions. *Nassar* has also caused some lower courts to reevaluate the proposition that mere temporal proximity may *ever* establish causation. There were some courts, prior to *Nassar*, that took the position that mere temporal proximity could help establish the causation element of the

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115. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 2517, 2524 (2013) (citing *Nassar v. Univ. of Tex. Sw. Med. Ctr.*, 674 F.3d 448, 454 (5th Cir. 2012)).

116. *Id.* at 2533.

117. *Id.* *Nassar* involved a Title VII retaliation claim. Not all statutes employ the same language as Title VII, thus leaving open the question as to what causation standard applies under some of these other statutes. See generally Nancy S. Modesitt, *Causation in Whistleblowing Cases*, 50 U. RICH. L. REV. 1193 (2016) (discussing the various causation standards that exist under different statutes).

118. See Deborah L. Brake, *Tortifying Retaliation: Protected Activity at the Intersection of Fault, Duty, and Causation*, 75 OHIO ST. L.J. 1375, 1377 (2014) (referring to the but-for standard as stricter than the motivating factor standard); William R. Corbett, *What Is Troubling About the Tortification of Employment Discrimination Law*, 75 OHIO ST. L.J. 1027, 1029–30 (2014) (discussing the Court's rejection of less rigorous causation standards in employment cases and its adoption of a but-for causation standard); Modesitt, *supra* note 117, at 1213 (discussing evidential problems plaintiffs face under a but-for causation standard); Kate Webber, *It Is Political: Using the Models of Judicial Decision Making to Explain the Ideological History of Title VII*, 89 ST. JOHN'S L. REV. 841, 854 (2015) (describing the motivating factor test as more lenient than the but-for test); Michael J. Zimmer, *Hiding the Statute in Plain View: University of Texas Southwestern Medical Center v. Nassar*, 14 NEV. L.J. 705, 705 (2014) ("The obvious impact of *Nassar* is that it makes it more difficult for plaintiffs to prove retaliation.").

plaintiff's prima facie case but was insufficient, standing alone, to do so.<sup>119</sup> Since *Nassar*, several courts have taken the position that *Nassar* forecloses the possibility that temporal proximity, standing alone, is sufficient to establish causation.<sup>120</sup> And others have at least questioned the extent to which *Nassar* has changed the analysis and whether mere temporal proximity can ever be sufficient to satisfy the but-for standard.<sup>121</sup>

Finally, *Nassar* may also have impact beyond Title VII retaliation cases. Federal courts are currently grappling with whether the stricter but-for causation standard applies to retaliation cases brought under the ADA.<sup>122</sup> *Nassar* may also limit protection from retaliation at the state level as state courts are likewise confronting how *Nassar* impacts the interpretation of their own discrimination statutes that contain anti-retaliation provisions.<sup>123</sup>

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119. *Mobley v. Allstate Ins. Co.*, 531 F.3d 539, 549 (7th Cir. 2008).

120. *See Shaninga v. St. Luke's Med. Ctr. LP*, No. CV-14-02475-PHX-GMS, 2016 WL 1408289, at \*11 (D. Ariz. Apr. 11, 2016); *Montgomery v. Trs. of Univ. of Ala.*, No. 2:12-CV-2148-WMA, 2015 WL 1893471, at \*4 (N.D. Ala. Apr. 27, 2015); *Ellorin v. Applied Finishing, Inc.*, 996 F. Supp. 2d 1070, 1091 (W.D. Wash. 2014); *Williams v. Serra Chevrolet Auto., LLC*, 4 F. Supp. 3d 865, 879 (E.D. Mich. 2014).

121. *See White v. Caterpillar Logistics, Inc.*, 67 F. Supp. 3d 713, 724 (E.D.N.C. 2014) (noting the dispute among lower courts regarding the effect of *Nassar*, including the temporal proximity issue); *Taylor v. Peninsula Reg'l Med. Ctr.*, 3 F. Supp. 3d 462, 472 (D. Md. 2014) (stating court did not believe that *Nassar* significantly impacts the causation analysis where plaintiff relies upon temporal proximity); cases cited *supra* note 120. *But see Montell v. Diversified Clinical Servs., Inc.*, 757 F.3d 497, 505 (6th Cir. 2014) (restating post-*Nassar* that mere temporal proximity may be sufficient); *Zann Kwan v. Andalex Grp. LLC*, 737 F.3d 834, 845 (2d Cir. 2013) (“[T]he [*Nassar*] but-for causation standard does not alter the plaintiff’s ability to demonstrate causation at the prima facie stage on summary judgment or at trial indirectly through temporal proximity.”); *Hubbard v. Ga. Farm Bureau Mut. Ins. Co.*, No. 5:11-CV-290 (CAR), 2013 WL 3964908, at \*2 (M.D. Ga. July 13, 2014) (concluding that *Nassar*’s heightened but-for causation standard did not prevent plaintiff from raising an issue of material fact regarding causation when the temporal proximity between protected conduct and adverse action was “very close”); *Pierce v. Universal Steel of N.C., LCC*, No. 1:13CV158, 2014 WL 868858, at \*3 (M.D.N.C. Mar. 5, 2014) (“[e]ven after *Nassar*, courts have adhered to [the] rule” that temporal proximity may suffice).

122. Courts are currently split on this issue. *Compare Gallagher v. San Diego Unified Port Dist.*, 14 F. Supp. 3d 1380 (S.D. Cal. 2014) (applying *Nassar*), with *Siring v. Or. State Bd. of Higher Educ.*, 977 F. Supp. 2d 1058, 1062–63 (D. Or. 2013) (declining to apply *Nassar*).

123. *See Gonska v. Highland View Manor*, No. CV126030032S, 2014 WL 3893100, at \*7 (Conn. Super. Ct. June 26, 2014) (declining to follow *Nassar* for purposes of interpreting state anti-retaliation provision).

### III. A TALE OF TWO STATUTES: HOW THE STORY OF RETALIATION LAW TRACKS THE STORY OF DISABILITY LAW

In many ways, the story arc of modern retaliation law tracks the story arc of modern disability law. In both cases, a period of initial optimism regarding the ability of the relevant federal statutes to effectuate positive change eventually gave way to a judicial backlash that limited the reach of the laws. The following Part explores the similarities between the two areas of law and offers some explanations as to the source of judicial backlash in both cases.

#### A. *The Americans with Disabilities Act: Promise, Backlash, and Legislative Intervention*

As this Article posits, the story regarding the evolution of the law regarding disability discrimination closely parallels that of the evolution of the law regarding workplace retaliation. Therefore, it is first necessary to briefly tell the story of the rise, fall, and rebirth of the ADA.

##### 1. *High Hopes*

The ADA was enacted in 1990 with the goal of providing equality of opportunity for individuals with disabilities.<sup>124</sup> Under the employment provisions of the Act, an employer is prohibited from discriminating against a qualified individual with a disability.<sup>125</sup> Importantly, the term “discrimination” includes not only traditional forms of discrimination but also the failure to make reasonable accommodations.<sup>126</sup> Thus, employers are required under the ADA to make reasonable modifications to their workplaces and practices to enable individuals with disabilities to enjoy equal opportunity in the workplace.

Prior to its passage, individuals with disabilities were protected from discrimination through a hodgepodge of state and federal statutes that provided only limited protection.<sup>127</sup> The most significant of these laws

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124. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2(a)(8), 104 Stat. 327, 329 (codified at 42 U.S.C. § 12101(a)(7) (2012)).

125. 42 U.S.C. § 12112(a).

126. *Id.* § 12112(b)(5)(A).

127. See Alex B. Long, “If the Train Should Jump the Track . . .”: Divergent Interpretations of State and Federal Employment Discrimination Statutes, 40 GA. L. REV. 469, 477–78 (2006) (describing the statutory scheme providing protection from disability discrimination at the time of the ADA’s enactment).



was section 504 of the federal Rehabilitation Act.<sup>128</sup> As enacted, section 504 provided that “[n]o otherwise qualified handicapped individual in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”<sup>129</sup>

Because section 504 only reached discrimination by federal government actors and those receiving federal financial assistance, the scope of the statute was somewhat limited.<sup>130</sup> There were relatively few judicial decisions interpreting section 504’s “otherwise qualified handicapped individual” (later re-termed “disability”) language prior to the ADA’s passage.<sup>131</sup> Despite the relative lack of decisional law, the prevailing narrative has long been that federal courts rarely stopped to question whether an individual had a “disability” for purposes of the Act.<sup>132</sup> Instead, the primary focus was on whether the individual with the disability was “qualified.” While there was the occasional outlier case in

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128. Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (current version at 29 U.S.C. § 794 (2012)).

129. *Id.*

130. Michael Selmi, *Interpreting the Americans with Disabilities Act: Why the Supreme Court Rewrote the Statute, and Why Congress Did Not Care*, 76 GEO. WASH. L. REV. 522, 535 (2008) (referring to the Act as a “very modest” statute).

131. Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 631 (1999); see also Steven B. Epstein, *In Search of a Bright Line: Determining When an Employer’s Financial Hardship Becomes “Undue” Under the Americans with Disabilities Act*, 48 VAND. L. REV. 391, 433 (1995).

132. See, e.g., Kevin Barry, *Toward Universalism: What the ADA Amendments Act of 2008 Can and Can’t Do for Disability Rights*, 31 BERKELEY J. EMP. & LAB. L. 203, 233 (2010) (“With a few exceptions, courts considered anyone alleging discrimination based on an impairment to be ‘disabled.’”); Susan Stefan, *Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination and the Americans with Disabilities Act*, 52 ALA. L. REV. 271, 301–02 (2000) (discussing plaintiffs’ success on this issue and stating “Congress had no reason to believe when it passed the ADA that the courts would closely scrutinize” the question of whether an individual had a disability); Hillary K. Valderrama, *Is the ADAAA a “Quick Fix” or Are We Out of the Frying Pan and into the Fire: How Requiring Parties to Participate in the Interactive Process Can Effect Congressional Intent Under the ADAAA*, 47 HOUS. L. REV. 175, 192 (2010) (stating “the courts had generally interpreted the definition in favor of plaintiffs”).

Professor Chai Feldblum, one of the original authors of the ADA, has provided this account of the pre-ADA caselaw:

Courts deciding cases under that definition had decided that individuals with a wide range of serious medical conditions could invoke the protections of the law. Indeed, courts had rarely even parsed the language of the definition to decide whether a plaintiff was a “handicapped individual” under the law. Rather, the definition was understood to include any medical condition that was non-trivial, and the courts had applied the law’s coverage in that manner.

Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 91–92 (2000).

which a defendant successfully challenged the existence of a disability, the narrative surrounding section 504 has been that courts generally took a liberal view of the definition of disability. As such, disability rights advocates were optimistic that the statute provided a solid working model when they began drafting what would become the ADA.<sup>133</sup>

Any concerns that disability rights advocates might have had about the ability of the Rehabilitation Act's definition of disability to serve as a model for the ADA were apparently alleviated by the Supreme Court's decision in 1989 in *School Board of Nassau County v. Arline*,<sup>134</sup> however.<sup>135</sup> In *Arline*, the Supreme Court gave an expansive reading to the terms in the Act's definition of disability.<sup>136</sup> Indeed, the Court spent relatively little time focusing on the statutory definition and instead focused heavily on the purposes underlying the statute.<sup>137</sup> So, when disability rights advocates began work on the ADA and used the

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133. See Feldblum, *supra* note 132, at 113 (describing the false sense of security disability rights advocates had at the time). The reality of section 504's effectiveness as a model for defining the concept of "disability" was actually more complicated. In some instances, defendants simply did not challenge the existence of a disability in section 504 cases. See *id.* at 108, 138 (stating it was rare for courts to question whether a plaintiff had a disability and that lawyers increasingly focused on this issue following passage of the ADA). As section 504 decisional law developed over time, more decisions emerged in which plaintiffs were unable to satisfy the threshold question of whether a disability existed under the statute. In 1984, a federal court stated that there was only one decision in which a court concluded that a plaintiff was unable to establish the existence of a disability. *Tudyman v. United Airlines*, 608 F. Supp. 739, 745–46 (C.D. Cal. 1984). In fact, there were others. See *Stevens v. Stubbs*, 576 F. Supp. 1409, 1414 (N.D. Ga. 1983); *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088, 1092 (D. Haw. 1980). As the decade progressed, more plaintiffs lost on this issue. *Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir. 1986); *Oesterling v. Walters*, 760 F.2d 859, 861 (8th Cir. 1985); *Fuqua v. Unisys Corp.*, 716 F. Supp. 1201, 1205–07 (D. Minn. 1989); *Elstner v. Sw. Bell Tel. Co.*, 659 F. Supp. 1328, 1342–43 (S.D. Tex. 1987); *Pridemore v. Legal Aid Soc'y of Dayton*, 625 F. Supp. 1171, 1175 (S.D. Ohio 1985). In these cases, courts began to parse the definition of disability found in the statute and apply it with a certain amount of rigor. See *Forrisi*, 794 F.2d at 934 (noting the "limiting adjectives" in the statutory definition of disability and concluding that the Act protects only the "truly disabled"). For disability rights advocates who were paying attention, there were certainly warning signs that the statutory text of section 504's definition of disability potentially posed some problems for future plaintiffs. See Robert L. Burgdorf, Jr., "Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 VILL. L. REV. 409, 432 (1997) (noting that the Rehabilitation Act's first definition of disability is "worded in restrictive terms").

134. 480 U.S. 273 (1987).

135. See Feldblum, *supra* note 132, at 92 (stating that "there seemed to be little legal need to change the definition of 'disability' for the ADA" following *Arline*).

136. See Selmi, *supra* note 130, at 537 (discussing the expansive approach of *Arline*).

137. *Arline*, 480 U.S. at 281–82; see Feldblum, *supra* note 132, at 118 (noting that "[t]he Court did not engage at any length with the statutory definition of 'handicapped individual'" and that "the simplicity and breeziness with which the Supreme Court" dealt with the text "is almost breathtaking in its naivete" compared to subsequent decisions); Long, *supra* note 48, at 543 (arguing that the Court glossed over the statutory definition).

Rehabilitation Act as the model for the new legislation, they did so with the belief that future courts would take a similarly expansive view of the ADA.<sup>138</sup> They would soon learn how mistaken they were.

## 2. *Judicial Backlash*

The ADA was enacted in 1990 with great fanfare.<sup>139</sup> In addition to addressing discrimination at hotels, restaurants, and other places of public accommodation, the Act expanded the statutory protection against disability discrimination to the private employment sector.<sup>140</sup> Congress estimated at the time that there were over 43 million Americans with a disability.<sup>141</sup> In light of the fact that the new law would cover private workplaces, it was easy to foresee that there would be far more cases brought under the ADA than had been brought under the Rehabilitation Act. Indeed, within the first two years of the ADA's existence, there were over 30,000 charges of employment discrimination filed with the EEOC.<sup>142</sup> In contrast, there had only been a total of 265 lawsuits filed under the Rehabilitation Act when the ADA was enacted, and those suits covered not just employment discrimination but also education, housing, and other forms of discrimination.<sup>143</sup>

As the decisional law under the ADA developed in the 1990s, disability rights advocates became alarmed over the increased attention that defendants and courts were paying to the preliminary question of whether a plaintiff had a disability.<sup>144</sup> ADA plaintiffs increasingly found themselves having to satisfy the preliminary question of whether they had disabilities. And as courts increasingly turned their attention to the statutory definition of "disability," ADA plaintiffs increasingly encountered greater difficulties meeting the statutory definition.<sup>145</sup>

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138. See Selmi, *supra* note 130, at 537 (explaining that *Arline* "almost certainly sealed the subsequent decision to incorporate the Rehab Act's definition into the ADA").

139. See Bradley A. Areheart, *Accommodating Pregnancy*, 67 ALA. L. REV. 1125, 1145 n.129 (2015) (noting that sponsors of the Act referred to it at the time as the "'emancipation proclamation' for people with disabilities"); Stefan, *supra* note 132, at 271 (describing the optimism surrounding enactment of the Act).

140. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, §§ 101-07, 302(a), 104 Stat. 327, 330-37, 355 (codified at 42 U.S.C. §§ 12111-17, 12182(a) (2012)).

141. *Id.* § 2(a)(1), 104 Stat. at 328.

142. Epstein, *supra* note 131, at 433-34.

143. *Id.*

144. Feldblum, *supra* note 132, at 139.

145. *Id.* at 138-39.

In 1999, the Supreme Court formalized the narrow view of the concept of a “disability” under the ADA through a trilogy of decisions that dramatically narrowed the scope of the statute.<sup>146</sup> Adopting a narrow approach to the terms in the statutory definition, the Court held that an individual’s use of mitigating measures to compensate for the effects of an impairment—such as eyeglass, prescription medication, or even the individual’s own unconscious attempts to adapt to an impairment—must be taken into account when determining whether an individual is substantially limited in a major life activity.<sup>147</sup> In addition, the Court took a narrow view of what it means to be substantially limited in the major life activity of working, concluding that one must be precluded from a class of jobs or broad range of jobs.<sup>148</sup> In 2002, the Court followed up with an explicit statement that the terms in the ADA’s definition of disability need to be interpreted strictly “to create a demanding standard for qualifying as disabled.”<sup>149</sup>

As these decisions filtered down to the lower courts, the situation became fairly grim for ADA plaintiffs. Physical and mental impairments that disability rights supporters had long assumed would always qualify as disabilities—such as multiple sclerosis,<sup>150</sup> cancer,<sup>151</sup> HIV infection,<sup>152</sup> cerebral palsy,<sup>153</sup> and bipolar disorder<sup>154</sup>—were increasingly held by courts not to qualify.<sup>155</sup> Studies soon consistently revealed astonishingly low success rates for ADA plaintiffs.<sup>156</sup> In the vast majority of reported decisions, ADA plaintiffs were unable to clear the initial hurdle of establishing the existence of a disability<sup>157</sup>—the legal issue disability

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146. See *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999); *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999).

147. *Kirkingburg*, 527 U.S. at 566.

148. *Sutton*, 527 U.S. at 493.

149. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197 (2002).

150. *Sorensen v. Univ. of Utah Hosp.*, 194 F.3d 1084, 1085 (10th Cir. 1999).

151. *Hirsch v. Nat’l Mall & Serv., Inc.*, 989 F. Supp. 977, 980–82 (N.D. Ill. 1997).

152. *Blanks v. Sw. Bell Commc’ns, Inc.*, 310 F.3d 398 (5th Cir. 2002).

153. *Holt v. Grand Lake Mental Health Ctr., Inc.*, 443 F.3d 762, 766–67 (10th Cir. 2006).

154. *Horwitz v. L & J.G. Stickley, Inc.*, 122 F. Supp. 2d 350 (N.D.N.Y. 2000).

155. See Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217, 217 (2008) (discussing coverage issues under the ADA).

156. See Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 108 (1999) (relating details of study showing plaintiffs lost 94% of cases at the trial court level between 1992 and 1998).

157. See Sharona Hoffman, *Corrective Justice and Title I of the ADA*, 52 AM. U. L. REV. 1213, 1215 (2003) (citing study reporting low plaintiff success rates and attributing much of the failure to the inability of plaintiffs to satisfy the ADA’s definition of disability).

rights advocates, based on earlier decisions, had assumed would rarely even be at issue.<sup>158</sup> In short, all of the initial excitement that accompanied the ADA eventually gave way to the sense that the federal courts had effectively gutted the statute.

### 3. *A New Beginning, a New Backlash*

Ultimately, the perceived ADA backlash from courts led to a backlash from Congress. In 2008, Congress amended the ADA, focusing almost exclusively on the definition of disability. In the Findings and Purposes accompanying the ADA Amendments Act (ADAAA), Congress expressly disapproved of the Supreme Court's restrictive interpretations of the terms in the ADA's definition of disability.<sup>159</sup> The ADAAA substantially broadened the definition of disability, thus providing significantly greater coverage for individuals with a variety of physical and mental impairments.

Despite Congress's intervention, there remain concerns that lower courts continue to unduly limit the reach of the statute. The new definition of "disability" is expansive enough, and the accompanying Findings and Purposes specific enough, that plaintiffs now face less difficulty in establishing the existence of a disability.<sup>160</sup> However, as Professor Michelle A. Travis has suggested, lower courts have found new ways to "avoid the difficult questions of accommodation."<sup>161</sup> To be protected under the Act, it is not enough that one simply have a disability. To be protected and to be entitled to a reasonable accommodation, one must be qualified. To be qualified, one must be capable of performing the essential

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158. See *supra* notes 124–32 and accompanying text.

159. ADA Amendments Act of 2008, Pub. L. No. 110-325, §§ 2, 4(a), 122 Stat. 3553, 3553–56.

160. See Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2051, 2057–58 (2013) (finding improved success rate for ADA plaintiffs in federal courts on threshold issue of disability); Nicole Buonocore Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1, 46–47 (2014) ("[A]nyone who has studied disability law cases can easily ascertain a clear distinction between pre-ADAAA cases, where courts went out of their way to find that various impairments were not disabilities, and post-ADAAA cases, where at least some courts seem to be bending over backward to find individuals disabled (or at least allow those plaintiffs to survive summary judgment on the issue.);"); Michelle A. Travis, *Disqualifying Universality Under the Americans with Disabilities Act*, 2015 MICH. ST. L. REV. 1689, 1694 (stating "the ADAAA largely eliminated courts' ability to use disability status as the law's gatekeeper").

161. See Travis, *supra* note 160, at 1695.

functions of a position, with or without reasonable accommodation.<sup>162</sup> The ADAAA did not amend this portion of the ADA.<sup>163</sup>

Rather than relying upon the “disability” as the gatekeeper to coverage under the ADA, courts now seem to be relying upon the “qualified” language as the gatekeeper and, in particular, the “essential functions” portion of that language.<sup>164</sup> The EEOC regulations and Interpretive Guidance accompanying the ADA describe the essential functions of a job in terms of the duties of the job, such as typing, proofreading, or operating a cash register.<sup>165</sup> In her study of post-ADAAA federal court decisions, Professor Nicole Buonocore Porter observed that rather than limiting the “essential function” concept to actual job duties or tasks, courts frequently treat various workplace norms—such as working a rotating shift or working certain hours—as essential functions. For example, in a workplace where the ability to work the day or night shift was a norm, an employee who could not work the night shift due to a disability was held not to be able to perform the essential function of the position.<sup>166</sup> And as an employer is not required to eliminate an essential function of a position under the ADA, courts often hold that the individual is not qualified and is thus not entitled to the protection of the ADA.<sup>167</sup>

Professor Michelle Travis has also noted the tendency of courts to mischaracterize an employer’s qualification standards as essential job functions.<sup>168</sup> According to the EEOC, the phrase “qualification standards” refers to the personal and professional attributes of an employee, such as “skill, experience, education,” etc., that the employer establishes as requirements for a position.<sup>169</sup> The definition is significant because the ADA prohibits an employer from utilizing qualification standards that screen out or tend to screen out an individual with a disability or a class of individuals unless the employer can show that the standard is job

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162. 42 U.S.C. § 12111(8) (2012).

163. *See* Long, *supra* note 155, at 228–29 (noting the failure of Congress to amend the reasonable accommodation portion of the statute).

164. *See* Travis, *supra* note 160, at 1697 (explaining that “the qualification requirement is being used to replace disability status as the new gatekeeper for ADA protection” and that “the ‘essential functions’ component of the qualifications test has become the critical source for undermining the ADAAA”).

165. 29 C.F.R. § 1630.2(n) (2017); 29 C.F.R. app. § 1630.2(n).

166. *See* Porter, *supra* note 160, at 74 (citing *Tucker v. Mo. Dep’t of Soc. Servs.*, No. 2:11-CV-04134-NKL, 2012 WL 6115604, at \*1 (W.D. Mo. Dec. 10, 2012)).

167. *See id.* at 70 (citing cases).

168. Travis, *supra* note 160, at 1721.

169. 29 C.F.R. § 1630.2(q).

related and consistent with business necessity.<sup>170</sup> Thus, the employer bears the burden of establishing the need for a particular qualification standard under the strict business necessity standard. In contrast, because the ADA only protects qualified individuals with disabilities, the employee bears the burden of establishing either that a job function is not essential or that the employee can perform the function in order to establish that the employee is qualified. As Professor Travis has noted, after the passage of the ADAAA, employer groups began encouraging employers to list things like education and experience requirements—which clearly fall under the category of qualification standards that need to be affirmatively justified by the employer on business necessity grounds—as essential job functions in their job descriptions.<sup>171</sup> Some courts have gone along with these kinds of mischaracterizations, with the result being that an employee who lacks the education or experience requirements established by an employer is deemed by the court unable to perform the essential functions of a position and, hence, not a qualified individual.

On the one hand, these results are not terribly surprising. EEOC Interpretive Guidance and longstanding judicial precedent both emphasize the idea of preserving employer discretion surrounding which job functions should be deemed essential.<sup>172</sup> At the same time, these kinds of decisions are flatly inconsistent with the language of the Act and the regulations. By mischaracterizing workplace structural norms and qualification standards as essential functions, courts make it significantly more difficult for plaintiffs to establish that they are qualified under the ADA.

### *B. Explanations for the ADA Backlash*

So what caused the original raft of restrictive holdings regarding the ADA's definition of disability and the more recent restrictive interpretations of the essential function concept among federal courts? One explanation might be that the restrictive decisions under the ADA simply reflect the proper or at least a better interpretation of the ADA's

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170. 42 U.S.C. § 12112(b)(6) (2012).

171. Travis, *supra* note 160, at 1723.

172. See 29 C.F.R. app. § 1630.2(n) (explaining that the inquiry into whether a function is essential “is not intended to second guess an employer’s business judgment with regard to production standards”); Travis, *supra* note 160, at 1701 (discussing pre-ADAAA court deference to an employer’s definition of “essential functions” if listed as part of a job description before litigation).

text than the earlier decisions under the Rehabilitation Act. While plausible on its face, this explanation is not completely satisfying.<sup>173</sup>

Under the ADA's original definition of disability, a plaintiff needed to establish the existence of a physical or mental impairment that substantially limited one or more major life activities, a record of such an impairment, or that the employer regarded the plaintiff as having such an impairment.<sup>174</sup> To be sure, some of the earlier decisions under the Rehabilitation Act tended to gloss over the adverb "substantially" and the adjective "major" in that definition.<sup>175</sup> But the fact that those terms appear in the definition of disability is only evidence of the inherently ambiguous nature of the definition. There is no self-evident meaning of the terms "substantially limits" and "major life activities." This ambiguity provided courts with substantial leeway when interpreting those terms.

It would hardly be a stretch, for example, to conclude that one who can only see out of one eye is substantially limited in the major life activity of seeing, regardless of any sort of unconscious, physiological coping mechanisms one may employ to correct for the results of the impairment. Moreover, a resort to the legislative history accompanying the ADA and other tools of statutory construction might have easily led a court to the conclusion that this sort of impairment should qualify as an actual disability or at least that individuals with such impairments who faced adverse actions from their employers were regarded by their employers as having such impairments.<sup>176</sup> The ADA's legislative history cited *Arline* and similar decisional law under the Rehabilitation Act extensively and indicated that courts should take a similarly expansive approach regarding the interpretation of the ADA's definition of disability.<sup>177</sup> Yet in *Albertson's, Inc. v. Kirkingburg*,<sup>178</sup> the Supreme Court held that an individual who could see out of only eye was not necessarily substantially limited in the major life activity of seeing.<sup>179</sup> Subsequent lower court

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173. See Kevin M. Barry, *Exactly What Congress Intended?*, 17 EMP. RTS. & EMP. POL'Y J. 5, 10–14 (2013) (discussing text-based arguments against the Court's holdings).

174. 42 U.S.C. § 12102(1).

175. See, e.g., *Grube v. Bethlehem Area Sch. Dist.*, 550 F. Supp. 418, 418 (E.D. Pa. 1982) (concluding that plaintiff, who was missing a kidney but whose other kidney fully compensated for loss, was entitled to relief).

176. See *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 499–503 (1999) (Stevens, J., dissenting) (discussing legislative history undermining majority opinion in *Sutton*).

177. See Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119, 1139 n.83 (2010) (noting that references to *Arline* are "sprinkled throughout the ADA legislative history"); Feldblum, *supra* note 132, at 130–32 (discussing *Arline's* role in the legislative history).

178. 527 U.S. 555 (1999).

179. *Id.* at 567.



decisions found that similarly situated individuals were not substantially limited in the major life activity of seeing.<sup>180</sup>

Despite the obvious ambiguity in the terms “substantially limited” and “major life activities,” the Supreme Court eschewed any need to resort to legislative history, explaining that the statutory text was clear and compelled, in the Supreme Court’s words, the creation of a “demanding standard” for qualifying as having a disability.<sup>181</sup> Thus, in the face of ambiguous statutory language, legislative history suggesting an expansive approach, and decisional law taking the completely opposite approach, one can hardly be blamed for believing that courts were influenced by something more than mere statutory text.

Dismayed commentators devoted considerable time and effort to exploring what they perceived to be the “ADA backlash” or “disability backlash” from the courts. Commentators offered various explanations for the perceived judicial hostility to the ADA’s definition of disability. According to some, the problem was that many judges failed to grasp the ADA’s reliance on a civil rights model for addressing disability discrimination and instead viewed the Act as bestowing special benefits for people with disabilities.<sup>182</sup> Under this theory, courts viewed the ADA’s reasonable accommodation requirement as a requirement that employers provide preferential treatment to people with physical or mental impairments. Bothered by that idea, courts sought to limit the number of potential claimants.<sup>183</sup> Closely related to this explanation was the explanation that courts were frustrated by the dramatic increase in the number of cases coming onto their dockets that involved what they perceived to be relatively trivial issues.<sup>184</sup> Facing an increase in the

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180. See, e.g., *Flores v. Am. Airlines, Inc.*, 184 F. Supp. 2d 1287, 1292–93 (S.D. Fla. 2002); *Rivera v. Apple Indus. Corp.*, 148 F. Supp. 2d 202, 214 (E.D.N.Y. 2001).

181. See *Toyota Motor Mfg., Inc. v. Williams*, 534 U.S. 184, 197 (2002).

182. Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 *BERKELEY J. EMP. & LAB. L.* 19, 23–24 (2000).

183. See Porter, *supra* note 160, at 5 (2014).

184. See Stephen F. Befort, *Let’s Try This Again: The ADA Amendments Act of 2008 Attempts to Reinvigorate the “Regarded as” Prong of the Statutory Definition of Disability*, 2010 *UTAH L. REV.* 993, 1000 (“Perhaps as a partial response to the burdens of this growing caseload, federal court decisions began to adopt a more restrictive view of the ADA’s disability definition.”). Befort cites as an example a sentence in an ADA decision from the Eighth Circuit Court of Appeals in which the court expressed frustration that the ADA “had the potential of being the greatest generator of litigation ever, and that the court doubted whether Congress, in its wildest dreams or wildest nightmares, intended to turn every garden variety worker’s compensation claim into a federal case.” *Id.* at 1000 n.56 (quoting *Pedigo v. P.A.M. Transp.*, 891 F. Supp. 482, 485 (W.D. Ark. 1994), *rev’d*, 60 F.3d 1300 (8th Cir. 1995)); see also Peter David Blanck & Mollie Weighner Marti, *Attitudes, Behavior and the Employment Provisions of the Americans with Disabilities Act*, 42 *VILL. L. REV.* 345, 369 (1997) (noting that over 80,000 charges of employment discrimination with the EEOC in the five years the

number of claims from individuals whom they have viewed as seeking special treatment, skeptical courts were attempting to narrow the scope of the statute so that it only protected those who, in the courts' view, were "truly disabled."<sup>185</sup>

The final explanation incorporates some of these same ideas but offers a slight twist. The question of whether an individual with a disability is qualified requires a court to consider whether the individual can perform the essential functions of a position with a reasonable accommodation. In turn, the question of whether a proposed accommodation is reasonable requires courts to delve into the minutiae of the workplace and to evaluate the discretionary decisions as to that minutiae.<sup>186</sup> Therefore, one explanation for the disability backlash is that courts were anxious to avoid engaging in this type of hard look and instead chose to focus heavily on the preliminary question of whether an individual has a disability. In other words, a strict reading of the definition of disability served, in the words of Professors Samuel Issacharoff and Justin Nelson, as "a gatekeeping mechanism" that allowed courts to avoid thorny questions concerning the reasonable accommodation concept.<sup>187</sup> Indeed, in his dissenting opinion in *Sutton*, Justice Stevens expressed a similar view, suggesting that the majority's restrictive interpretation of the ADA's definition of disability was based, in part, on "a concern that their decision will legalize issues best left to the private sphere."<sup>188</sup> In short, by adopting a strict interpretive approach to the definition of disability, courts could avoid being in the position of having to second-guess employer decision-making concerning the day-to-day operations of the workplace.

The very nature of the reasonable accommodation requirement impacts employers' discretion as to how to structure their workplaces in a way that other anti-discrimination statutes do not. Under traditional anti-discrimination statutes, employers are simply prohibited from taking into

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statute became effective); Diller, *supra* note 182, at 50 (suggesting federal courts viewed the ADA as an example of the type of statute "that clutter[s] up the dockets of federal courts").

185. *Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir. 1986).

186. *Wernick v. Fed. Reserve Bank of N.Y.*, 91 F.3d 379, 384 (2d Cir. 1996) ("[N]othing in the law leads us to conclude that in enacting the disability acts, Congress intended to interfere with personnel decisions within an organizational hierarchy."); see also Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. REV. 307, 336-37 (2001) (noting that the analysis of whether an individual is qualified may require a court "to delve into the factual minutia of each individual case").

187. Issacharoff & Nelson, *supra* note 186, at 321.

188. *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 513 (1999) (Stevens, J., dissenting).

account race, sex, or other factors in their decisions.<sup>189</sup> In contrast, it is discrimination under the ADA for an employer to fail to make reasonable modifications to the employer's policies and practices in the case of an individual with a disability.<sup>190</sup> Thus, it may be reasonable under the circumstances for an employee to demand that the employer allow the employee to begin the work day earlier or later than scheduled,<sup>191</sup> to work on a part-time basis instead of a full-time basis,<sup>192</sup> to work from home,<sup>193</sup> to require a supervisor to provide more detailed instructions or to otherwise alter her supervisory style,<sup>194</sup> to make an exception to an existing leave policy,<sup>195</sup> or to make an exception to an existing seniority system.<sup>196</sup> In short, the reasonable accommodation requirement is sweeping in its scope in that it potentially impacts virtually all employer-established workplace policies and practices.<sup>197</sup>

This theory also best explains the courts' mishandling of the ADA's essential function concept. By misclassifying certain workplace structural norms—such as the ability to work a rotating shift—as essential functions of a position that an employer is not required to waive, courts are able to avoid having to question an employer's judgment as to why such a waiver would not be a reasonable accommodation. Likewise, by misclassifying educational requirements and the like as essential functions, courts are

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189. To the extent a statute prohibits an employer from employing a neutral practice that has a disparate impact on a particular group, the ADA is similar. *See* EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024, 1028 (7th Cir. 2000) (noting the similarity).

190. 42 U.S.C. § 12112(b)(5)(A) (2012).

191. *See id.* § 12111(9)(B) (listing modified work schedules as a reasonable accommodation).

192. *Id.* (listing part-time work schedules as a reasonable accommodation).

193. *See* Core v. Champaign Cty. Bd. of Cty. Comm'rs, No. 3:11-cv-166(TSB), 2012 WL 3073418, at \*4 (S.D. Ohio July 30, 2012) (recognizing that working from home can potentially be a reasonable accommodation).

194. *See* Kravits v. Shinseki, No. CIV.A. 10-861(GLL), 2012 WL 604169, at \*7 (W.D. Pa. Feb. 24, 2012) (concluding a triable issue existed as to whether requiring employer to provide more detailed instructions was a reasonable accommodation); *Bennett v. Unisys Corp.*, No. 2:99-CV-0446(FVA), 2000 WL 33126583, at \*10 (E.D. Pa. Dec. 11, 2000) (holding that adjusting supervisory methods could potentially be a reasonable accommodation); Alex B. Long, *Reasonable Accommodation as Professional Responsibility, Reasonable Accommodation as Professionalism*, 47 U.C. DAVIS L. REV. 1753, 1762 (2014) (discussing the reluctance of employers to make these types of accommodations).

195. *See* Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 647–48 (1st Cir. 2000) (recognizing that permitting an employee to extend her medical leave beyond that allowed under the company's own policy could be a reasonable accommodation).

196. *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 403 (2002).

197. *See id.* at 418 (Scalia, J., dissenting) (criticizing decision and stating that as a result of the decision, "all workplace rules are eligible to be used as vehicles of accommodation" (emphasis in original)).

able to avoid delving into the minutiae of the workplace and potentially placing themselves in a position where they might have to second-guess an employer's decisions.

Of course, the ADA and its accompanying regulations go to considerable lengths not to unduly impact employer discretion.<sup>198</sup> But courts have nonetheless frequently expressed concern over second-guessing employers regarding their decisions about whether to provide an employee's requested accommodation.<sup>199</sup> Thus, one of the more compelling explanations for why courts took such a strict approach to defining the concept of "disability" under the ADA is that they realized that if they did not do so, they would be compelled to more often dig deep into the minutiae of an individual workplace and second-guess an employer's refusal to provide an employee's requested accommodation.

### *C. Similarities Between the History of the ADA and the History of Retaliation Law*

There are numerous similarities in terms of the narratives surrounding the ADA and retaliation law. In both fields, early successes gave rise to misplaced optimism. And in both fields, initial optimism eventually gave way to judicial backlash. The following section examines the similarities in more detail and offers some additional explanation as to the source of the judicial backlash in the case of employment retaliation law.

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198. *See supra* note 172 and accompanying text (discussing the deference given to employer discretion regarding which functions are essential).

199. *See Rehrs v. Iams Co.*, 486 F.3d 353, 358 (8th Cir. 2007) (concluding that the ability to rotate shifts was an essential function of position and stating that "[i]t is not the province of the court to question the legitimate operation of a production facility or determine what is the most productive or efficient shift schedule for a facility"); *Kaitschuck v. Doc's Drugs, Ltd.*, No. 13-C-1985, 2014 WL 1478017, at \*5 (N.D. Ill. Apr. 15, 2014) (refusing to require employer to waive its certification requirement for eligibility for a job on the grounds that the court does not "sit as a kind of super-personnel department" (quoting *Magnus v. St. Mark United Methodist Church*, 688 F.3d 331, 338–39 (7th Cir. 2012)); *EEOC v. Ford Motor Co.*, No. 11-13742, 2012 WL 3945540, at \*5 (E.D. Mich. Sept. 10, 2012) (declining to "second-guess" employer's business judgment regarding whether it was essential for employee to be present at the office); *Wood v. Crown Redi-Mix, Inc.*, 218 F. Supp. 2d 1094, 1104 (S.D. Iowa 2002) (deferring to employer's judgment that the ability to drive a ready-mix truck in an emergency was an essential function that employer was not required to waive and stating "it is not its position to question the soundness of Crown's business judgments"); *Lewis v. Zilog, Inc.*, 908 F. Supp. 931, 948 (N.D. Ga. 1995) ("Forcing transfers of employees under the guise of reasonably accommodating employees under the ADA inherently would undermine an employer's ability to control its own labor force.").

1. *Initial Successes Mask Pitfalls of Statutory Language: The Histories of the ADA and Retaliation Law*

a. *Initial Successes Mask Pitfalls of Statutory Language: The ADA*

In both areas, the initial success that plaintiffs enjoyed masked underlying areas of concern inherent in the relevant statutory language. In the ADA context, disability rights advocates were lulled into a false sense of security by generally favorable decisional law under the Rehabilitation Act.<sup>200</sup> This sense of security reached its peak with the Supreme Court's decision in *Arline*, in which the Court spent little time parsing the statutory definition of definition and gave an expansive reading to the statute.<sup>201</sup>

One explanation for the inability of disability rights advocates to predict the subsequent string of pro-defendant decisions lies in the changing approach to statutory interpretation that took place during this period. Looked at through the lens of the textualist approach that dominates modern statutory interpretation, the text of the ADA's original definition of disability seems anything but pro-plaintiff. To establish the existence of an actual disability, a plaintiff was required to establish the existence of an impairment that *substantially* limited a *major* life activity.<sup>202</sup> The modifying words "substantially" and "major" potentially imposed a not-insignificant burden on a plaintiff. And while the two alternate definitions permitted a plaintiff to qualify as disabled by establishing a record of such an impairment, or that the defendant regarded the plaintiff as having such an impairment, those definitions also utilized the same modifying terms.<sup>203</sup> In hindsight, the potential deficiencies of the definition from a plaintiff's perspective should have been obvious.

Why, then, were they not? Part of the explanation has to do with the fact that the ADA was born at the same time that textualism was becoming the dominant approach to statutory interpretation.<sup>204</sup> In the 1970s and '80s, when courts were reviewing the language of the Rehabilitation Act that served as the basis for the ADA's definition, textualism was not the force

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200. See *supra* notes 138–41 and accompanying text.

201. See *supra* notes 138–41 and accompanying text.

202. 42 U.S.C. § 12102(2) (2012).

203. *Id.*

204. See Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 30, 30 n.125 (2006) (discussing how textualism began to displace purposivism during the 1980s and 1990s); Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807, 852 (2014) (stating that the shift toward textualism began in the 1980s but accelerated through the 1990s).

it would soon become. Instead, courts were more willing to look to the underlying purposes of a statute in construing the language. But by the time the ADA went into effect in 1992, textualism was ascending.<sup>205</sup> Reviewing courts in the 1990s were simply less inclined to look to the purposes underlying the ADA's statutory text rather than to focus on the text itself. In addition, while the ADA was more dense and more specific in terms of its text than older statutes like Title VII, it still contained a great deal of ambiguous language.<sup>206</sup> Thus, it took textualism to expose some of the inherent limitations in the ADA's definition of disability.

A related explanation has to do with the fact that the number of disability discrimination cases exploded with the birth of the ADA. Prior to the ADA, disability discrimination cases in the workplace were fairly rare. Once private employers became subject to the requirements of the ADA, the number of discrimination cases naturally increased. The result was an increased attention to the language of this strange new law, which led to defense attorneys, for the first time, advancing text-based arguments in support of the argument that a plaintiff did not have a disability.<sup>207</sup> Ultimately, it took an increase in the number of disability discrimination cases and a hard look at the statutory definition of disability to expose some of the flaws in the ADA.

*b. Initial Successes Mask Pitfalls of Statutory Language: Retaliation Law*

The story of the courts' treatment of retaliation plaintiffs follows the same pattern: early successes masked significant statutory shortcomings. Prior to *Nassar*, most of the Supreme Court's retaliation decisions involved (1) basic threshold questions involving only a fairly limited number of potential plaintiffs, such as whether former employees have a claim under Title VII,<sup>208</sup> whether a friend or relative of the party opposing unlawful conduct has a claim under Title VII,<sup>209</sup> and whether a particular

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205. See Molot, *supra* note 204, at 30, 30 n.125 (discussing the rise of textualism around this time).

206. Justice O'Connor was once quoted as saying that the ADA is "an example of what happens when the sponsors are so eager to get something passed that what passes hasn't been as carefully written as a group of law professors might put together. So it leaves lots of ambiguities and gaps and things for courts to figure out." William C. Smith, *Drawing Boundaries*, 88 A.B.A. J. 49, 49 (2002).

207. Chai Feldblum, one of the original authors of the ADA, tells the story of conducting seminars in front of lawyers who were learning about the ADA for the first time shortly before the law went into effect. These lawyers, knowing nothing about the prior history of the Rehabilitation Act case law, focused heavily on the plain language of the statute. Feldblum, *supra* note 132, at 138-39.

208. *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997).

209. *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170 (2011).

statute provides for a retaliation cause of action to begin with;<sup>210</sup> or (2) interpretive issues so confined to the statute in question that they were unlikely to have broader application, such as whether a plaintiff who made an oral complaint regarding unlawful discrimination under the Fair Labor Standards Act had a retaliation claim.<sup>211</sup> Thus, while these were all victories for retaliation plaintiffs, they were victories of somewhat limited precedential value.

The Supreme Court's retaliation decisions reflect a strong emphasis on textualist analysis; reliance on the purposes underlying the text is typically of secondary importance in the opinions.<sup>212</sup> As was the case before it with the ADA, the statutory text of anti-retaliation provisions is often not as plaintiff-friendly as early retaliation decisions might have led some to believe. Supreme Court decisions affording retaliation plaintiffs victories have tended to be based so strongly on textual grounds that they are of limited value for retaliation plaintiffs outside of those narrow circumstances. And it was not until the number of retaliation actions increased and lower courts were forced to deal with the Supreme Court's rulings that the limitations of Title VII's anti-retaliation provisions were fully exposed.

The Court's decision in *Crawford*—a case generally perceived as a win for employees—provides an example. In *Crawford*, the Supreme Court held that an employee who participated in an employer's internal investigation into alleged discrimination and provided “ostensibly disapproving” testimony was protected by the opposition clause of Title VII's anti-retaliation provision.<sup>213</sup> While a win for future retaliation plaintiffs in the sense that the Court concluded that the employee's conduct was protected even though it did not fit the classic form of “retaliation” one ordinarily thinks of, the Court's decision was not as protective of employees as one might assume. Title VII's participation clause, unlike the opposition clause, does not impose any sort of good faith or reasonableness standard upon an employee seeking its protection.<sup>214</sup> Thus, the protection afforded by the participation clause is virtually absolute. The statutory text of both clauses actually imposed at least some obstacles to classifying the plaintiff's conduct as fitting under

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210. *Gomez-Perez v. Potter*, 553 U.S. 474 (2008); *CBOCS W., Inc. v. Humphries*, 553 U.S. 442 (2008); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005).

211. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1 (2011).

212. *See Long*, *supra* note 48, at 541 (“Textualism has won the war with respect to the interpretation of statutory antiretaliation provisions.”).

213. *See supra* notes 17–23 and accompanying text.

214. *See supra* notes 17–23 and accompanying text.

either clause. Had the Court concluded that the *Crawford* plaintiff's conduct fit within the protections of Title VII's participation clause, future employees who participate in internal investigations into discrimination would not have been forced to establish that they reasonably believed they were addressing unlawful conduct or that they acted in good faith.<sup>215</sup> Instead, they would have been entitled to the absolute protection of the participation clause.<sup>216</sup>

There are other examples of how the Court's textualist approach to the interpretation of anti-retaliation provisions has limited the protection afforded to retaliation plaintiffs. In *Thompson*, the Court held that an individual who suffers an adverse action due to a coworker's protected activity is an "aggrieved person" under Title VII who is entitled to a statutory remedy.<sup>217</sup> While certainly a victory for retaliation plaintiffs, it is a win of limited value for the victims of retaliation who proceed under other statutes. The Court's decision was premised not on the grounds that the aggrieved person was entitled to any sort of derivative right stemming from the protected activity of the coworker but instead from a separate provision in Title VII affording a remedy to anyone aggrieved by an employer's unlawful retaliation.<sup>218</sup> While some other federal employment statutes contain this same "aggrieved person" language, others do not.<sup>219</sup> Thus, *Thompson* is hardly a broad pronouncement regarding the evils of third-party retaliation and is instead a quite narrow opinion in which—fortunately for the plaintiff in question—the text of the statute provided a way for the court to address the obvious unjustness of permitting an employer to take action against an innocent third party while still toeing the textualist line.

## 2. *Concern over Intrusions into Employer Discretion: The Histories of the ADA and Retaliation Law*

The recent histories of disability law and retaliation law are also similar in terms of how the courts have viewed the relevant statutes as intruding upon employer discretion. With the ADA, courts could easily foresee that the statute—with its requirement that an employer provide a reasonable accommodation to a qualified individual with a disability—impacted

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215. See *supra* notes 17–23 and accompanying text.

216. See *supra* notes 17–23 and accompanying text.

217. *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 177–78 (2011).

218. *Id.* at 175; see also 42 U.S.C. § 2000e-5(f)(1) (2012).

219. For example, the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) does not contain such a provision. 38 U.S.C. §§ 4322(a), 4323(d) (2012).



employer discretion in meaningful ways.<sup>220</sup> And with the statute's potential coverage of an estimated 43 million Americans, courts could also foresee themselves frequently being dragged into the legal battles over workplace minutiae.

The same fears perhaps explain the tendency of the Supreme Court and lower courts to adopt narrow readings and applications of anti-retaliation provisions. In some instances, the text of anti-retaliation provisions might plausibly be read to produce a plaintiff-friendly result but perhaps more easily could be read in a narrower fashion. In these situations, the Supreme Court has more often chosen the narrower option. And when presented with the opportunity to apply Supreme Court retaliation precedent in a manner that would further the purposes underlying statutory anti-retaliation provisions, lower courts have increasingly applied that precedent in a highly restrictive manner.

Perhaps the clearest example of the Court's tendency to choose the narrower reading as between two plausible readings of statutory text is the Court's 2013 decision in *Nassar*. Title VII prohibits an employer from retaliating against an individual "because" that individual engaged in protected activity.<sup>221</sup> Faced with the question of what standard of causation is imposed by the word "because," the Court chose the demanding "but-for" standard over other, less restrictive standards.<sup>222</sup> Nothing in the text obviously required or even strongly suggested this result, and there were compelling arguments for a more expansive reading of the word "because."<sup>223</sup> Yet, a five-member majority chose the more narrow reading.

Lower courts have similarly chosen to interpret the Court's retaliation decisions in a particularly narrow fashion. Following *Breeden*, lower courts could have taken into account the complex nature of discrimination law when assessing whether an employee could have reasonably believed that an employer's conduct was unlawful. Instead, lower courts have frequently adopted a highly restrictive reading of the reasonableness

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220. See *supra* notes 184–85 and accompanying text.

221. 42 U.S.C. § 2000e-3(a).

222. See *supra* notes 115–23 and accompanying text.

223. The four dissenting justices raised several concerns regarding the majority opinion. First, by adopting a but-for standard, the Court established separate causation standards for discrimination and retaliation claims. Aside from creating unnecessary confusion, the creation of a separate standard for retaliation claims ignored the interconnected nature of the two theories. Univ. of Tex. Sw. Med. Ctr. v. *Nassar*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 2517, 2537 (Ginsburg, J., dissenting). The dissent was also critical of the majority's failure to defer to the EEOC's position on the issue. *Id.* at 2543–44. The dissent also noted that the adoption of a but-for standard was contrary to tort law's handling of causation issues in which multiple causes contribute to a result. *Id.* at 2546.

requirement.<sup>224</sup> Following *Burlington Northern*, lower courts could have recognized the strong deterrent effect that threats of retaliation can have on an employee's willingness to oppose perceived unlawful discrimination. Instead, lower courts have increasingly held as a matter of law that employer actions such as negative employee evaluations and threats of firing would not deter a reasonable employee from opposing unlawful discrimination.<sup>225</sup>

The obvious question is why would courts consistently choose readings of the statutory text and precedent that limit the protection afforded to the victims of retaliation? *Nassar* provides perhaps the clearest answer. The majority opinion in *Nassar* spends a fair amount of time attempting to make sense of the legislative history and inconsistent statutory language as well as the Court's own decisions concerning the anti-discrimination and anti-retaliation provisions of Title VII and the Age Discrimination in Employment Act (ADEA).<sup>226</sup> While the majority's reading of Title VII's text to adopt a but-for standard of causation is certainly defensible, the textualist case for such an interpretation is hardly compelling.<sup>227</sup> Perhaps aware of this fact, the majority devotes a portion of the opinion at the end to explaining why, from a policy standpoint, its interpretation is preferable.

The majority's fears over intruding too heavily upon employer discretion with respect to the workplace are almost palpable in this portion of the opinion.<sup>228</sup> Justice Kennedy's majority opinion points out "the ever-increasing frequency" of retaliation claims and that "the number of retaliation claims filed with the EEOC has now outstripped those for every type of status-based discrimination except race."<sup>229</sup> The opinion then notes the potential burden that the rise in retaliation cases places on judicial resources.<sup>230</sup> But beyond the burden on courts, there is a concern about the

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224. See *supra* note 79 and accompanying text.

225. See *supra* note 99 and accompanying text.

226. *Nassar*, 133 S. Ct. 2517 at 2528–31 (majority opinion).

227. See *supra* note 223 and accompanying text.

228. See *Nassar*, 133 S. Ct. at 2547 (Ginsburg, J., dissenting) (stating that the majority "appears driven by a zeal to reduce the number of retaliation claims filed against employers"); Sandra F. Sperino & Suja A. Thomas, *Fakers and Floodgates*, 10 STAN. J. C.R. & C.L. 223, 224 (2014) (stating that the majority "used these concerns about fakers and floodgates to tip substantive discrimination law in an employer-friendly direction"). It is noteworthy that the actual number of civil rights lawsuits filed has declined over the same period while the number of retaliation charges filed with the EEOC has increased. *Id.* at 236–37.

229. *Nassar*, 133 S. Ct. at 2531 (majority opinion).

230. See *id.* (noting concerns over "the fair and responsible allocation of resources in the judicial and litigation systems").

burden on employers. Not only might adopting a less stringent causation standard lead to more retaliation claims, doing so might also lead to more *frivolous* claims, according to Justice Kennedy.<sup>231</sup>

Indeed, the concern that a less stringent causation standard would spur more frivolous claims, thereby interfering with the ability of employers to run their own shops and impose litigation burdens on employers, seems to drive much of the opinion. In the majority's view, a less strict causation standard will allow bad employees who fear disciplinary action to preemptively and falsely cry "discrimination" in an effort to set up a future retaliation claim if they are subsequently fired.<sup>232</sup> The idea that bad employees often file frivolous claims of discrimination in order to deter employers from taking adverse action against them for fear of retaliation has long been an article of faith among many employers.<sup>233</sup> That fear found voice in Justice Kennedy's majority opinion: "an employee who knows that he or she is about to be fired for poor performance, given a lower pay grade, or even just transferred to a different assignment or location . . . might be tempted to make an unfounded charge of racial, sexual, or religious discrimination."<sup>234</sup> By engaging in what is at least potentially protected opposition conduct, the complaining employee might be able "to forestall [the employer's] lawful action" by making an employer fear the possibility of a retaliation claim.<sup>235</sup> If the employer goes ahead and makes a legitimate business decision about whether the

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231. *Id.*; see also *Shaniga v. St. Luke's Med. Ctr. LP*, No. CV-14-02475-PHX-GMS, 2016 WL 1408289, at \*11 (D. Ariz. Apr. 11, 2016) (quoting *Nassar* and stating "the stronger 'but-for causation' standard serves to close the door on employees seeking to file *even more* frivolous retaliation claims" (emphasis added)).

232. See *Nassar*, 133 S. Ct. at 2532 (noting concerns over frivolous claims).

233. Jonathan A. Segal, *Supreme Court's Messages on Retaliation, Arbitration, and Discrimination*, in *INSIDE THE MINDS: THE IMPACT OF SUPREME COURT EMPLOYMENT LAW CASES* 7, 11 (2010) ("[W]hile most employees who make complaints do so in good faith, there are times when an employee engages in a pre-emptive strike by alleging discrimination and harassment before an employment action is taken; and if an adverse action is taken at a later time, it may appear retaliatory."); Robert J. Grossman, *Diffusing Discrimination Claims*, HR MAG. (May 1, 2009), <https://www.shrm.org/hr-today/news/hr-magazine/pages/0509grossman.aspx> [<https://perma.cc/DF48-XN59>] (explaining that retaliation "claims can be engineered" by filing a discrimination claim and that by doing so, an employee is "painting himself with a coat of Teflon"); Paul Falcone, *Avoid the Preemptive Strike*, PAULFALCONEHR (Mar. 18, 2014), <http://www.paulfalconehr.net/avoid-the-preemptive-strike/> [<https://perma.cc/AJE4-VY5G>] ("[W]orkers are realizing more and more that it may be in their best interests to lodge a complaint with HR before you, their supervisor, have an opportunity to discipline or terminate them."); Flander, *supra* note 62, at 20 (relating observation of defense lawyer that there is "more of a willingness among employees to use retaliation claims as covers for their poor job performance").

234. *Nassar*, 133 S. Ct. at 2532.

235. *Id.*

employee should keep her job, get paid the same, or be reassigned to a different job or location, the employee could turn around and sue for retaliation, knowing that a more favorable causation standard might make it more difficult for a court “to dismiss dubious claims at the summary judgment stage.”<sup>236</sup> In short, concerns over the possibility that the threat of a retaliation claim might result in additional litigation costs and impact the discretion afforded to employers under the employment at-will doctrine mitigate in favor of a stringent causation standard.

This portion of *Nassar* is one of the clearest expressions one can expect to find regarding the concerns that underlie some of the restrictive approaches federal courts have taken with respect to retaliation claims: there are too many trivial retaliation claims clogging up the docket and impacting the ability of employers to run their workplaces. Lower courts have raised similar concerns regarding retaliation claims. As one court suggested, employers may be “paralyzed into inaction once an employee has lodged a complaint under Title VII, making such a complaint tantamount to a ‘get out of jail free’ card for employees engaged in job misconduct.”<sup>237</sup>

This theme is perhaps even more prevalent in retaliation cases in which the primary issue is whether an employee suffered a materially adverse action. Every day, an employer makes decisions or implements decisions concerning what the essential functions of a job are, who performs them, and when, where, and how they are performed. A retaliation claim involving the issue of whether an employer’s actions were materially adverse goes to the core of the discretion afforded to employers by the employment at-will rule. As explained by one court in the context of a retaliation decision, “[w]ork assignment claims strike at the very heart of an employer’s business judgment and expertise because they challenge an employer’s ability to allocate its assets in response to shifting and competing market priorities.”<sup>238</sup>

This type of statement perhaps explains the strict approach some courts take on the issue of material adversity; the more broadly the concept of material adversity is defined, the greater the impact on an employer’s

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236. *Id.*

237. *Brooks v. City of San Mateo*, 229 F.3d 917, 928 (9th Cir. 2000); *see also Drott v. Park Electrochemical Corp.*, No. CV 11-1596-PHX-JAT, 2013 WL 6157858, at \*15 (D. Ariz. Nov. 25, 2013) (explaining that a less stringent causation standard “would transmute an employee’s preemptive engagement in a protected activity, whether frivolous or not, into a shield against the imminent consequences of poor job performance”).

238. *Davis v. Town of Lake Park*, 245 F.3d 1232, 1244 (11th Cir. 2001).

decision-making authority concerning the minutiae of the workplace.<sup>239</sup> As a result, one frequently sees courts in these cases trotting out the almost boilerplate observation that anti-discrimination statutes do not authorize courts to act as a “super-personnel department,” second-guessing employers’ business decisions and intervening whenever employees feel they are being treated unjustly.<sup>240</sup> This sentiment is usually conveyed in the process of concluding that the harms that an employee suffered were merely minor annoyances or inconveniences and that the law does not guarantee an employee a genial boss.<sup>241</sup>

The Court’s decision in *Crawford* is also consistent with this idea. On its face, *Crawford* appears to be a case in which the Supreme Court could be expected to interpret Title VII’s anti-retaliation provision strictly in order to avoid judicial meddling in an employer’s internal affairs. Recall that *Crawford* involved retaliatory conduct on the part of an employer who was conducting an internal investigation into alleged sexual harassment.<sup>242</sup> This seems like the sort of internal process lying deep within the shadow of employer discretion that the Court would seem hesitant to interfere with. Yet, the Court held that the employee’s act of providing “an ostensibly disapproving account of sexually obnoxious behavior toward her by a fellow employee” was protected activity under Title VII’s opposition clause.<sup>243</sup> The Court’s decision seems considerably less intrusive upon employer discretion when one considers just how extreme the Sixth Circuit Court of Appeals’ interpretation of the language in the opposition clause truly was. According to the Sixth Circuit, it was not enough that an employee merely oppose unlawful conduct; an

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239. See Brake, *supra* note 61, at 155 (“The strictness of the reasonable belief doctrine may well mask an unarticulated concern in retaliation cases that the law not intrude too deeply into employer prerogatives to base employment decisions on discretionary reasons—for example, the employment at-will doctrine.”).

240. *Lisdahl v. Mayo Found.*, 633 F.3d 712, 722 (8th Cir. 2011); *Barren v. Ne. Ill. Reg’l Commuter R.R. Corp.*, No. 13 CV 4390, 2016 WL 861183, at \*8 (N.D. Ill. Mar. 7, 2016); *Moat v. Aaron’s, Inc.*, No. 4:13-CV-181-VEH, 2014 WL 5860574, at \*10 (N.D. Ala. Nov. 12, 2014); *Levitant v. N.Y.C. Human Res. Admin.*, 914 F. Supp. 2d 281, 300 (E.D.N.Y. 2012); *Webb v. Niagara County*, No. 11-CV-192S, 2012 WL 5499647, at \*6 (W.D.N.Y. Nov. 12, 2012); *Beverly v. Kaupas*, No. 05 C 6338, 2008 WL 62404, at \*14 (N.D. Ill. Feb. 29, 2008); *Bozeman v. Per-Se Tech., Inc.*, 456 F. Supp. 2d 1282, 1341 (N.D. Ga. 2006); *Mowery v. Escambia Cty. Utils. Auth.*, No. 3:04CV382-RS-EMT, 2006 WL 327965, at \*20 (N.D. Fla. Feb. 10, 2006); see also *Wolf v. MWH Constructors, Inc.*, 34 F. Supp. 3d 1213, 1224, 1227 (M.D. Fla. 2014) (using the phrase in reference to employer’s actions that formed the basis for plaintiff’s discrimination claim and then concluding that the same actions were not materially adverse for purposes of plaintiff’s retaliation claim).

241. *Lisdahl*, 633 F.3d at 722; *Levitant*, 914 F. Supp. 2d at 300.

242. *Crawford v. Metro. Gov’t of Nashville*, 555 U.S. 271 (2009); *supra* notes 17–19 and accompanying text.

243. *Crawford*, 555 U.S. at 276.

employee must engage in “active, consistent ‘opposing’ activities” before conduct is protected.<sup>244</sup> This rather extreme interpretation was inconsistent with ordinary understandings of the word “oppose.”

Moreover, *Crawford* presented an extremely unusual situation that was unlikely to repeat itself often. When asked, as part of the investigation, whether harassment had occurred, the plaintiff answered in the affirmative and apparently did so in a way that conveyed her disapproval of the harassment. Ordinarily, it is not terribly difficult to decide whether an employee has opposed employer conduct. *Crawford* presents the one-in-a-hundred case in which the employee’s actions are difficult to classify. But it seems obvious in hindsight that if Title VII’s anti-retaliation provision was going to serve *any* useful purpose in addressing discrimination, the Court had no choice but to declare that the plaintiff engaged in protected activity; it was simply a question of categorization. By declaring the plaintiff’s conduct to be protected under the opposition clause under these limited circumstances, the Court was hardly throwing open the floodgates of litigation. And by classifying the conduct as opposition conduct as opposed to participation conduct—thereby forcing future employees in this unusual situation to establish that they reasonably believed the conduct opposed was unlawful—the Court helped limit the potential impact of the decision on employer discretion.

To be clear, this phenomenon is hardly unique to ADA and retaliation cases. Courts routinely bring out the “super-personnel department” language in discrimination cases of all stripes, most often when explaining why an employer has offered a legitimate, non-discriminatory reason for its actions and why the plaintiff has failed to show that the asserted reason is a pretext for discrimination.<sup>245</sup> And this is hardly the first article to posit that court decisions in the employment context may be influenced by fears concerning the floodgates of litigation and impinging upon the employment at-will rule. But these concerns are even more pronounced in retaliation and disability discrimination cases than in traditional discrimination cases.

Much like the potential impact the ADA’s reasonable accommodation requirement has on employee discretion regarding virtually every aspect

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244. *Id.* at 275 (quoting *Crawford v. Metro. Gov’t of Nashville*, 211 F. App’x 373, 376 (6th Cir. 2006)).

245. *See, e.g.,* *Marcinuk v. Lew*, No. 13-CV-12722, 2016 WL 111409, at \*4 (D. Mass. Jan. 11, 2016) (using “super personnel department” language and stating that to establish pretext, plaintiff “must offer evidence of such strength and quality . . . to permit a reasonable finding that [the adverse action] was obviously or manifestly unsupported” (alterations in original) (citations and internal quotation marks omitted) (emphasis omitted)).

of the workplace,<sup>246</sup> Title VII's anti-retaliation provision addresses a range of employer actions not addressed by Title VII's anti-discrimination provision. Title VII's anti-retaliation provision covers more forms of employer action and decisions than its anti-discrimination provision.<sup>247</sup> The anti-discrimination provision prohibits only adverse employment actions, which are, by definition, limited to employer actions that concern employment.<sup>248</sup> To qualify as an adverse employment action, the employer's action must materially affect the compensation, terms, conditions, or privileges of employment.<sup>249</sup> In some circuits, the term is defined so narrowly that it only includes "ultimate employment decisions," such as hiring, firing, promotion, and demotions.<sup>250</sup> As the Supreme Court held in *Burlington Northern*, Title VII's anti-retaliation provision covers a much wider array of retaliatory conduct. While the anti-retaliation provision does not address "petty slights or minor annoyances" in the workplace,<sup>251</sup> it does address a range of discretionary, day-to-day managerial decisions that the employment at-will rule largely immunizes from judicial second-guessing. This potentially includes assignment of less desirable job duties,<sup>252</sup> reassignment to a less desirable location or department,<sup>253</sup> schedule changes,<sup>254</sup> threatening a complaining employee with discipline, passing an employee over for training, and moving the employee to a less desirable office,<sup>255</sup> preparing unfair performance evaluations,<sup>256</sup> and formal reprimands.<sup>257</sup>

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246. See *supra* notes 191–97 and accompanying text.

247. *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 67 (2006).

248. See *id.* at 63 (explaining that Title VII's anti-discrimination provision covers "employer actions and harm that concern employment and the workplace").

249. *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1089 (9th Cir. 2008); see also *Jackman v. Fifth Judicial Dist. Dep't of Corr. Servs.*, 728 F.3d 800, 804 (8th Cir. 2013) ("An adverse employment action is defined as a tangible change in working conditions that produces a material employment disadvantage, including but not limited to termination, cuts in pay or benefits, and changes that affect an employee's future career prospects.").

250. *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997).

251. *Burlington N.*, 548 U.S. at 68.

252. *Id.* at 70.

253. *Leslie v. Noble Drilling, LLC*, No. H-16-0610, 2017 WL 1051131, at \*9 (S.D. Tex. Mar. 17, 2017).

254. *Burlington N.*, 548 U.S. at 69 (recognizing the potential for a schedule change to constitute a materially adverse action); *Spalding v. City of Chicago*, 186 F. Supp. 3d 884, 918 (N.D. Ill. 2016) (involving shift change as possible materially adverse action).

255. *Kretzman v. Erie County*, No. 11-CV-0704, 2013 WL 636545, at \*7 (W.D.N.Y. Feb. 20, 2013); *Loya v. Sebelius*, 840 F. Supp. 2d 245, 252–53 (D.D.C. 2012).

256. *Walker v. Johnson*, 798 F.3d 1085, 1095 (D.C. Cir. 2015).

257. *Millea v. Metro-N. R.R.*, 658 F.3d 154, 165 (2d Cir. 2011).

Given the potential impact on employer discretion and the concomitant burden on courts to review employers' discretionary decisions, courts are seeking to limit the reach of retaliation law. With the ADA, courts developed a demanding approach to the definition of disability to prevent them from having to review an employer's decision whether to grant a reasonable accommodation. In the retaliation context, courts have been able to develop a similar set of interpretive tools that often have the same effect.

#### IV. PAST AS PROLOGUE: WHAT THE HISTORY OF DISABILITY LAW CAN TEACH US ABOUT THE FUTURE OF RETALIATION LAW

The story arcs of modern disability law and retaliation law reveal an important lesson for employees: as a general rule, the greater the potential for a statute to intrude upon employer discretion regarding day-to-day decisions, the less likely a court is to interpret the statute in that manner. Stated differently, the deeper a statute potentially intrudes upon the discretion traditionally afforded to employers under the employment at-will rule, the less receptive a court will be to interpretive arguments that would produce that result.<sup>258</sup>

With this guiding principle in mind, the following Part briefly considers what can be done moving forward to better further the goals of anti-retaliation provisions and protect employees from unlawful retaliation. And, once again, the history of the ADA proves instructive.

##### A. *The ADA Amendments Act: Congressional Response to the Disability Backlash*

In its original form, the ADA was a more detailed statute than Title VII.<sup>259</sup> Unlike Title VII, which prohibits discrimination on the basis of traits that everyone possesses (race, sex, national origin, etc.), the ADA protected only a particular class of people: qualified individuals with disabilities.<sup>260</sup> Thus, at least in this context, there was a more pressing need to define the relevant class.

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258. See *supra* note 239 and accompanying text.

259. See Judith L. Johnson, *Rescue the Americans with Disabilities Act from Restrictive Interpretations: Alcoholism as an Illustration*, 27 N. ILL. U. L. REV. 169, 182 (2007) (noting that while many of the ADA's provisions were taken from Title VII, "the discrimination provisions of the ADA are much more specific").

260. See Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2(b), 104 Stat. 327, 329 (codified at 42 U.S.C. § 12101(b) (2012)).



The original language of the ADA employed “a thicket of interlocking definitions and requirements” to help define the concept of a “qualified individual with a disability.”<sup>261</sup> However, several of these definitions provided limited guidance. Instead of defining the concept of “reasonable accommodation,” Congress instead simply included a relatively short list of illustrative accommodations.<sup>262</sup> Congress placed an “undue hardship” limit on an employer’s reasonable accommodation obligation but included only the most general of definitions for that term.<sup>263</sup> As discussed, the definition of “disability” was itself quite vague. For example, to meet this threshold, a plaintiff needed to establish the existence of an impairment that substantially limited a major life activity. However, the term “major life activity” was not defined in the Act.<sup>264</sup> This led to numerous disputes over the meaning of the word “major”;<sup>265</sup> whether certain activities (e.g., performing manual tasks) qualified as major life activities;<sup>266</sup> and whether bodily functions, such as eliminating waste from one’s blood, could qualify as major life activities.<sup>267</sup>

In this respect, the original version of the ADA and Title VII were fairly representative of older statutes in terms of their overall lack of specificity. After the enactment of the ADA, statutes have tended to become more detailed. As Professor Jarrod Shobe has observed, more modern statutes (which he defines as those drafted in the late 1990s and beyond) are more precise and detailed than their predecessors and are “replete with complex definitions and exceptions.”<sup>268</sup> As a result, there is simply less room for judicial interpretation.<sup>269</sup>

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261. Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 8 (1996).

262. *See* Americans with Disabilities Act of 1990 § 101(9), 104 Stat. at 331 (codified at 42 U.S.C. § 12111(9)).

263. *Id.* § 101(10), 104 Stat. at 331 (codified at 42 U.S.C. § 12111(10)).

264. *Id.* § 101, 104 Stat. at 330–31.

265. *See* *Toyota Motor Mfg., Inc. v. Williams*, 534 U.S. 184, 197 (2002) (concluding that the phrase “major life activities” “refers to those activities that are of central importance to daily life”); *Bragdon v. Abbott*, 524 U.S. 624, 659–60 (1998) (Rehnquist, C.J., dissenting) (questioning whether the word “major” in the definition indicates “comparative importance” or “greater in quantity, number, or extent”).

266. *See* *Toyota Motor Mfg.*, 534 U.S. at 196–97 (concluding that to fit within the definition, “the manual tasks in question must be central to daily life”).

267. *See* Long, *supra* note 155, at 222–23 (discussing this issue).

268. Shobe, *supra* note 204, at 813.

269. *Id.* at 853.

The ADAAA is representative of these types of more modern statutes.<sup>270</sup> The original version of the ADA included a Findings and Purposes section that described the types of discrimination individuals with disabilities had faced and the need for action.<sup>271</sup> But when Congress amended the ADA, it added detailed findings and purposes that describe Congress's objections to the courts' interpretation of the original Act.<sup>272</sup> For example, over the course of several paragraphs, the Findings and Purposes section of the ADAAA explicitly rejects the reasoning and legal standards that emerged from Supreme Court decisions and explains in greater details the underlying purposes of the Act.<sup>273</sup> Courts now routinely cite to this language as they consider ADA claims that would once have probably floundered on the question of whether a plaintiff had a disability.<sup>274</sup> The ADAAA also added considerable detail to the definition of disability, including rules of construction regarding some of the more problematic and controversial definitional issues that had arisen.<sup>275</sup> In addition, the amendments add a fairly substantial illustrative list of major life activities and clarify that the term "major life activity" covers major bodily functions.<sup>276</sup>

As a result of these changes, ADA plaintiffs have enjoyed much greater success on the threshold question of whether a disability exists.<sup>277</sup> The ADAAA has significantly limited the need for judicial interpretation of the terms in the definition of disability and it has made application of those

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270. See Barry, *supra* note 173, at 20 (explaining that the guiding principle of the ADAAA "was to leave nothing important to legislative history—get it all in the text, and use legislative history as a safety net and a blueprint for agencies to follow in promulgating regulations"). Professor Barry explains, "[t]he ADA is a micromanager statute; courts should not be botching the disability analysis by failing to consider rules of construction clearly enumerated in the statute's text." *Id.* at 33.

271. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2, 104 Stat. 327, 328–29.

272. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553, 3553–34 (codified at 42 U.S.C. § 12101 (2012)).

273. *Id.*

274. See, e.g., *Ramdeen v. Trihop 69th St., LLC*, No. 16-1361, 2017 WL 930431, at \*3 (E.D. Pa. Mar. 9, 2017) (explaining why pre-ADAAA decision calling for strict interpretation of terms within the definition of disability was no longer relevant); *Gard v. Dooley*, No. 4:41-CV-04023-LLP, 2017 WL 782279, at \*5 (D.S.D. Feb. 28, 2017) (explaining that pre-ADAAA caselaw required that mitigating measures be taken into account when determining whether an impairment substantially limits a major life activity).

275. See ADA Amendments Act of 2008 § 4, 122 Stat. 3553, 3555–57 (amending 42 U.S.C. § 12102). For example, the ADAAA contains a section explaining how courts should approach the question of whether to take into account the ameliorative effects of mitigating measures such as medication or devices when assessing whether an individual is substantially limited in a major life activity. *Id.*

276. *Id.*

277. See *supra* note 160 and accompanying text.

terms much simpler. In contrast, Congress chose not to provide greater clarity to the concepts of reasonable accommodation, essential functions, and undue burden.<sup>278</sup> As a result, courts are left to deal with difficult interpretive issues that directly implicate employer discretion in meaningful ways. Not surprisingly, ADA plaintiffs continue to face significant difficulty on these issues even after the passage of the ADAAA.<sup>279</sup>

### B. *Retaliation*

The history of the ADA provides a model for those interested in protecting employees from retaliation. Creative interpretive arguments and calls for courts to pay attention to the underlying purposes of the statutory language failed miserably in the case of the ADA and are increasingly failing in the case anti-retaliation provisions. In light of the tendency of courts to interpret and apply the language of anti-retaliation provisions in ways that preserve employer discretion with respect to the minutiae of the workplace, anti-retaliation advocates need to seek a legislative fix. The ADA Amendments Act provides a useful example, both positive and negative.

The ADAAA serves as a positive example in terms of the greater clarity and guidance it provides to courts. Congress could do something similar with respect to retaliation law. First, Congress could include an updated findings and purposes section that makes explicit that one of the primary purposes of anti-retaliation provisions is to prevent employer interference with unfettered access to a statute's remedial mechanisms.<sup>280</sup> The section could also briefly summarize some of the realities associated with workplace retaliation, such as the reluctance many employees have to report concerns over unlawful discrimination, how strongly fears over retaliation tend to dissuade such reporting, and the financial and emotional impact some employees have faced after having been retaliated against. Finally, like the ADAAA, this new section could identify specific congressional objections to previous federal decisions, such as holding employees to an unrealistic standard in terms of the reasonableness of their beliefs regarding whether employer conduct was unlawful.<sup>281</sup>

In addition, the amendments could add clarity to each portion of the plaintiff's prima facie case. In defining protected conduct under the

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278. See Long, *supra* note 155 and accompanying text.

279. See *supra* notes 164–72 and accompanying text.

280. Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 68 (2006).

281. See *supra* note 273 and accompanying text.

opposition clause, the amendments could incorporate *Breedon*'s reasonable belief but clarify, as the ADAAA did with respect to the definition of disability,<sup>282</sup> that this standard should be construed in favor of broad coverage. The amendments could incorporate the likely-to-dissuade-a-reasonable-employee standard from *Burlington Northern* in defining what types of retaliation are actionable. And much in the same way the ADAAA clarified the "major life activities" concept, the amendments could also provide an illustrative list of employer actions that might well dissuade a reasonable employee from opposing unlawful conduct and that courts sometimes rule as a matter of law do not rise to this level, including threatened termination or negative evaluations.<sup>283</sup> Finally, much in the same way the ADAAA expressly rejected some of the Supreme Court's specific holdings regarding the ADA's definition of disability,<sup>284</sup> the amendments could explicitly reject the Supreme Court's holding in *Nassar* regarding the but-for causation standard and adopt something more akin to a motivating factor standard.<sup>285</sup>

The ADAAA also provides an example of the dangers of a piecemeal approach to statutory amendment. Ideally, Congress would undertake a comprehensive reform of all of discrimination law, including retaliation law.<sup>286</sup> Failing that, Congress would enact a measure adopting a uniform retaliation standard for all federal workplace statutes to replace the current piecemeal approach, which often results in different language and different standards for seemingly no good reason.<sup>287</sup> Failing *that*, Congress could at least amend the dominant statutes in the field—Title VII, the ADA, and the ADEA—to include the suggested revisions.

But unless the political realities mandate doing so, Congress should avoid the piecemeal approach it took with respect to the ADAAA. The amendments took aim at specific federal court decisions regarding the definition of disability but left untouched the portions of the statute covering reasonable accommodations. Not surprisingly, courts have interpreted those portions in a manner that limits their reach.<sup>288</sup> It would perhaps be tempting for Congress to simply overrule *Nassar*, the most

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282. See ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555 (amending 42 U.S.C. § 12102).

283. See *supra* note 94 and accompanying text.

284. See *supra* note 273 and accompanying text.

285. *Nassar v. Univ. of Tex. Sw. Med. Ctr.*, 674 F.3d 448, 454 (5th Cir. 2012) (recognizing this standard), *rev'd*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 2517 (2013).

286. William R. Corbett, *Calling on Congress: Take a Page from Parliament's Playbook and Fix Employment Discrimination Law*, 66 VAND. L. REV. EN BANC 135, 136 (2013) (calling on Congress to undertake a comprehensive reform of employment discrimination law).

287. See Long, *supra* note 48, at 569–76 (calling for such a standard).

288. See *supra* notes 164–72 and accompanying text.

recent and high profile judicial limitation on the reach of anti-retaliation law. But this sort of tinkering around the edges fails to account for the likelihood that if courts are required to apply a more lenient causation standard, they are likely to continue to interpret and apply the rest of the statute in a manner that limits its impact on employer discretion.

## CONCLUSION

The judicial fears associated with serving in the role of “super-personnel department” are especially strong in the case of retaliation cases. While acts of employer retaliation sometimes trigger an almost intuitive sense of injustice, the concerns over second-guessing the types of managerial decisions that make up the average workday have greatly influenced judicial decisions in the retaliation area. These same concerns originally prompted a judicial backlash that thwarted the reach of the ADA to the point that legislative reform was the only solution. Anti-retaliation law is gradually heading in this same direction. Given the similarities in terms of the development of the law, employee rights advocates should take a page from the history of disability law and seek broad legislative reform.