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TAKING MATTERS INTO THEIR OWN HANDS: RETALIATORY ACTIONS BY COWORKERS AND THE FIFTH CIRCUIT’S NARROW STANDARD FOR EMPLOYER LIABILITY

Elizabeth A. Cramer*

I. INTRODUCTION

Bullying has become an increasingly popular social issue in recent years. The public typically focuses on bullying between adolescents in schools, but what happens when bullies become adults and bullying occurs in the workplace? Workplace harassment, and the retaliation that may stem from reporting improper behavior, comes in frightening forms. Employees such as Cherri Hill, who report discrimination to their employers internally, often witness the devastating ramifications of their actions. In Hill’s case, her car was set on fire just a few weeks after reporting claims of sexual harassment to her employer.1 Left with few options, Hill and three of her coworkers who experienced the same harassment eventually brought suit against their employer, Anheuser-Busch, for claims of sex discrimination and coworker retaliation.2

The U.S. Court of Appeals for the Sixth Circuit reversed the district court’s grant of Anheuser-Busch’s motion for summary judgment on Hill’s sexual discrimination and retaliation claims.3 The likelihood of success for Hill’s retaliation claim could have been greatly diminished if her case was tried in another jurisdiction. The Fifth Circuit, for example, imposes a much higher burden on plaintiffs in coworker retaliation claims than the Sixth Circuit. This high standard was pronounced in the Fifth Circuit’s recent decision, Hernandez v. Yellow Transportation, Inc.4 This Casenote addresses how the Hernandez decision departs from Supreme Court precedent, and other circuit courts, and makes it more difficult for employees to find protection under Title VII of the Civil Rights Act of 1964.5

* I would like to thank Professor Sandra F. Sperino and Professor Ann Hubbard for their invaluable guidance on my Casenote. I would also like to thank my loved ones for their unwavering support throughout my entire educational career.

2. Id. at 331. The case was removed to the United States District Court for the Southern District of Ohio based on diversity jurisdiction. Id.
3. Id. at 349. The remaining plaintiffs, Hawkins, Cunningham, and Jackson were somewhat less successful. The court affirmed the grant of summary judgment in favor of Anheuser-Busch on Hawkins’s sexual harassment claim and Jackson’s coworker retaliation claim. Id. at 344, 349. The court reversed the grant of summary judgment in favor of the employer for Cunningham’s sexual harassment claim. Id. at 342.
Part II of this Casenote provides background information on Title VII § 704(a), known as the "antiretaliation" provision. Part II also introduces the various standards used by U.S. Circuit Courts of Appeals in determining employer liability for coworker retaliation. Part III outlines the Fifth Circuit decision of Hernandez v. Yellow Transportation, Inc. Part IV discusses why the Fifth Circuit's coworker retaliation standard and resulting holding in Hernandez conflicts with precedent established by the Supreme Court, and how legal and public policy reasoning undermines the Fifth Circuit's standard and holding. Part IV also advocates for the use of a broad negligence standard for coworker retaliation as applied by the majority of federal appellate courts. The Casenote will conclude that only a negligence standard can successfully deter and remedy coworker retaliation.

II. BACKGROUND

A. Introduction to § 704(a) of Title VII

Title VII of the Civil Rights Act of 1964 was enacted "to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment ...." It protects individuals on the basis of race, color, religion, sex, and national origin. The antiretaliation provision of Title VII is codified in § 704(a). A primary purpose of § 704(a) is to grant employees "unfettered access to statutory remedial mechanisms." In addition, the provision is meant to prevent employers from inhibiting employees' efforts to either secure or advance the enforcement of Title VII's protections.

9. The section states, "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a).
through the use of retaliation. 11 Thus, § 704(a) "prevents harm to individuals based on what they do, i.e., their conduct." 12

Section 704(a) advances these objectives by offering two types of enforceable rights to job applicants, current employees, and former employees. 13 First, § 704(a) protects those who oppose employer practices that are deemed unlawful under Title VII. 14 Opposition to unlawful employer practices includes activities such as refusal to perform a supervisor's order to engage in discriminatory conduct. 15 Second, it protects those who participate in Title VII proceedings. 16 Participation includes activities such as making a charge of employers' violations or assisting in an investigation of alleged discrimination. 17 These dual protections are often referred to as the "opposition" clause and the "participation" clause. 18

In order for individuals, or potential claimants, to bring claims under § 704(a) they must first file a charge with the U.S. Equal Employment Opportunity Commission (EEOC). 19 The EEOC is the federal administrative agency responsible for the enforcement of Title VII's provisions. 20 To enforce Title VII, the EEOC first serves a notice upon the charged party, and then begins to investigate the charge. 21 Upon the conclusion of the investigation, the EEOC decides whether reasonable cause exists to believe that the claims within the charge are true. 22 If the agency determines reasonable cause exists to believe the claims, it then attempts to resolve the charge through settlement processes with the charged employer. 23 If the EEOC does not find reasonable cause to the claims, it dismisses the charge and notifies the

12. Id.
14. See Burlington N., 548 U.S. at 56.
16. See Burlington N., 548 U.S. at 56.
17. See id.
20. Id. § 2000e-5(a).
21. Id. § 2000e-5(b).
22. Id. When determining the reasonable cause inquiry, "the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section." Id. The EEOC must make its determination within the statutory time limits found in § 706(b)–(d). Id. § 2000e-5(a).
23. Id. § 2000e-5(b). If settlement attempts are unsuccessful, the EEOC decides whether to file a lawsuit against the employer. If the EEOC determines not to file a lawsuit itself, it will issue a Notice of Right to Sue to the claimant. Id. § 2000e-5(f)(1).
claimant by issuance of a "Notice of Right to Sue." This notice gives the claimant permission to file suit against the employer in court. Though receiving a notice means the EEOC did not find reasonable cause to the claims in the charge, these notices do not have any precedential value in future litigation.

Individuals who choose to file retaliation claims in federal court must be able to prove a prima facie case of retaliation. To prove a prima facie case, a plaintiff must show: (1) the employee was engaged in a protected activity, either opposition or participation; (2) the employer took a materially adverse employment action against the employee; and (3) a causal connection between the adverse employment action and protected activity. Federal courts were divided on what constituted an "adverse employment action" prior to the Supreme Court's Burlington Northern & Santa Fe Railway Co. v. White decision. Some federal circuits required the action to be an "ultimate employment decision." Others required actions that altered the "terms, conditions, or benefits" of employment. Still other courts required actions to "have been material to a reasonable employee," or "based on a retaliatory motive and [reasonably] likely to deter the charging party or others from engaging in protected activity."

The Supreme Court resolved the various interpretations of "adverse employment action" in Burlington Northern, and held that the scope of § 704(a) is not limited to discriminatory employment actions that affect the terms or conditions of employment. Instead, employers are liable for materially adverse employment actions that would discourage a reasonable employee from filing or supporting a discrimination claim. 

24. Id. § 2000e-5(f)(1). The notice is also often called a "right to sue" letter.
25. Id. Individuals have ninety days to file suit. Id.
26. Holcomb v. Powell, 433 F.3d 889, 901-02 (D.D.C. 2006). In University of Texas Southwestern Medical Center v. Nassar, the U.S. Supreme Court held that necessary proof of causation for a Title VII retaliation claim is "but-for" causation (i.e. employer's desire to retaliate was the but-for cause of the materially adverse employment action). 133 S.Ct. 2517, 2533 (2013).
28. Id. at 60 (brackets omitted). Some federal courts, including the Court of Appeals for the Fifth and Eighth Circuits, interpret ultimate employment actions to include "hiring, granting leave, discharging, promoting, and compensating." Id. (quoting Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997)).
29. Id. at 60 (quoting Von Gunten v. Maryland, 243 F.3d 858, 866 (4th Cir. 2001)).
30. Id. (quoting Washington v. Ill. Dept. of Revenue, 420 F.3d 658, 662 (7th Cir. 2005)). Both the Seventh Circuit and District of Columbia Circuit apply this standard.
31. Id. at 61 (quoting Ray v. Henderson, 217 F.3d 1234, 1242-43 (9th Cir. 2000)). The EEOC has also noted this standard in its guidance materials.
32. Id. at 63.
33. Id. at 68.
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The Court supported its broad interpretation of § 704(a) with two reasons: the plain text of the statute and the need to give the provision actual power. First, the Court noted that § 704(a) lacks reference to “status as an employee” or “employment opportunities” in the way that § 703, Title VII’s antidiscrimination provision, incorporates the terms of “compensation, terms, conditions, or privileges of employment.” Second, the broad interpretation was necessary due to the realities that successful retaliation can occur by taking harmful actions outside of the workplace, or taking actions only indirectly related to employment. The Court noted examples of effective retaliation occurring outside the workplace, such as an employer not following its own policy of investigating death threats against workers, and another employer who filed false criminal charges against an employee. Such findings, according to the Court, showed that § 704(a) would not be able to deter all effective forms of retaliation without a broad interpretation.

The Supreme Court then supported its use of an objective standard because retaliatory actions could be “immaterial in some situations” yet “material in others.” The objective standard was also deemed necessary because it could be judicially administered and also avoids the potential uncertainties and unfair discrepancies that would arise if a subjective standard was applied by the federal courts.

B. The Federal Circuit Courts’ Opposing Standards for Coworker Retaliation

Federal courts have continued to apply varying standards in the context of employer liability for coworker retaliation despite the Supreme Court’s guidance in its Burlington Northern decision. The Fifth Circuit’s recent decision in Hernandez v. Yellow Transportation,
Inc. has widened the differences in the circuit courts’ standards. The following Subpart will outline the standards applied by the Court of Appeals for the First, Third, Fifth, Sixth, Seventh, and Tenth Circuits. These standards may be grouped by those requiring: (1) employers to have known or should have known of the coworkers’ retaliatory actions, the broadest standard; (2) employers to have actual knowledge of the coworkers’ retaliatory actions, the intermediate standard; or (3) the retaliation to be in furtherance of the employer’s business without any element of the employer’s knowledge, the narrowest standard.

The majority of federal appellate courts utilize the broadest standard, which is based on the employers’ negligence. The First, Second, Third, and Sixth Circuits have all applied this standard with minor variants. The First Circuit requires that the employer knew, or should have known, about coworkers creating hostile work environments, but failed to stop such harassment. Coworkers may create a hostile work environment when workplace harassment is sufficiently severe or persuasive.

The Second Circuit also follows the broad standard, holding that employers are liable for coworker retaliation if the employer knew of the coworker’s actions and did not take any action in response, or failed to provide a reasonable avenue for the original complaint. Similarly, the Third Circuit finds employers liable for coworker retaliation when supervisors “knew or should have known about the [coworker] harassment, but failed to take prompt and adequate remedial action’ to stop the abuse.”

The Sixth Circuit applies a negligence standard as well, though it has elaborated on its requirements with a more detailed list of elements. The court has ruled that employers are liable for coworker retaliation when the conduct is so sufficiently severe that it would dissuade a reasonable employee from either making or supporting discrimination claims, the supervisors or management have either actual or constructive knowledge of the retaliatory behavior, and the

42. Federal courts also utilize negligence standards for coworker harassment falling within the scope of Title VII’s § 703(a) antidiscrimination provision. E.g., Noviello v. City of Boston, 398 F.3d 76, 95 (1st Cir. 2005).
43. Id. at 94.
44. Id. at 89.
47. Hawkins v. Anheuser-Busch, Inc., 517 F.3d 321, 347 (6th Cir. 2007). The Sixth Circuit uses the language of “constructive knowledge” without further elaboration and appears to use constructive
supervisors or management condoned, encouraged, or tolerated the retaliation, or responded to the plaintiff’s complaints in an inadequate manner that manifests either indifference or unreasonableness.48

The Seventh and Tenth Circuits employ the intermediate standard, which requires employers to have actual knowledge of coworkers’ retaliatory actions. The Seventh Circuit imposes employer liability if the employers were aware of the retaliation and did not correct the conduct.49 Similarly, the Tenth Circuit holds employers liable “where its supervisory or management personnel either orchestrate[d] the harassment or kn[e]w about the harassment and acquiesce[d] in it in such a manner as to condone and encourage the co-workers’ actions.”50

The Fifth Circuit uses the narrowest standard applied by any of the circuit courts. The court requires coworker retaliatory actions to be committed “in furtherance of the employer’s business” in order for plaintiffs to meet the materially adverse employment action requirement of a prima facie case of retaliation, which may then later be rebutted by the employer.51 Actions are only made in furtherance of the business when a direct, and not simply indirect, relationship exists between the retaliatory actions and the business.52 The Fifth Circuit recently applied this narrow standard in Hernandez v. Yellow Transportation, Inc.53

III. HERNANDEZ v. YELLOW TRANSPORTATION, INC.

The following Part first discusses the United States District Court for the Northern District of Texas’s decision in Arrieta v. Yellow Transportation, Inc. The Part then discusses the Fifth Circuit’s decision on appeal.

A. The District Court’s Decision

Before reaching the Fifth Circuit, the Hernandez plaintiffs brought their claims before the United States District Court for the Northern

knowledge as knowledge that parties should have known. This note takes no position on whether constructive knowledge and knowledge the employer should have known are distinguished.

48. Id.
49. Knox v. State of Ind., 93 F.3d 1327, 1334 (7th Cir. 1996).
50. Gunnell v. Utah Valley State Coll., 152 F. 3d 1253, 1265 (10th Cir. 1998). The court further elaborated that management cannot orchestrate, condone, or encourage the retaliatory actions unless management has actual knowledge. Id.
52. Id.
District of Texas in *Arrieta v. Yellow Transportation, Inc.* The *Arrieta* lawsuit involved seven current and former employees at Yellow Transportation, Inc.’s (YTI) Dallas Terminal. These employees brought claims of Title VII violations including racial discrimination, hostile work environment, and retaliation for opposition to discriminatory practices.

The employees alleged numerous actions taken by coworkers against minority employees. The allegations included: a hangman’s noose being hung on a dock where the majority of minority employees worked, racial slurs being spoken and appearing on bathroom walls, firecrackers being thrown at the minority employees, and the tires of minority employees’ personal vehicles being slashed while on company property.

The district court granted summary judgment in favor of YTI on each of the plaintiffs’ retaliation claims. The court applied a modified *McDonnell-Douglas* framework, which requires plaintiffs to first prove a prima facie case of retaliation. Subsequently, the burden of production shifts to the employer to articulate a nondiscriminatory reason for the alleged retaliation. Then, if the employer is able to meet its burden of production, the burden again shifts back to plaintiffs to show evidence that would allow a reasonable jury to conclude the adverse employment action would not have transpired but for the plaintiffs’ protected activity.

When considering each of the retaliation claims within the modified *McDonnell-Douglas* framework, the district court found that all of the plaintiffs met the first element to prove a prima facie case of retaliation by participating in the protected activity of picketing outside of an YTI


55. *Arrieta*, 2008 WL 5220569, at *1; *Hernandez*, 670 F.3d at 649. Each of the plaintiffs were also members of the International Brotherhood of Teamsters and thus, the Yellow Transp., Inc. and Teamster’s collective bargaining agreement governed the terms and conditions of the plaintiffs’ employment. *Id.*


58. *Id.* at 9.

59. *Id.* at 16.

60. *Id.* at 29. The plaintiffs also alleged supervisors granted white employees more favorable assignments, break times, and lunch times than minority employees. *Id.* at 60.


64. *Id.* at *17.
Dallas terminal. However, the plaintiffs’ claims ultimately failed when the district court held that the alleged materially adverse employment action was not made in furtherance of the employer’s business.

B. The Court of Appeals for the Fifth Circuit’s Decision

In response to the district court’s ruling, the plaintiffs first moved for reconsideration by the district court, but the motion was denied. Then, three of the plaintiffs, Rubin Hernandez, John Ketterer, and Abram Trevino, appealed the district court’s decision; however, only Ketterer’s appeal was based on coworker retaliation.

John Ketterer, a Caucasian, was a dockworker for YTI at the time of the suit. As a basis for his retaliation claim, Ketterer asserted participation in a protected activity when he picketed the YTI’s Dallas terminal. He then alleged coworkers harassed him due to his picketing. The coworker harassment included physical intimidation, vandalism of his property, verbal threats, name calling, and observing violence and illegal behavior. Ketterer’s appeal of his retaliation claim focused on first, whether he suffered adverse employment action, and second, whether the action would have been taken but for his participation in a protected activity.

The Fifth Circuit elaborated on the requirements of a prima facie case and held that the determination of whether an adverse employment action has occurred is dependent on the identity of the final decision maker. Actions of ordinary employees, due to their lack of decision-making power, could therefore not be imputable to employers unless the employee actions were conducted “in the

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65. Id. at *18.
66. Id. at *1. The district court also concluded that some of the plaintiffs could not meet the third requirement of showing a causal link between the protected activity and the adverse employment action. Id. at *19–22.
69. Hernandez, 670 F.3d at 650.
70. Id. at 657.
71. Id. at 657–58. Ketterer also alleged adverse material action due to supervisors assigning him an increased and unfavorable workload and reinstating him without backpay. Id.
72. Id. at 657.
73. Id.
74. Id.

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furtherance of the employer’s business.”75 The court continued to hold that only a showing of a direct connection between the employer’s business and the alleged conduct would suffice.76

When applying this coworker retaliation standard to Ketterer’s claims, the court found he was unable to meet the adverse employment action requirement. First, the court found that any alleged harassment was made by ordinary employees and was not in furtherance of YTI’s business.77 Next, Ketterer could not prove a causal link between his protected activity and an increase in less favorable work assignments.78 Finally, reinstatement without pay could not prove retaliation because YTI offered a legitimate, nondiscriminatory reason for its decision, and Ketterer could not rebut this reason by offering but for causation between his protected activity and the employment decision.79 The Fifth Circuit therefore affirmed the district court’s grant of summary judgment on Ketterer’s retaliation claim.80

IV. THE WEAKNESSES OF THE “IN FURTHERANCE” STANDARD

The Fifth Circuit standard for coworker retaliation in its Hernandez decision is problematic for a variety of reasons. First, the “in furtherance of the business” standard departs from Supreme Court precedent. Second, the standard dismisses other legal justifications that support the application of a broad negligence standard for coworker retaliation. Third, the Fifth Circuit’s standard ignores public policy concerns that expose its weaknesses. The following Part will elaborate on these significant issues.

A. The Fifth Circuit’s Departure from Supreme Court Precedent

The most troublesome aspect of the Fifth Circuit’s standard is that it fails to align with the Supreme Court’s holdings. As previously mentioned within Part II of the Casenote, the Supreme Court has held that “the scope of [§ 704(a) of Title VII] extends beyond workplace-

75. Id.
76. Id.
77. Id. Ketterer urged the court to abandon its “in furtherance of the employer’s business” framework and replace it with a standard that holds employers liable for their inaction to respond to coworker retaliation when the employers have actual knowledge of the retaliatory actions. Id. The court responded that, “[t]his Court adheres strictly to the maxim that one panel of the court cannot overturn another, even if it disagrees with the prior panel’s holding.” Id. at 658.
78. Id.
79. Id.
80. Id.
related or employment-related retaliatory acts and harm.\textsuperscript{81} The Court has also held that actionable retaliation is not limited to "ultimate employment decisions."\textsuperscript{82} These holdings have been clearly justified and expanded upon by the Court.

The Court has reasoned that § 704(a) does not include any language referring to either employee status or opportunities.\textsuperscript{83} In addition, it has acknowledged that because retaliatory actions are diverse in form, § 704(a) must be broad enough to provide a deterrent effect.\textsuperscript{84} The Court has also emphasized that the two main objectives of § 704(a) are to protect those who have been retaliated against by giving them access to remedial measures and to avoid future harm.\textsuperscript{85} Out of these purposes, the Court has held the primary objective of Title VII’s provisions is to avoid harm.\textsuperscript{86} By limiting employer liability for coworker retaliation to only those times when the retaliation is employment-related and in furtherance of the business, the Fifth Circuit contradicts the Court’s broad interpretation of retaliation claims under Title VII.

\textbf{B. Legal Justifications for the Application of a Negligence Standard}

Additional legal rationale supports the application of a negligence standard for coworker retaliation, thus undermining the Fifth Circuit’s narrow standard. The use of a negligence standard in other Title VII causes of action show the feasibility of its application in coworker retaliation cases. Furthermore, the Fifth Circuit’s narrow standard fails to recognize the reality that coworker retaliation can be a materially adverse action, which causes employees to reconsider their decision to

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\caption{Diagram of legal justifications for negligence standard.}
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\begin{tabular}{|c|c|}
\hline
Reason & Negligence Standard Application \\
\hline
Fairness & Suitability for coworker retaliation cases \\
\hline
Feasibility & Similar application in other Title VII causes of action \\
\hline
Recognition & Adequate to recognize materially adverse action \\
\hline
\end{tabular}
\caption{Comparison of negligence and Fifth Circuit standards.}
\end{table}

\begin{enumerate}
\item \textsuperscript{81} Burlington N. & Santa Fe R.R. Co. v. White, 548 U.S. 53, 67 (2006).
\item \textsuperscript{82} Id.
\item \textsuperscript{83} Id. at 62; 42 U.S.C. § 2000e-2(a). The entire section states, “it shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a).
\item \textsuperscript{84} Burlington N., 548 U.S. at 64.
\item \textsuperscript{85} “Although Title VII seeks ‘to make persons whole for injuries suffered on account of unlawful employment discrimination,’ its ‘primary objective,’ like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm.” Faragher v. City of Boca Raton, 524 U.S. 775, 805–06 (1998) (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 417–18 (1975)).
\item \textsuperscript{86} Id. Individuals may also fail to report unethical actions like discrimination in the workplace because they will be less likely to be promoted or receive letters of recommendation. Reasons may also include fear that a “reporting” reputation may extend outside of the particular employer internally. Kipling D. Williams, Ostracism: The Power of Silence 193 (2006).
\end{enumerate}
make or support a charge of discrimination against their employers.

1. A Broad Negligence Standard Is Used in Other Title VII Causes of Action

The Supreme Court has departed from the notion that employers are only liable for actions within the scope of employment, or actions made with some intent to aid the employer. Accordingly, many federal courts have applied a negligence standard to Title VII violations involving the actions of coworkers. The use of a negligence standard in these contexts shows that a broad negligence standard is a reasonable and effective way to adjudicate coworker retaliation claims.

Different types of harassment, especially sexual harassment, fall outside the scope of employment, but courts still impose liability on negligent employers in these types of claims. As an example, courts have used a negligence standard for employer liability regarding coworker harassment. The Seventh Circuit has held that employers may be liable if they knew, or should have known, about the harassing acts, but failed to take adequate remedial measures. Even the Fifth Circuit looks to whether the employer knew, or should have known, of the coworker harassment, yet failed to take prompt corrective action.


89. In Ellerth, the Supreme Court held, "The general rule is that sexual harassment by a supervisor is not conduct within the scope of employment." It continued to hold, "in limited circumstances, agency principles impose liability on employers even where employees commit torts outside the scope of employment. The principles are set forth in the much-cited § 219(2) of the Restatement." Ellerth, 524 U.S. at 757-58. The Court recently acknowledged that employers can be held liable for harassment occurring outside of the scope of employment because § 219(2)(d) provides an exception that servants (or employees) can be "aided in accomplishing the tort by the existence of the agency relation." Vance v. Ball State Univ., 133 S. Ct. 2434 (2013).

90. McKenzie v. Ill. Dept. of Transp., 92 F.3d 473, 480 (7th Cir. 1996). See also Vance, 133 S.Ct. at 2451 ("Contrary to the dissent's suggestions, this approach will not leave employees unprotected against harassment by co-workers who possess the authority to inflict psychological injury by assigning unpleasant tasks or by altering the work environment in objectionable ways. In such cases, the victims will be able to prevail simply by showing that the employer was negligent in permitting this harassment to occur, and the jury should be instructed that the nature and degree of authority wielded by the harasser is an important factor to be considered in determining whether the employer was negligent.") (internal references omitted).

91. This "negligence" standard is one of the four elements used to determine whether coworker harassment constitutes a hostile work environment. The other factors required include: (1) the employee is member of a protected group; (2) the employee was subjected to unwanted harassment; (3) the harassment was based on the protected trait; (4) the harassment affected a term, condition, or privilege of employment. Harvill v. Westward Commc'n's, L.L.C., 433 F.3d 428, 434 (5th Cir. 2005).
The similarities between harassment and retaliation support the application of negligence standards for both coworker harassment and coworker retaliation.

Retaliation and harassment are closely intertwined in an obvious way. Retaliatory actions often include diverse types of harassment when the harassment occurs after assertions of Title VII protection have been made. In addition, concerns of potential retaliation also affect the way individuals react to harassment. The EEOC’s interpretation of retaliatory actions further supports a claim of relatedness between retaliation and harassment. The EEOC website states that it is “illegal to fire, demote, harass, or otherwise ‘retaliate’ against people (applicants or employees)” because the employees opposed the employer’s actions or participated in Title VII proceedings. This interrelatedness leads to a reasonable conclusion that both coworker harassment and coworker retaliation should be held to a similar standard in which employers are liable for their negligence.

2. The Fifth Circuit’s Narrow Standard is Contrary to the Concept of “Materially Adverse Action”

The Fifth Circuit’s narrow standard infers coworker retaliation could never be materially adverse, and thus never dissuade reasonable employees from making or supporting a charge of discrimination. This conclusion assumes that only supervisor retaliation could dissuade reasonable employees from opposing unlawful employer practices or participating in Title VII proceedings. Such logic is erroneous. As stated by Supreme Court Justice Anthony Kennedy, “[a] co-worker can break a co-worker’s arm as easily as a supervisor, and anyone who has regular contact with an employee can inflict psychological injuries by his or her offensive conduct.”

Though coworkers cannot control employment conditions such as the assignment of tasks, coworkers can dramatically alter the ability of other employees to perform their duties efficiently. Case law reveals that employees have been faced with coworkers hiding their time cards, slashing their vehicles’ tires, or even setting their vehicles on fire. These types of retaliatory actions would severely affect employees’

94. Ellerth, 524 U.S. at 762 (citing Gary v. Long, 59 F.3d 1391, 1397 (D.C. Cir. 1995); Henson v. Dundee, 682 F.2d 897, 910 (11th Cir. 1982); Barnes v. Costle, 561 F.2d 983, 996 (D.C. Cir. 1977) (MacKinnon, J., concurring)).
ability to perform their work. These retaliatory actions would also likely
dissuade reasonable employees from making or supporting a charge of
discrimination due to fear that further retaliation would occur. These
realities show the vast problems with the "in furtherance" standard
applied by the Fifth Circuit in its Hernandez decision.

3. Coworker Retaliation Can Be Related to Employers' Businesses

One argument against the application of a negligence standard for
coworker retaliation is that such retaliatory acts are too unrelated to the
employer's business to impose employer liability. The Fifth Circuit
has held that coworker recommendations to discharge a peer are outside
the scope of "in furtherance of the business" because coworkers have no
control over their peer's employment status. If coworker
recommendations regarding management and the future workforce of
the business are outside the scope of the "in furtherance standard," one
has difficulty imagining what actions would satisfy this standard.
Perhaps this is why neither the Hernandez decision, nor the Fifth
Circuit's previous decisions cited in the opinion, reveal any examples
of when employers could be liable for coworker retaliation.

Retaliatory acts by coworkers can arguably be closely related to the
employer's business. As stated by the Supreme Court in dicta, "in a
sense, most workplace tortfeasors, whether supervisors or co-workers,
are aided in accomplishing their tortious objective by the employment
relation: Proximity and regular contact afford a captive pool of potential
victims." Moreover, employees could commit retaliatory actions
against coworkers for the purpose of aiding the employer, especially
management. Employees may believe retaliating against coworkers will
stifle employees' willingness to make complaints against the employer
and to demand remedial action that would dramatically alter workplace
customs. In addition, the retaliating employees may believe their
actions will benefit other low-level employees by giving the employees
more freedom in their workplace conduct. As a result of these potential
beliefs, coworkers taking matters into their own hands could allow the
employer to more easily avoid addressing and remedying workplace
complaints. While not all coworker retaliation is committed to benefit
the employer, the possibility of it shows that a negligence standard is a
fair method to determine employer liability.

96. Id.
97. E.g., id.
98. Ellerth, 524 U.S. at 744. The Court continued to say that the aided in the employment
relation principle does require something in addition to the relation itself. Id.
C. Public Policy Justifications for the Application of a Negligence Standard

In addition to legal reasoning, prominent public policy reasons advocate for broad employer liability in the context of coworker retaliation. These public policy reasons include the potential chilling effect stemming from the Fifth Circuit’s standard, the difficulty in determining supervisors from coworkers, the rising prevalence of workplace retaliation, the standard’s discouragement of proper employer supervision, and the benefits employers receive by proactively responding to coworker retaliation.

1. The Fifth Circuit’s Standard Has a Potentially Great Chilling Effect

Both the federal courts and the EEOC have been concerned with the chilling effect facing potential Title VII plaintiffs.\(^99\) The Supreme Court in particular has reiterated that the main reason why discrimination or bias goes unreported is due to fear of retaliation.\(^100\) In fact, the Court previously stated, “Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses.”\(^101\)

Despite these realizations, cases such as Hernandez demonstrate that employees still have reason to fear retaliation from supervisors as well as coworkers. Even if employees can overcome this fear, the social and economic costs of internal reporting, filing an EEOC charge, and bringing a lawsuit are extreme. Employees who file charges must endure months of discomfort at work and uncertainty regarding their future employment, all while wondering whether their complaints will, or can be, adequately remedied. If employees bring suit against their employer, then the employees must prepare to battle with employers who have more resources to litigate the suit. The obstacles facing such employees are even further exacerbated when considering the low likelihood of the employees receiving a judicially imposed remedy, especially in a jurisdiction that adopts a narrow standard such as the Fifth Circuit.\(^102\)

\(^99\) The EEOC also stated, “[i]f retaliation for such activities were permitted to go unremedied, it would have a chilling effect upon the willingness of individuals to speak out against employment discrimination or to participate in the EEOC’s administrative process or other employment discrimination proceedings.” EEOC Compliance Manual, supra note 18, at A.


\(^102\) Some of these social costs include being viewed as disloyal to the employer, or as an
2. Determining Supervisors from Coworkers Can Be Challenging

Applying a narrow standard for coworker retaliation is problematic because clear distinctions between coworkers and supervisors are not present in all workplaces. Title VII does not offer any guidance on this issue, as the statute is devoid of a definition for "supervisors." In response, up until very recently the federal courts have been left to use various definitions for supervisors in the scope of employment law.

The Seventh Circuit utilized a narrow definition, holding that supervisors are those who have the authority to directly affect the terms and conditions of an individual's employment. Such direct authority "primarily consists of the power to hire, fire, demote, promote, transfer, or discipline an employee." Actions such as overseeing aspects of another employee's performance are therefore too weak to establish a supervisory position under this standard.

In contrast, the Second Circuit adopted a much broader definition of supervisors. The court held that supervisors are those who possess "authority given by the employer to the employee [that] enabled or materially augmented the ability of the latter to create a hostile work environment" for the subordinate employee. The EEOC also followed this broad definition of supervisor, stating that employees serve as supervisors when "(a) the individual has authority to undertake or recommend tangible employment decisions affecting the employee; or (b) the individual has authority to direct the employee's daily work activities."

The Supreme Court recently resolved the circuit split regarding the definition of "supervisors" in Vance v. Ball State University, a 5–4 decision. The Court agreed with the Seventh Circuit's narrow...
definition and held that “for purposes of vicarious liability under Title VII” employees are supervisors “if [they are] empowered by the employer to take tangible employment actions against the victim, i.e., to effect a ‘significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.’” The Court supported its decisions with the Ellerth and Faragher holdings, which “presuppose[s] a clear distinction between supervisors and co-workers” by holding that only supervisors can cause direct economic harm. The Court stated the Ellerth/Faragher framework allows supervisory status to be “readily determined” and the Seventh Circuit’s understanding of this principle “can be applied without undue difficulty at both the summary judgment stage and at trial.” The Supreme Court then noted its belief that “the approach recommended by the EEOC Guidance...would make the determination of supervisor status depend on a highly case-specific evaluation of numerous factors.”

Justice Ruth Bader Ginsburg, writing for the dissenting Justices, advocated for courts to use the EEOC’s definition of supervisors, which allows supervisory status to be established by an employee’s power to direct another employee’s daily activities. Justice Ginsberg contrasted this approach with the majority’s, stating that the Court’s narrow definition of supervisors “diminishes the force of Faragher and Ellerth, ignores the conditions under which members of the work force labor, and disserves the objective of Title VII to prevent discrimination from infecting the Nation’s workplaces.”

Though the Court’s recently established definition of supervisors is meant to be “workable,” the lower courts may still have difficulty in determining whether employees are supervisors or coworkers. As Justice Ginsburg noted, ambiguity remains as to what constitutes “significantly different responsibilities” for job reassignments. In addition, the Court did not provide a definition for “significant change[s] in benefits,” thus leaving the lower courts to interpret its meaning. Finally, the Court does not provide guidance on how the

109. Id. at 2443.
110. Id.
111. Id. at 2443–44.
112. Id.
113. Justices Breyer, Sotomayor, and Kagan joined Justice Ginsburg in dissenting from the majority opinion. Id. at 2454.
114. Id. at 2455.
115. Id.
116. Id. at 2462.
117. Id. at 2444.
courts should consider situations in which employment action is taken based on information or recommendations from employees who do not have the authority to take tangible employment action, yet are the true cause behind the tangible employment action. The lower courts may find different answers to these unanswered issues, and thus employer liability may remain somewhat unpredictable even after Vance.

3. Workplace Retaliation Is Increasing

The Fifth Circuit’s narrow standard can also be undermined by the EEOC’s statistical findings and other studies regarding retaliation in the workplace. These findings reveal a prevalence of retaliation, including retaliation by coworkers, and its substantially harmful effects. EEOC statistics from 1997 to 2012 reveal that retaliation claims have reached their height in recent years. The EEOC received 14,814 more Title VII retaliation claims in 2012 than 1997. Title VII claims made by federal employees in 2011 alone show that “the basis most frequently alleged was reprisal/retaliation” and “the issue most frequently alleged was non-sexual harassment.” The EEOC reports these findings as a consistent trend for the past five fiscal years.

Other studies also expose the increasing trend of workplace retaliation. The Ethics Resources Center (ERC) has reported that physical harm against both employees’ person and property are on the rise. The ERC reports physical harm growing an alarming 27% in just two years. The ERC also published findings regarding retaliatory actions committed solely by coworkers. Employees reported retaliation in the form of the coworkers giving the cold shoulder, or ignoring the employees, at a rate of about 60%. In addition, reports of retaliation in the form of verbal abuse from coworkers rose 9% between 2009 and 2011.

Furthermore, a study by NAVEX Global, a global ethics and

119. The EEOC received 16,394 claims in 1997 and received 31,208 in 2012. Id.
121. Id.
123. Instances of physical harm were reported at 4% in 2009 and 31% in 2011. Id.
124. The statistics reveal this form of retaliation was reported at a rate of 60% in 2009 and 62% in 2011. Id.
125. Id.
compliance intelligence consultant, found that employees have increasingly categorized retaliation as harm that is specifically committed by coworkers. The company also found that employees often define retaliation in the form of negative comments made by coworkers. Similar reports by other groups have noted that social ostracism of whistleblowing employees is a more common retaliatory technique than adverse employment action.

These studies show retaliation has been an increasingly significant issue for employees. Even with statutory protections like Title VII, coworker retaliation has continued and even increased in the workplace. The growing number of retaliatory actions by coworkers lead to a reasonable conclusion that stronger remedial measures should be adopted, such as all federal courts applying a broad negligence standard for coworker retaliation to properly implement the purposes behind the applicable statutory protections.

4. A Narrow Standard Discourages Proper Employer Supervision

The Fifth Circuit’s coworker retaliation standard, and even the intermediate standard applied by other federal courts, may unintentionally discourage employers from being active supervisors. These standards incentivize employers to be ignorant of what occurs in their places of business. Before the implementation of these standards employers may have monitored the workplace to ensure employee safety and collegiality, while now employers may choose to be uninformed of workplace activities in attempts to avoid liability in a potential Title VII suit. A lack of appropriate supervision of workplace activities could lead to increased rates of physical violence between employees and increased damage to both employer and employee property.

5. Proactive Responses to Coworker Relationships Actually Benefits Employers

Those concerned with the potential increase of employer liability


127. Id. While the ERC and NAVEX Global studies did not compile their findings based on retaliation solely for Title VII claims, they do show coworkers can, and do, retaliate against their peers. The studies also reveal that retaliation by coworkers, not just supervisors, is significant to employees.

may fear that a negligence standard would impose a heavy burden against employers, without providing a substantial benefit to employees. Opponents may reference potential harms such as the inefficient use of the employer’s resources if management increased monitoring of employees’ workplace conduct. These concerns can be dismissed under the premise that, in actuality, employers who are more cognizant of coworker retaliation and take an affirmative stance against such retaliation can personally benefit. The harmful and far-reaching effects of coworker retaliation support the view that employers should make coworker retaliation prevention and correction a part of their business practices.

Generally, coworker retaliation may decrease the overall success of a company.\(^\text{129}\) Retaliatory actions can stifle even substantial claims of harassment and improper behavior. In turn, this can diminish workplace morale and result in lower productivity and disinterest from employees.\(^\text{130}\) Coworker retaliation may also hinder the ability of employees to effectively and efficiently perform their assigned tasks due to interdependency of the particular assignment.\(^\text{131}\)

Coworker retaliation can even have a harmful effect on parties who are not directly involved in the retaliatory acts. For example, employees who experience retaliation have reported having less confidence in company executives and having less trust that executives are honest about the well-being of the company.\(^\text{132}\) Retaliation has even caused victimized employees to report feeling less optimistic about the company’s financial future.\(^\text{133}\) Therefore, the entire hierarchy of the employer’s business can be viewed negatively even after low-level coworker retaliation.

Some may argue that employees who experience coworker retaliation will inevitably quit their position and any issues related to coworker retaliation will end upon the victimized employees’ departure. However, employers may still confront extensive internal and external problems stemming from the coworker retaliation even in these situations. Departing employees can impact businesses

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129. "The quality and effectiveness of coworker relationships has important implications for the quality and effectiveness of employees' experiences and the organization as a whole.” PATRICIA M. SIAS, ORGANIZING RELATIONSHIPS: TRADITIONAL AND EMERGING PERSPECTIVES ON WORKPLACE RELATIONSHIPS 57 (2009).

130. KIPLING, supra note 86, at 198.

131. Id.

132. Retaliation: The Cost to Your Company and Its Employees, ETHICS RESOURCE CENTER, 2010, at 12. This study surveyed retaliation generally, not solely in the scope of Title VII or coworker retaliation.

133. Id. These types of beliefs can cause the employees to be less productive, less interested in their work, and cause current employees to search for alternative employment.
internally, as employers must rehire replacement employees. Rehiring requires the employer to use its resources to recruit qualified individuals. Then, employers must devote their resources to interview applicants and train any new hires. Alternatively, if employers choose not to hire replacement employees and consumer demand remains constant, employers must somehow adjust their business plans to maintain necessary production levels. In addition, departing employees can negatively affect employers externally by discussing instances of coworker retaliation and inaction by the employers with third parties, thus damaging the employers’ reputations. A lower reputation in the market can decrease the employers’ applicant pools and may even harm relationships with consumers.

V. CONCLUSION

Current responses to coworker relation have failed to properly remedy and deter coworkers from taking matters into their own hands once employees assert Title VII protections. Both employers and the government can make changes to prevent coworker retaliation and to adequately address retaliation when it does occur. In regards to employers, they should train all levels of employees on the basic elements of applicable workplace laws and regulations so that all employees can learn the vast implications of their behavior. Employers should also increase employee monitoring when necessary and feasible. Next, employers must provide adequate avenues for employees who report complaints, thus ensuring that employees feel comfortable bringing such issues to light. Finally, employers must also be cognizant of the most effective way to remedy complaints in their particular business, so that these remedies can be applied consistently and swiftly.

In regards to the government, the proper approach to coworker retaliation is twofold, involving both the administrative and judicial branches. First, administrative agencies that address employment-related issues should strongly advise, and incentivize, employers to adopt business practices that encourage employees to report workplace misconduct. Second, all federal courts should adopt a broad negligence standard to determine when employers are liable for retaliatory actions by coworkers.

Although combatting coworker retaliation will require active changes from many parties, including employers, employees, and the government, these changes are necessary to safeguard Title VII’s true purpose.