Notes

A CHOICE OF RULES IN TITLE VII RETALIATION CLAIMS FOR NEGATIVE EMPLOYER REFERENCES

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INTRODUCTION

Terrie Hillig worked at the Defense Finance Accounting Service (DFAS) for five years, during which time she filed two Title VII racial discrimination complaints.[1] The complaints were settled under terms that required DFAS to "upgrade [her] performance appraisal, expunge negative information from her personnel file, and retroactively promote her."[2] After the settlement, Hillig applied for a position at the Department of Justice ("DOJ") and was told by her interviewer that she would be "a perfect fit for the position."[3] Despite this praise, Hillig did not receive the job. After she was rejected, Hillig discovered that one of her supervisors gave "very strong negative feedback" to the DOJ and that this information may have disqualified her for the job.[4] Hillig's supervisor "admitted characterizing Hillig as a 'shitty employee' . . . ."[5] After being rejected for the DOJ position, Hillig filed suit for retaliation.[6]

Negative references are something employers are increasingly nervous about because of uncertainty as to what liability exposure they incur when giving a reference.[7] One human resources expert

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1. Hillig v. Rumsfeld, 381 F.3d 1028, 1029 (10th Cir. 2004).
2. *Id.*
3. *Id.*
4. *Id.* at 1030 (internal quotation marks omitted).
5. *Id.*
6. *Id.*
7. Some employers will not give references at all for fear of liability; according to a survey by the Society for Human Resource Management, one in five employers refuses to do so.

explains that "[t]he 'silence is golden' approach to providing references has definitely triumphed over an 'available on request' philosophy. Why? Because litigation anxiety is alive and well in the reference checking arena."[8] Getting references is increasingly desirable, both because employers wish to hire the best possible employees and because they are attuned to potential security risks; failing to get adequate references exposes employers to the possibility of lawsuits for negligent hiring.[9] Yet employers' desire to get accurate references clashes with a countervailing trend: a swift increase in the number of retaliation claims against employers for negative references.[10] Retaliation cases over negative references involve claims that the negative reference was motivated by a desire to "get back" at the employee for engaging in protected activity under Title VII of the Civil Rights Act of 1964 (Title VII).[11] A negative reference, although perhaps less dramatic than termination, can be just as devastating to an employee's career in that it extends beyond the current employment relationship to taint a potential future one.

Both the importance of the reference issue to employers and the potentially devastating consequences of negative references for employees resonate in the Tenth Circuit's recent opinion of *Hillig v. Rumsfeld*.[12] In *Hillig*, as in other Title VII retaliation and discrimination cases, the court applied the *McDonnell Douglas* framework[13] for burden shifting which, as a threshold matter, requires that the employee prove a prima facie case of retaliation.[14] To

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Carolyn Hirschman, *The Whole Truth*, HR MAGAZINE, June 2000, at 86, 86–87. For a thoughtful discussion of the ethical and legal implications of reference giving, see Ellen Harshman & Denise R. Chachere, *Employee References: Between the Legal Devil and the Ethical Deep Blue Sea*, 23 J. BUS. ETHICS 29, 34–38 (2000).

8. WENDY BLISS, LEGAL, EFFECTIVE REFERENCES: HOW TO GIVE AND GET THEM 7 (2001).

9. *Id.* at 22–24; *see also* Mark J. Dorris & Brian H. Kleiner, *New Developments Concerning Negligent Hiring in Public Schools*, MGMT. RES. NEWS, Feb. 2003, at 155, 159 (analyzing how to prevent liability by checking references before hiring). In addition to avoiding litigation, reference checking assures an employer that the applicant is who he says he is: "[A]bout 30 percent of all job applicants make material misrepresentations on resumes. . . ." Pamela Babcock, *Spotting Lies*, HR MAGAZINE, Oct. 2003, at 46, 47.

10. *See* Robin E. Shea, *Break the Retaliation Cycle*, HR MAGAZINE, July 2002, at 89, 89 ("More than 27 percent of all charges filed with the EEOC in 2001 were retaliation charges.").

11. 42 U.S.C. § 2000e-3(a) (2000).

12. 381 F.3d 1028 (10th Cir. 2004).

13. *See* McDonnell Douglas Corp. v. Greene, 411 U.S. 792, 800–07 (1973) (identifying the system of burden shifting for Title VII disparate treatment claims).

14. *Id.* at 1030–31.

establish a prima facie case, the employee must show that the employer has taken an "adverse employment action" against her.[15] Although such employer actions as terminations and demotions fall clearly into this category, the requirement is defined differently among the circuits, and some types of employer action, including negative references, have proven very difficult to categorize.[16] In *Hillig*, the Tenth Circuit found that a negative reference constituted an adverse employment action even though there was no proof that the employee would have received the job if the reference had not been given.[17] This holding sparked debate both within the media and among academics about whether the Tenth Circuit's standard for defining an adverse employment action exposes employers to unnecessary liability.[18]

The Tenth Circuit's decision in *Hillig* aroused controversy not only because it seemed to leave employers too vulnerable to retaliation suits, but also because it highlighted the divide among the circuits as to what exactly constitutes an adverse employment action in Title VII retaliation claims. The circuits disagree as to whether an employee must show she would have received the prospective job but for the negative reference.[19] They generally follow either the "narrow" or "broad" rules for determining what constitutes an adverse action.[20] Circuits that apply the "narrow" or "conservative" standard require that an employee who receives a negative reference prove that she would have gotten the prospective job if not for that reference, whereas circuits applying the "broad" or "liberal" standard apply a more holistic test and do not require such "but for" evidence.[21]

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15. See *infra* Part I.A for a detailed explanation of the prima facie case and McDonnell Douglas framework.

16. *See* Matthew J. Wiles, Comment, *Defining Adverse Employment Action in Title VII Claims for Employer Retaliation: Determining the Most Appropriate Standard*, 27 U. DAYTON L. REV. 217, 223–241 (2001) (discussing the difficulty of categorizing certain employment actions and the standards that should be used to do so).

17. *Hillig*, 381 F.3d at 1031–33.

18. *See* Maria Greco Danaher, *Negative References Can Be 'Adverse Action,'* HR MAGAZINE, Nov. 2004, at 131, 131 (discussing *Hillig v. Rumsfeld*); Patrick F. Dorrian, *Negative Reference Proved Retaliation Claim of Defense Employee, Tenth Circuit Rules*, LEADING THE NEWS, THE BUREAU OF NATIONAL AFFAIRS, INC., Sept. 2, 2004, AA-1 (same).

19. *See infra* Part II.

20. *See id.*

21. *See infra* Part II.A. Some scholars have divided the circuits into three camps: narrow, intermediate, and broad *See* Melissa A. Essary & Terence D. Friedman, *Retaliation Claims*

Although there has been thoughtful discussion about how the adverse employment action requirement should generally be defined, neither the Supreme Court nor scholars have addressed the more specific issue of employer liability in retaliation claims for providing a negative reference.[22] Although other types of employer actions have also proved difficult to classify consistently in adverse employment action determinations, this Note refrains from analyzing these other actions in favor of closely examining the important issue of employer references.[23] References are a particularly important issue for both employers and employees in this increasingly security-conscious world; in addition to traditional concerns over hiring competent people, employers now worry about the safety of employees and customers.[24] Despite the acute need for employer references that go beyond the "name, rank, and serial number" approach taken by so many employers,[25] the current confusion in the law has created an environment in which employers are more reluctant than ever to provide references for fear of litigation. Not only are references an issue of great import for employers, but as allegations in negative reference retaliation cases range from the most frivolous[26] to the very

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Under Title VII, the ADEA, and the ADA: Untouchable Employees, Uncertain Employers, Unresolved Courts, 63 MO. L. REV. 115, 134–40 (1998). Professors Essary and Friedman identify the Second and Third Circuits as falling into the intermediate camp, but this Note will show that, using references as a point of analysis, the Second Circuit follows the narrow rule and the Third Circuit follows the broad rule. *See id.*; *infra* Part II. This Note argues that the First, Third, Seventh, Ninth, and D.C. Circuits all follow the broad rule. *See infra* note 69. The Second and Eleventh Circuits follow the narrow rule. *See infra* note 61; *see also* Wendy Hyland, Note, *Equal Opportunity for Employers: Elevating the Adverse Employment Action Standard to Allow Only Meritorious Retaliation Claims*, 90 KY. L.J. 273, 277–83 (2001) (dividing the circuits into liberal, moderate, and conservative groups).

22. The Supreme Court case of *Robinson v. Shell Oil Co.* held that the term "employee" as used in Title VII includes former employees, and thus that retaliation and discrimination suits may be brought by former employees. 519 U.S. 337, 346 (1997). The Court, however, did not go beyond this holding to address the retaliation issue specifically. *Id.* For an analysis of the impact of *Shell Oil*, see Lucia B. Thompson, *Annual Survey of Labor and Employment Law*, 39 B.C. L. REV. 410, 410–21 (1998).

23. Some examples of these other difficult-to-classify potential adverse actions are verbal threats of termination, missed pay increases, and reprimands. Wiles, *supra* note 16, at 223–29.

24. *See* BLISS, *supra* note 8, at 23 (describing an incident where, after Allstate Insurance Company failed to mention concerns about a mentally unstable employee in a recommendation to his new employer, Fire man's Fund Insurance Co., the employee killed several employees and himself when Fireman's Fund fired him for an unexcused absence).

25. *Id.* at 3–7.

26. *See, e.g.*, Brown v. Chicago Transit Auth., 115 Fed. App'x 865, 867 (7th Cir. 2004) (finding that the employee failed to produce evidence that her previous employer was even contacted by any prospective employers, much less that it gave her a negative reference).

serious,[27] these cases offer a unique opportunity to consider the appropriateness of the broad and narrow rules in general. An analysis of negative reference cases, as discussed in Part III, illustrates the great danger that the narrow rule poses to employees' ability to assert their rights under Title VII.

This Note agrees with other scholars that the narrow rule inappropriately applies Supreme Court precedent. Unlike previous scholarship, however, it also argues that the narrow rule introduces an additional and incorrect "but for" causation requirement into the prima facie case. This Note addresses for the first time the recent Supreme Court case of *Pennsylvania State Police v. Suders*, which considered the parameters of the tangible employment action requirement in discrimination cases,[28] and its likely impact on this debate. Further, the uniform adoption of the broad rule is necessary to balance the relevant public policy interests such as deterring retaliation, promoting responsible recordkeeping by employers, information forcing, ensuring that Title VII's protections remain vital, and discouraging frivolous retaliation suits. Finally, this Note argues that when the broad rule is analyzed within the context of the entire *McDonnell Douglas* framework, the result is a balanced test that takes both employer and employee interests into consideration; therefore, the Supreme Court should grant certiorari in a future Title VII retaliation case and determine that the broad rule is the correct standard for judging adverse employment actions.

Part I briefly outlines the requirements for making a prima facie retaliation case and reviews Supreme Court precedent influencing retaliation cases. Part II uses the Tenth Circuit's decision in *Hillig* as a lens through which to examine the current split in the circuits as to the meaning of an adverse employment action. Part III uses the issue of negative references to show the particular dangers of the narrow rule and both the policy and legal advantages of the broad rule in retaliation cases generally. Finally, Part IV addresses the practical implications of the broad rule when viewed within the entirety of the *McDonnell Douglas* framework.

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27. *See, e.g.*, Hillig v. Rumsfeld, 381 F.3d 1028, 1030 (10th Cir. 2004) ("[The employee's supervisor] also admitted characterizing Hillig as a 'shitty employee.'").

28. 542 U.S. 129 (2004).

I. THE PRIMA FACIE CASE AND SUPREME COURT PRECEDENT

An employee making a Title VII retaliation claim must first prove a prima facie case under the *McDonnell Douglas* framework. Although there is little Supreme Court precedent on retaliation claims specifically, the Court's standard for a tangible employment action[29] in the context of discrimination claims has been applied—improperly—to retaliation claims as part of the narrow rule. The facts of *Hillig v. Rumsfeld* can be applied to this framework to illustrate the burden placed upon employees in making such a case.

A. McDonnell Douglas *and the Prima Facie Case*

Like many other federal statutes that regulate the employer-employee relationship,[30] Title VII of the Civil Rights Act of 1964 relies on an antiretaliation provision to give effect to its prohibition of discrimination in the workplace.[31] Section 704 of Title VII establishes that it is unlawful for an employer to:

> discriminate against any of his employees or applicants for employment . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter, or because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.[32]

Without such a provision protecting employees who bring claims against their employers, the threat of retaliation could chill potential claims and undermine the effectiveness of Title VII.

As Title VII does not specify which party bears the burden of proof in a retaliation case, courts follow the allocation of burdens outlined by the Supreme Court in *McDonnell Douglas Corp. v.*

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29. See *infra* Part I.C for a discussion of the distinction between the tangible and adverse employment action standards.

30. *See* Donna Smith Cude & Brian M. Steger, *Does Justice Need Glasses? Unlawful Retaliation Under Title VII Following* Mattern: *Will Courts Know It When They See It?*, 14 LAB. LAW. 373, 375 n.10 (1998) (identifying several such statutes, including the Family and Medical Leave Act, 29 U.S.C. § 2615; the National Labor Relations Act, 29 U.S.C. § 158(a)(4); the Fair Labor Standards Act of 1938, 29 U.S.C. § 215(a)(3); and the Occupational Safety and Health Act, 29 U.S.C. § 660(c)); *see also* Sarno v. Douglas Elliman-Gibbbons & Ives, Inc., 183 F.3d 155, 159 (2d Cir. 1999) ("It is appropriate to apply the framework used in analyzing retaliation claims under Title VII in analyzing a claim of retaliation under the ADA.").

31. 42 U.S.C. § 2000e-3(a) (2000) [hereinafter "Title VII"].

32. *Id.*.

Green.[33] Even though the Supreme Court created the *McDonnell Douglas* framework for the discrimination context, lower courts have adapted and applied it to retaliation cases as well.[34] Although the Court has not clearly articulated all of the reasoning behind the *McDonnell Douglas* framework, some members of the legal community claim that it exists to provide "a significant helping hand [to employees], to make sure their prospects are better than they would be under the rigors of the ordinary rules of litigation."[35] This Note (and much of the retaliation litigation) focuses on the first burden in the framework, the employee's establishment of a prima facie case of retaliation.[36] The prima facie case has three elements: first, that the employee engaged in activity protected by Title VII; second, that there is a causal connection between the adverse employment action and the protected activity; and third, that the employee suffered an adverse employment action.[37] If the employee successfully makes out a prima facie case, the burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action.[38] If the employer succeeds, the employee, to maintain a claim, must establish that the employer's reason was merely a pretext.[39]

The facts of *Hillig v. Rumsfeld* can be used to clarify the requirements for the prima facie case. Although the Tenth Circuit only addressed the adverse employment action requirement in *Hillig*, the next Section will apply each of the requirements to the facts of the case to illustrate how an employee might establish a prima facie case of retaliation.

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33. *See* 411 U.S. 792, 800–07 (1973) (identifying the system of burden shifting for Title VII disparate treatment claims); *see also* Cude & Steger, *supra* note 30, at 375–85 (offering an analysis of the history of the framework).

34. *See* Cude & Steger, *supra* note 30, at 375 n.16 (listing cases in which the First, Seventh, and Eighth Circuits have applied the *McDonnell Douglas* framework to retaliation cases).

35. Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2231 (1995).

36. *See id.* at 2276 n.153.

37. EEOC v. L.B. Foster Co., 123 F.3d 746, 754 (3d Cir. 1997).

38. *McDonnell Douglas*, 411 U.S. at 802.

39. *Id.* at 804.

B. The Prima Facie Case as Applied to the Facts of Hillig v. Rumsfeld

To make out a prima facie case, employees must show, first, that they were involved with protected activity as it is defined in Title VII. Hillig satisfied this requirement because she had filed the sexual discrimination suit.[40] Lesser involvement than filing suit will suffice as well, as the statute defines "protected activity" broadly and includes actions such as testifying against employers or simply opposing unlawful employment practices.[41] This is usually one of the more clear-cut requirements.[42]

Second, employees must establish a causal link between the alleged retaliation and their involvement with the protected activity. Proving causation can be difficult, given that the employer must have been aware of the protected activity and that there must be a close temporal connection between the protected activity and the adverse action in question.[43] This element is fairly contentious, and the exact definition of causation varies among federal courts.[44] Although the *Hillig* opinion did not address causation, Hillig would likely satisfy this requirement, given that there was a close temporal connection between her filing and settling of the discrimination suit and the

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40. *See* 42 U.S.C. § 2000e-3(a) (2000) (enumerating approved types of participation, including having "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]").

41. *See id*. Title VII specifies two different categories of protected activity, commonly referred to as "participation" and "opposition." Cude & Steger, *supra* note 30, at 378. The opposition category has been more difficult for courts to define and varies by circuit. *Id.* at 379.

42. *See* Cude & Steger, *supra* note 30, at 378 ("Section 704(a)'s participation clause is relatively straightforward.").

43. *See id*. at 379–80:

> The courts are in agreement that proof of retaliation may be shown by either direct or circumstantial evidence. Likewise, the courts agree that, to demonstrate a causal link, a employee must show that the person who took the allegedly adverse action was aware that the employee had engaged in protected activity.

The Supreme Court has also declined to weigh in on the issue of causation, only briefly discussing the issue in *Clark County School District v. Breeden*, 532 U.S. 268, 272–74 (2001). There, the employee failed to show that a reasonable person would have believed that the actions against her were discriminatory and so did not make out a successful retaliation case. *Id*. Without deciding the appropriate extent of causation in Title VII retaliation claims, the Court considered the temporal proximity requirement and implied that it would allow a showing of close temporal proximity to imply causation if it believed that the original activity was protected. *See id.* at 273–74 (citing cases that require "very close" temporal proximity).

44. *See* Cude & Steger, *supra* note 30, at 380 n. 37 ("Due to [uncertainty over the issue of temporal proximity], whether or not a plaintiff can establish a causal connection is often the most hotly contested element of a retaliation lawsuit.").

negative reference she received when applying for the DOJ position. Moreover, the supervisor who gave the negative reference knew about her discrimination claims.[45]

Third, employees must show that the employer took an adverse employment action against them. This is perhaps the most contentious prong of the prima facie case because the law is unsettled. The Supreme Court has clearly established, however, that the prima facie case is intended to be a fairly low bar, so the adverse action requirement should not be so tough as to screen out legitimate cases.[46] The outcome of Hillig's case depends on how the adverse action requirement is defined. Part II offers a detailed examination of how her fate would change under the different characterizations of the adverse employment action requirement.

C. The Tangible Employment Action

In the absence of a Supreme Court decision clarifying the requirements for the prima facie case for retaliation, lower courts have looked to the Court's seminal discrimination cases of *Burlington Industries, Inc. v. Ellerth*[47] and *Faragher v. City of Boca Raton*[48] for guidance.[49] The cases dealt with employer liability for discriminatory acts of supervisors under Title VII and held that employers would be strictly liable when a supervisor "takes a tangible employment action against [a] subordinate."[50] The Court famously defined tangible employment action as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[51] If the employment action fails to meet this high standard, the employer may raise an affirmative

45. Hillig would have had a more difficult time meeting the temporal proximity requirement, *see supra* note 43, but it is unclear whether such temporal proximity is required in every case.

46. *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981) ("The burden of establishing a prima facie case of disparate treatment is not onerous.").

47. 524 U.S. 742 (1998).

48. 524 U.S. 775 (1998).

49. *See* Rosalie Berger Levinson, *Parsing the Meaning of "Adverse Employment Action" in Title VII Disparate Treatment, Sexual Harassment, and Retaliation Claims: What Should Be Actionable Wrongdoing?*, 56 OKLA. L. REV. 623, 635 n.24 (citing Evans v. City of Houston, 246 F.3d 344, 353 (5th Cir. 2001), and Boone v. Goldin, 178 F.3d 253, 255–56 (4th Cir. 1999), as examples of cases incorrectly applying *Ellerth* to retaliation claims).

50. *Ellerth*, 524 U.S. at 760.

51. *Id.* at 761.

defense to liability in the discrimination suit context.[52] Although all of the circuits follow these cases in the discrimination context,[53] some courts have inappropriately applied the *Ellerth/Faragher* definition of tangible employment action to the adverse employment action requirement in retaliation cases.[54]

The distinction between a tangible employment action and an adverse employment action may seem merely semantic, but the level of employer action required to establish the two types of actions has been construed differently by the courts. The Supreme Court clarified *Ellerth/Faragher* most recently in *Pennsylvania State Police v. Suders*,[55] explaining that the tangible employment action requirement applies in cases in which the employer will be strictly liable for the discrimination; in situations in which there is no tangible employment action, the employer may raise an affirmative defense to the claim.[56] Specifically at issue in *Suders* was whether constructive discharge is a tangible employment action under Title VII.[57] The Court held that whether a constructive discharge was a tangible employment action would depend on the circumstance of the individual case; this "case-by-case"[58] rule is likely to confuse the circuits even further as they attempt to analogize the *Suders* holding to retaliation cases. Because the Supreme Court has not defined what constitutes an adverse employment action for the prima facie case of retaliation, the lower courts have constructed their own, often conflicting, definitions.[59]

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52. *Faragher*, 524 U.S. at 807.

53. *See* Hillig v. Rumsfeld, 381 F.3d 1028, 1031 (10th Cir. 2004) (distinguishing the tangible employment action standard from the adverse employment action standard used in retaliation cases).

54. *See* Margery Corbin Eddy, *Finding the Appropriate Standard for Employer Liability in Title VII Retaliation Cases: An Examination of the Applicability of Sexual Harassment Paradigms*, 63 ALB. L. REV. 361, 372–77 (1999) (explaining the historical application of sexual harassment law to retaliation cases); *see also infra* Part III for a discussion of why this application of the tangible employment action standard is incorrect.

55. 124 S. Ct. 2342 (2004).

56. *Id.* at 2347.

57. *Id.* at 2346–47.

58. *Id.* at 2357.

59. *See supra* note 54 and accompanying text.

II. THE DIVISION IN THE CIRCUITS: NARROW VERSUS BROAD

Hillig v. Rumsfeld[60] illustrates particularly well the problem of defining an adverse employment action in the context of references. Using this case as a framework, this Part analyzes the differences between the narrow and broad views of what constitutes an adverse employment action, as well as the Supreme Court precedent that influences these rules. The narrow rule requires a prospective employee to prove that she would have gotten the job if not for the negative reference, whereas the broad rule applies a case-by-case approach that requires the employee to prove only that the action was "materially adverse" to the employee's job status.

A. The Narrow Rule

The narrow rule, in the reference context, requires that the employee show she would have received the prospective job were it not for the negative reference, or put differently, that the negative reference was an action that had an "ultimate" or "tangible" effect on the employee's status. This rule provides an understandably welcome bright-line for employers, and versions of this rule have been followed by the Fifth, Second, and Eleventh Circuits.[61] The Fifth Circuit requires an employee to show that the employer took an "ultimate employment action" against the employee in order to satisfy the prima facie case standard; therefore a negative reference will only be an ultimate employment action when it has the effect of preventing the employee from getting a job she would have otherwise received.[62] Actions such as "hiring, granting leave, discharging, promoting, and compensating" are also ultimate employment actions, and these actions would also be considered tangible employment actions under the Supreme Court's standard.[63]

Most of the circuits following the narrow rule refer to a tangible, rather than ultimate, employment action, but the effect is the same:

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60. Hillig v. Rumsfeld, 381 F.3d 1028 (10th Cir. 2004).

61. *See* Sarno v. Douglas Elliman-Gibbbons & Ives, Inc., 183 F.3d 155, 159 (2d Cir. 1999) (requiring proof that the reference "caused or contributed to the reject by the prospective employer"); Bailey v. USX Corp., 850 F.2d 1506, 1508 (11th Cir. 1988) (finding that negative reference was insufficient to show retaliation as the record indicated the employee would not have been hired even if the reference had not been given).

62. *See Mattern*, 104 F.3d at 708 (following the rule "that Title VII's anti-retaliation provision refers to ultimate employment decisions").

63. *Id.* at 707.

the employee has a more difficult burden in establishing the prima facie case than in a circuit following the broad rule.[64] Hillig's claim would not have succeeded in circuits following this rule, as despite the evidence of her supervisor's egregious conduct, she could not show definitively that she would have received the DFAS position were it not for the reference. If DFAS moved for summary judgment, it would have succeeded without having to offer any explanation for the supervisor's egregious conduct.

B. The Broad Rule

The Tenth Circuit found that Hillig did not have to prove that she would have gotten the position but for the negative reference: evidence that the negative reference was given, in light of the facts of the case, was enough to satisfy the adverse action requirement.[65] Rather than require a tangible employment action, circuits applying the broad rule allow an employee to satisfy the adverse employment action requirement if there is evidence that a negative reference was given and the overall facts of the case support a finding that the "employer's conduct [was] *materially* adverse to the employee's job status."[66] According to the Tenth Circuit, a "mere inconvenience"[67] or *de minimis* injury will not suffice, and the facts of each case must be considered in light of such factors as whether the action "causes 'harm to future employment prospects.'"[68] The Tenth Circuit is not alone in this interpretation: the First, Third, Seventh, Ninth, and D.C. Circuits all follow a version of this rule.[69]

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64. Levinson, *supra* note 49, at 648.

65. *Id.* at 1031–35.

66. *Id.* at 1033 (quoting Wells v. Colo. Dept. of Transp., 325 F.3d 1205, 1213 (10th Cir. 2003).

67. *Id.* at 1031 (quoting Berry v. Stevinson Chevrolet, 74 F.3d 980, 986–87 (10th Cir. 1996)).

68. *Id.* This test has been characterized as the broad rule by some scholars and has been called a "case-by-case" approach by others. Essary & Friedman, *supra* note 21, at 139.

69. EEOC v. L.B. Foster Co., 123 F.3d 746, 754 (3d Cir. 1997); Brown v. Chi. Transit Auth., 115 Fed. App'x 865, 867 (7th Cir. 2004); Hashimoto v. Dalton, 118 F.3d 671, 675 (9th Cir. 1997); Smith v. Sec'y of the Navy, 659 F.2d 1113, 1120 (D.C. Cir. 1981); *see also* Hyland, *supra* note 21, at 278–89 (explaining the First Circuit's version of this rule). Professors Cude and Steger, however, argue that most of the circuits follow the narrow rule as elucidated in *Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir. 1997). Cude & Steger, *supra* note 30, at 382–83. While the Fifth, Second, and Eleventh Circuits do follow the narrow rule, the professor's claim that the Seventh and Third Circuits follow the rule is incorrect. Although these Circuits have struggled with formulating a clear rule, the standard applied is most similar to the broad rule, as explained above.

For example, in *EEOC v. L.B. Foster Co.*,[70] the Third Circuit found the employee had shown an adverse employment action in her former employer's refusal to give a reference, even though there was no direct evidence that the refusal caused her rejection from the new position to which she had applied.[71] The court found that to hold otherwise would be to excuse retaliation merely because it was not effective: "[a]n employer who retaliates can not [*sic*] escape liability merely because the retaliation falls short of its intended result."[72] This statement encapsulates well the spirit of the broad rule.[73]

Although the broad rule is somewhat more employee-friendly than the narrow rule, it is not an open invitation for frivolous lawsuits. Even the Tenth Circuit, which describes its interpretation of adverse employment actions as a "liberal definition," has granted summary judgment to many employers when employees have failed to meet the requirements of the prima facie case.[74] The resulting test, although liberal in defining an adverse employment action, still ensures that the prima facie case requirement performs its intended function of weeding out those cases that are clearly without merit. It is unfortunate that the Tenth Circuit's language that it will "liberally define[] the phrase adverse employment action"[75] has been taken out of context and incorrectly interpreted by critics to mean that it will allow nearly any action to qualify.[76]

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70. 123 F.3d 746 (3d Cir. 1997).

71. *Id.* at 754.

72. *Id.*

73. A few scholars have characterized the Third Circuit's rule as a third type, calling it the moderate rule. *See* Hyland, *supra* note 21, at 277–83 (characterizing the circuits as liberal, intermediate, and conservative). When *L.B. Foster Co.* and *Hillig* are compared, however, it is clear that the Third and Tenth Circuits both follow the broad rule. *See L.B. Foster Co.*, 123 F.3d at 754 (holding that excusing retaliation merely because it did not cause the employee to lose the job would go against the purpose of the statute); *Hillig*, 381 F.3d at 1033 ("[W]hile we require that the 'employer's conduct [] be *materially* adverse to the employee's job status,' we allow an employee to show materiality other than by showing a tangible employment action." (quoting Wells v. Colo. Dep't of Transp., 325 F.3d 1205, 1213 (10th Cir. 2003)) (internal citation omitted) (alteration in original)). Those same scholars claim that the Second Circuit also follows this "moderate" rule, but *Sarno v. Douglas Elliman-Gibbons & Ives, Inc.*, 183 F.3d 155 (2d Cir. 1999), illustrates that the Second Circuit actually follows the narrow rule; see *id.* at 160, requiring proof that the reference "caused or contributed to the rejection by the prospective employer."

74. *Hillig*, 381 F.3d at 1032.

75. *Id.* (quoting Sanchez v. Denver Pub. Sch., 164 F.3d 527, 532 (10th Cir. 1998) (alteration in original)).

76. *See* Hyland, *supra* note 21, at 292 (arguing that the broad rule allows employees to bring retaliation suits based on trivial employment actions).

III. ARGUMENTS FOR A BROAD RULE IN THE CONTEXT OF REFERENCES

The broad rule for defining an adverse employment action is the best choice from both a legal and a policy standpoint. Legally, the narrow rule fails in two major ways: first, it unnecessarily introduces an additional "but for" causation element into the prima facie case framework; and second, it improperly applies Supreme Court rulings on discrimination, resulting in an unfairly restrictive rule. The Court's decision in *Suders* is likely to complicate this debate. The policy arguments in favor of the broad rule are varied and compelling, including promoting a level field of power and information between the parties, protecting the validity of the original statute, and deterrence.

A. Legal Arguments

This Note makes three legal arguments against the narrow rule. First, the narrow rule inserts an additional "but for" causation requirement into the prima facie case that is both unduly harsh and inconsistent with precedent. Second, as other scholars have noted, the narrow rule inappropriately applies the tangible employment action requirement created by the Supreme Court in *Ellerth/Faragher*. As a result, the adverse employment action prong of *McDonnell Douglas* becomes outcome-determinative against the employee. Third, the Supreme Court's decision in *Suders* is likely to muddy the waters even further, because it builds on the tangible employment action standard set forth in *Ellerth/Faragher*. Although some of the language in *Suders* could be interpreted to lend credence to the universal adoption of a narrower rule, the Court's holding actually supports the broad rule.

1. *Inappropriate Addition of a "But For" Requirement in the Prima Facie Case*. When applied in reference cases, the narrow rule requires that employees meet an additional "but for" causation element to make the prima facie case. The inquiry as to whether a negative reference constitutes an adverse employment action under the narrow rule focuses improperly on causation rather than on the harm or potential harm to the employee. In a case applying the narrow rule, for example, the Second Circuit stated: "[w]here . . . there is no admissible evidence that the statements of the former employer caused or contributed to the rejection by the prospective

employer, the employee has failed to present a prima facie case."[77] Although not worded as such, the result of this test is that Hillig would not have been able to prove the prima facie case as she could not show she would have gotten the job but for the negative reference. Employees have significantly less information about the hiring process than do employers, and given the subjective nature of the hiring process, it is difficult to state that any one factor would be determinative in a decision not to hire a particular applicant. Thus, the narrow rule incorporates an additional "but for" test into the adverse employment action element of the prima facie case, which creates a nearly impossible standard for an employee to meet.[78]

There is, of course, a causation element to the prima facie case that must be met by all employees. Although the specifics vary by jurisdiction, the general rules on the causation requirement are that it can be proved by direct or circumstantial evidence, there must be a proximate link between the protected activity and the alleged retaliation, and the person taking the adverse employment action must have known about the protected activity.[79] The causation requirement can be difficult to meet,[80] but even narrow-rule courts have acknowledged that requiring a "but for" test under the prima facie case is inappropriate. In *Long v. Eastfield College*,[81] for example, the Fifth Circuit stated: "we do note that a employee need not prove that her protected activity was the sole factor motivating the employer's challenged decision in order to establish . . . a prima facie case."[82] The court's analysis in *Long* was focused on the causation aspect of the prima facie case,[83] rather than on causation as an aspect

77. *Sarno*, 183 F.3d at 160. In *Bailey*, the employee received an unfavorable reference and was rejected for the prospective position: the court approved the district court's findings that the employer "would not have hired Bailey even if the negative reference had not been given." 850 F.2d at 1508.

78. *See* Hillig v. Rumsfeld, 381 F.3d 1028, 1030–31 (10th Cir. 2004) (finding that employee could not prove that she would have gotten the job but for the negative reference).

79. Cude & Steger, *supra* note 30, at 379–80. There is some disagreement as to how proximate the adverse action must be to the protected activity, given that the Third Circuit has held that "temporal proximity" is often sufficient to prove causation whereas the Eighth Circuit has held that temporal proximity is inadequate. *Id.* at 380 n.37 (citing Feltmann v. Sieben, 108 F.3d 970, 977 (8th Cir. 1997) and Woodson v. Scott Paper Co., 109 F.3d 913, 920 (3d Cir. 1997)).

80. *See supra* Part I.B.

81. 88 F.3d 300 (5th Cir. 1996).

82. *Id.* at 305 n.4.

83. *See id.* (finding that "[t]he standard for establishing the 'causal link' element of the employee's prima facie case is much less stringent" than the "but for" requirement incorporated later in the test).

of the adverse employment action requirement, and it is logical that the latter element should not contain a stricter causation requirement than does the causation element itself.

If the employee reaches a jury, however, some courts, including the Fifth Circuit, the leading proponent of the narrow rule, do incorporate a "but for" test into the *McDonnell Douglas* framework. After the employer provides a legitimate purpose for the adverse employment action, the Fifth Circuit requires the employee show that but for the discriminatory purpose, the adverse employment action would not have been taken.[84] Even the Fifth Circuit, however, agrees that the causation standard for the prima facie case is much lighter than the standard imposed on the employee to win before a jury, which is indeed a "but for" standard.[85] "At this threshold stage, the standard for satisfying the causation element is 'much less stringent' than a 'but for' causation standard."[86]

Why does it matter that the narrow rule implements a "but for" causation requirement for the adverse-employment-action prong of the prima facie case if employees will be forced to meet this burden eventually? The prima facie case exists to promote information sharing and solve the "problem of proof" that exists for employees trying to prove the intangibles of discrimination or retaliation.[87] The "problem of proof" refers to the difficulty that employees have establishing or finding proof of discriminatory intent: providing compelling evidence of the mental state and intentions of another is a very difficult task. When an employee meets the lighter burden called for under the prima facie case, the employer—the party with the information about the intentions behind the adverse employment action—has an incentive to produce information about those intentions to show that the action was not done in retaliation. The prima facie case also exists as a screening mechanism to ensure that those cases devoid of merit do not take up time in the legal system or create undue expense for the employer.[88] Employees who are able to establish a prima facie case are entitled to judgment in their favor

84. Pineda v. UPS, 360 F.3d 483, 487 (5th Cir. 2004).

85. Fierros v. Tex. Dep't of Health, 274 F.3d 187, 191–92 (5th Cir. 2001).

86. *Id.* at 191 (quoting Long v. Eastfield College, 88 F.3d 300, 305 n.4 (5th Cir. 1996)).

87. Mark S. Brodin, *The Demise of Circumstantial Proof in Employment Discrimination Litigation:* St. Mary's Honor Center v. Hicks, *Pretext, and the "Personality" Excuse*, 18 BERKELEY J. EMP. & LAB. L. 183, 187–92 (1997).

88. *See id.* at 191 ("A case is highly unlikely to get to trial if the complainant cannot make the minimal showing necessary to raise an inference of discrimination . . . .").

unless the employer offers some legitimate reason for the adverse employment action.[89] Once past the prima facie case stage, the employee is also more likely to receive a settlement offer or to be able to engage in more extensive discovery to get the proof required to actually win before a jury.

2. *The Inappropriate Application of the Tangible Employment Action Standard.* The narrow rule also inappropriately follows the tangible employment action standard set out by the Supreme Court for discrimination cases in *Ellerth/Faragher*.[90] Professor Rosalie Berger Levinson reaches this conclusion in her analysis of adverse employment actions in the larger context of Title VII retaliation, disparate treatment, and sexual harassment claims.[91] Although Professor Levinson does not examine the specific issue of references in retaliation claims, she argues that applying the tangible employment action standard to retaliation claims is generally inappropriate.[92] Perhaps most persuasive is her argument that applying discrimination law to retaliation claims is inappropriate because Congress intended to create a broader standard for retaliation than for discrimination.[93] Offering further support for this position is the Supreme Court's opinion in *Robinson v. Shell Oil*.[94] In *Shell Oil*, the Court interpreted Title VII's use of the term "employee" to include former employees and found "a primary purpose of antiretaliation provisions" is to promote "unfettered access to statutory remedial mechanisms."[95] Of *Shell Oil*, Professor Levinson writes that "[t]he Supreme Court . . . acknowledged the

89. *See id.* at 189 ("If the employer fails to articulate . . . a reason, the court must enter judgment for the employee.").

90. *See supra* Part I.C for a discussion of *Ellerth/Faragher* and the tangible employment action standard.

91. Levinson, *supra* note 49, at 674. Professor Levinson's analysis offers an excellent and detailed analysis of the standard for actionable wrongdoing under Title VII.

92. *See id.* at 648–52 (criticizing the application of discrimination law to retaliation claims). For another discussion of the inappropriateness of applying the *Ellerth/Faragher* standard to retaliation claims and the benefits of the "liberal standard," see Eddy, *supra* note 54, at 361.

93. Levinson, *supra* note 49, at 651–52. A less persuasive argument attempts to analogize Title VII retaliation claims to First Amendment retaliation cases, which have received broad treatment by the Supreme Court. *Id.* at 653–54. As First Amendment rights are constitutionally guaranteed and have a long history of protection, it seems illogical to compare the First Amendment decisions to retaliation, which is a statutory protection not traditionally granted the same deference.

94. 519 U.S. 337 (1997).

95. *Id.* at 346.

need for a broad interpretation of Title VII's retaliation provision because those who engage in EEOC activity must be confident that the Act will protect them."[96] Just as denying a former employee protection under the retaliation statute would go against the goal of unfettered access to remedial mechanisms, requiring the employee to meet such a difficult test at the prima facie case stage would work against this goal by unduly burdening the employee's access to the appropriate remedial mechanism.

Professor Margery Corbin Eddy has analyzed the application of the *Ellerth/Faragher* liability standard to retaliation claims and also found the narrow rule's application of this standard to retaliation claims inappropriate.[97] Professor Eddy argues that the application of the "ultimate employment action" standard, derived from the application of *Ellerth/Faragher* to retaliation claims under the narrow rule, will become outcome-determinative in a way that is harmful to both employers and employees.[98] Given that the *Ellerth/Faragher* standard calls for strict liability in discrimination cases if the employee shows a tangible employment action,[99] the direct application of this standard in retaliation cases would create strict liability for the employer if the employee showed a tangible employment action as part of the prima facie case.[100] As unbalanced as this strict liability in retaliation cases would be for employers, so too would the converse of this application be for employees: in the absence of a tangible employment action, the employee would always lose.[101] Therefore, when the tangible employment action requirement is applied to retaliation cases, the standard for recovery becomes even narrower than that in discrimination cases, not broader as Congress

96. Levinson, *supra* note 49, at 652. It is also worth noting that the majority of the circuits and the Equal Employment Opportunity Commission ("EEOC") support the use of the broad rule in defining adverse actions. *Id.* Professor Levinson highlights the EEOC's interpretation that retaliation should focus on the deterrent effect that an employer's conduct would have on protected activity rather than on the conduct's effect on the employee's employment status. *Id.* at 659.

97. *See* Eddy, *supra* note 54, at 377–79 (arguing that the liberal, or broad, definition is more desirable).

98. *Id.* at 378.

99. *See supra* Part I.C.

100. Eddy, *supra* note 54, at 378.

101. *See* Eddy, *supra* note 54, at 378 (noting that under the tangible employment action standard, "many claims recognized as viable by the Supreme Court in *Burlington Industries/Faragher* would never reach a trier of fact").

intended.[102] Although the dearth of Supreme Court guidance in retaliation cases naturally encourages courts to look to its discrimination cases, the resulting test under the narrow rule creates a standard that is both illogical and overly strict for employees when viewed in light of statutory intent.

3. *The Likely Impact of* Suders *on the Debate*. Next, although scholars have identified the incorrect application of the tangible employment action standard as a major problem with the narrow rule,[103] their analyses preceded the Supreme Court's decision in *Pennsylvania State Police v. Suders*.[104] At first glance, *Suders* might seem to support a narrow-rule construction because the Court held that an employee must show that a constructive discharge is effectuated by an "official act" of the company in order to constitute a tangible employment action in a retaliation case.[105] As explained in the previous section, however, applying the *Ellerth/Faragher* discrimination standard, as clarified in *Suders*, to retaliation cases would be inappropriate. Interpreted in the appropriate context, *Suders* actually offers support for the broad rule: it emphasizes that although employees in discrimination cases who cannot show that they suffered a tangible employment action would have to overcome the employer's affirmative defense, they would still be able to make a case.[106] Therefore, an employee unable to establish a tangible employment action could still make out a prima facie case of discrimination. It would be inconsistent with Court precedent and Congressional intent to give narrower interpretation to the retaliation provision than the discrimination provision, allowing discrimination employees, but not employees alleging retaliation, to proceed without showing tangible employment action.[107]

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102. Levinson, *supra* note 49, at 651–52.

103. *Id*.

104. 124 S. Ct. 2342 (2004); *see supra* Part I.C for a detailed discussion of the case.

105. *See id*. at 2355 ("[W]hen an official act does not underlie the constructive discharge, the *Ellerth* and *Faragher* analysis, we here hold, calls for extension of the affirmative defense to the employer.").

106. *See id*. at 2351 (concluding that an employer can raise an affirmative defense to a employee's prima facie case if the employee does not show a tangible employment action).

107. Levinson, *supra* note 49, at 651–52.

B. Policy Arguments

The policy arguments in favor of the broad rule are also powerful. The Supreme Court should find that the broad rule is preferable, especially in the reference context, for three reasons. First, the distribution of power between employers and employees is inherently unequal; second, as the EEOC has emphasized, Title VII's protections will be meaningless without an effective retaliation statute to protect employees; and third, employers will only be deterred from retaliating against employees for participating in protected activity if employees have the power to bring retaliation claims against them.

1. *Addressing the Imbalance of Power between Employers and Employees*. The broad rule is the only way to redress the inherently unequal access to information and power that exists in the employer-employee relationship. A reference, like any other employment action taken by an employer, is unilateral: the employee cannot control what is happening.[108] In *Hillig*, the employee could not change or control what her supervisor said about her,[109] and there are other cases in which a negative reference is given and the employee is never aware of it.[110] Because employees are unlikely to have much information about either the negative references or how potential employers will react to them, it is disadvantageous, from a policy standpoint, to require employees to prove they would have gotten the prospective job but for the negative reference. Employers, in contrast, have ready access to this information, and therefore they should be required to produce it at the second stage of the *McDonnell Douglas* framework.[111]

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108. Although, for example, an employee can "control" whether she is terminated by trying to be a good worker, ultimately the employer may choose to fire her whether or not she works hard. This is not meant to be an argument that employees should have a different role in the employment relationship or that the "at will" doctrine should be abolished. Rather, this Note argues that there is an inherent power disparity and that the law must respond to this in order to be effective.

109. *See* Hillig v. Rumsfeld, 381 F.3d 1028, 1030 (10th Cir. 2004) (finding that the supervisor made a variety of negative comments about Hillig's work performance).

110. *See* Randy Cohen, *The Way We Live Now*, N.Y. TIMES, Mar. 3, 2002, at 28 (discussing whether one friend should inform another that the latter had received a negative employer reference).

111. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) ("The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection.").

Moreover, the prima facie case is intended to be a fairly low bar;[112] applying the broad rule maintains the integrity of this bar and does not create an inappropriately high hurdle for employees. As this Note argued in Part II, the extra "but for" causation requirement imposed by the narrow rule makes it nearly impossible for an employee to make out a prima facie case when a negative reference is in question. Even employees like Hillig, with a compelling story and clearly egregious conduct by her supervisor, would be unable to establish the prima facie case.[113] The broad rule is necessary both because the information gap between employers and employees is wide and because it will allow employees to survive the prima facie case, thereby forcing employers to provide otherwise undiscoverable information to the court. Thus, at each stage of litigation, the broad rule puts the burden of production upon the party most able to satisfy it.

2. *Maintaining an Effective Retaliation Statute.* Given that many otherwise actionable claims would be rejected under the narrow rule,[114] the broad rule is necessary to ensure that employees are protected by an effective retaliation provision and are not dissuaded from bringing Title VII claims. The Supreme Court's opinion in *Shell Oil* indicates that the Court recognizes the importance of retaliation provisions and the need to interpret them broadly.[115] The EEOC has also argued for the adoption of the broad rule, and *Shell Oil* states that the EEOC's arguments "carry persuasive force given their coherence and their consistency with a primary purpose of antiretaliation provisions: Maintaining unfettered access to statutory remedial mechanisms."[116] Although Shell Oil concerned the EEOC's position on the interpretation of the statutory term "employee," the

112. *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981) (explaining that the burden for the prima facie case should not be overly high).

113. *See Hillig*, 381 F.3d at 1030 (describing the extremely negative feedback given by Hillig's supervisor to her prospective employer after she had made Title VII discrimination claims against the supervisor).

114. *See* Eddy, *supra* note 54, at 378 (noting that the narrow rule would preclude many viable claims from ever reaching a trier of fact).

115. Robinson v. Shell Oil, 519 U.S. 337, 346 (1997).

116. *Id.*

agency makes the same policy arguments in favor of the broad rule when defining adverse employment actions.[117]

Because employees are unlikely to be able to prove that they were not hired because of a negative reference, the possibility of a negative reference in retaliation is particularly damaging and very likely to chill employee involvement in protected activity. If employees thought that an employer could retaliate against them after engaging in protected activities and go beyond the current (and presumably already unhappy) employment relationship to damage a future one, they would be much less likely to participate in such activities.[118]

3. *Deterring Employer Retaliation*. The broad rule will deter illegal employer retaliation because employees will be more likely to be successful in establishing a prima facie case. The *New York Times* published a letter from an individual who knew (although the colleague did not know) that a colleague had received a negative reference.[119] Because so many people are unaware of negative references that have been given about them, it is especially important for those individuals with knowledge of a negative reference to have a fair chance at making a successful prima facie case in order to deter employers from retaliating against employees by giving negative references.[120] As difficult as it is to police the often hidden inner workings and politics of a workplace, a strong deterrent is one of the only ways to prevent employers from giving negative references motivated by retaliation.

The Supreme Court and the EEOC have both expressed the concern that employers will retaliate against employees for exercising their rights under Title VII if there is not a sufficient legal protection against such retaliation. The Supreme Court acknowledged, in *Shell Oil*, the danger of allowing employers to retaliate against employees

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117. *See id.* at 344-47 (citing the EEOC guidelines that call for a broad interpretation of Title VII).

118. Employers are likely to argue that many of these claims are frivolous and that there needs to be increased scrutiny of these claims, not increased access. Although this is certainly a valid argument, it contradicts the legal precedent and the EEOC guidelines for the interpretation of the statute. As explained in Part IV, *infra*, the overall test remains strict enough to weed out frivolous claims; the broad rule simply allows employees a narrow window to potentially make a valid claim.

119. *See supra* note 110 and accompanying text.

120. *See supra* note 110 and accompanying text.

who engage in protected activity. There the Supreme Court cited the EEOC Compliance manual with approval, agreeing that an antiretaliation provision must be effective to prevent discrimination against employees who invoke protections under Title VII.[121] Applying the broad rule will not only take away the "perverse incentives" feared by the Supreme Court,[122] it will deter more indefinite adverse actions, like references, that are by their very nature harder for employees to take action on later.

Scholars have also identified the need for a broad rule to deter employer retaliation. One article points out that the narrow rule "practically encourages employers to retaliate against protected employees in numerous intangible manners which, in their totality, may in fact be as tangible, if not more so, than any ultimate employment decision."[123] Another scholar suggests that applying the narrow rule would allow employers to subtly punish employees in such ways as moving them to another department without cause without fear of violating antiretaliation statutes.[124] Making employers consistently liable for giving a retaliatory negative reference will serve to deter bad actors and make all employers more thoughtful about the reference-giving process.

* * *

Legally, the narrow rule fails as it incorporates a "but for" requirement into the prima facie case and inappropriately applies Supreme Court precedent. These failings are only likely to be magnified if courts use *Suders* to further interpret these cases. The broad rule supports the important policy goals of deterring employers from retaliating against employees, upholding the protections of Title VII, and adjusting the imbalance of access to information and power that exists between employers and employees.

IV. PRACTICAL IMPLICATIONS OF APPLYING THE BROAD RULE: ACHIEVING A BALANCED OUTCOME

When combined with the entire *McDonnell Douglas* framework, the employee-favorable broad rule results in a fair framework that

121. *Shell Oil*, 519 U.S. at 346.

122. *See* Essary & Friedman, *supra* note 21, at 152 (quoting Robinson v. Shell Oil, 519 U.S. 337, 346 (1997)).

123. *Id.*

124. Wiles, *supra* note 16, at 234–35.

balances as best as possible the competing interests of employers and employees. Although Part III argued that the broad rule is preferable from both a legal and a policy perspective, the broad rule may increase employer anxiety because of its case-by-case approach and "fuzzy" nature.[125] Employers' anxiety over potential liability already makes them reluctant to provide references; although many states have protective legislation shielding employers from defamation suits resulting from references,[126] some scholars have suggested that protective legislation has done little to assuage employer concerns.[127] An equally powerful argument against the broad rule is that employers typically seek early resolution of litigation, either via summary judgment or by settling a case with the employee, and the broad rule makes this resolution less likely.[128] Efficiency is a worthy goal when paired with respect for an employee's rights, and there is a loss in rejecting the narrow rule, which provides a more bright-line resolution.[129]

The broad rule does deny the possibility of such tidy resolution, but when viewed within the entirety of the *McDonnell Douglas* framework, the broad rule actually balances out the system of burdens under which it has become increasingly difficult for employees to triumph. It is possible that an employee will be able to present a prima facie case of retaliation against an employer who had perfectly legitimate motives for providing a negative reference, but the framework then allows that employer to prove that legitimate

125. *See* Hyland, *supra* note 21, at 292 (arguing that the broad rule opens employers to unnecessary liability).

126. For a state-by-state review of job-reference shield laws, see William C. Martucci & Kevin Mason, *State Regulations Update*, EMPLOYER REL. TODAY, Summer 2002, at 75.

127. *See* Harshman & Chachere, *supra* note 7, at 37 (expressing the belief that the statutes do not bolster employer confidence and encourage references). Professor Saxman has suggested a fee-shifting arrangement to discourage employees from bringing frivolous claims and to reduce employer anxiety about the cost of litigation. *Id.* (citing B. Saxman, *Flaws in the Laws Governing Employment References: Problems of "Overdeterrence" and a Proposal for Reform*, 13 YALE L. & POL'Y REV. 45, 98–107 (1995)).

128. *See* John Parauda & Jathan Janove, *Settle for Less: Consider the Merits of an Early Settlement Approach to Employment Litigation*, HR MAGAZINE, Nov. 2004, at 135, 136–40 (analyzing approaches to modern employment litigation and describing employer preference to settle cases).

129. *See* Cude & Steger, *supra* note 30, at 374 (arguing that the Fifth Circuit's narrow rule is advantageous because it provides a bright-line rule).

motive.[130] Even scholars favoring the narrow rule admit that the second stage of the *McDonnell Douglas* framework favors employers: "Since [the employer's] burden [is] of production only, courts generally accept any nondiscriminatory reason proffered by employers."[131] The employee still has the opportunity to present evidence that the reason was pretextual; to prevail, however, the employee must prove both that the employer's proffered reason is false and that the real reason for the employer's action was discriminatory—a very high burden that is not often satisfied.[132] As explained in Part I, the burdens of the prima facie case differ significantly from the employee's ultimate burden of proof of causation.

Finally, any discussion of the *McDonnell Douglas* framework must take into consideration the Court's decision of *St. Mary's Honor Center v. Hicks*[133] and the subsequent scholarly uproar over its erosion of *McDonnell Douglas*.[134] Professor Deborah Malamud calls for abandonment of the framework, arguing that, after *Hicks*, it offers little help to employees who lack direct evidence of discrimination.[135] Other scholars claim that the framework still retains value.[136] Regardless of what some scholars suggest, however, the *McDonnell Douglas* framework has not been jettisoned by the Supreme Court, and until it is, federal courts will continue to use it to analyze retaliation cases.

Especially considering how difficult it is for employees to prove discrimination after *Hicks*, the broad rule does not create an overly employee-friendly test.[137] Even if the broad rule makes it more difficult for employers to obtain summary judgment at the prima facie

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130. *See* Shea, *supra* note 10, at 89 ("Dealing with an employee who has engaged in protected activity and also has attitude or performance problems can be one of the biggest challenges facing even experienced, seasoned HR professionals.").

131. Cude & Steger, *supra* note 30, at 380.

132. *See* St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506–11 (1993) (explaining that a employee must also prove that discrimination was the reason behind the employer's action and that showing the reason was pretextual is not enough to win before a jury).

133. 509 U.S. 502 (1993).

134. *See* Malamud, *supra* note 35, at 2236–37 (arguing that *McDonnell Douglas* has been so altered that employees would fare better under the traditional preponderance-of-the-evidence standard).

135. *Id.*

136. *See* Brodin, *supra* note 87, at 229–39 (criticizing the move away from allowing circumstantial evidence and the distortion of *McDonnell Douglas*).

137. *Id.*

case stage, the overall test still remains remarkably employer friendly. False claims of retaliation supported by flimsy evidence will not survive the prima facie case stage when the broad rule is applied, and those employees who are unable to prove before a jury that retaliatory intent ultimately motivated the negative reference will not prevail. The broad rule offers employees a small opportunity to have their cases heard by a jury, whereas the narrow rule offers almost no opportunity. If employers are desperate to avoid a jury trial and are unable to get summary judgment at the prima facie case stage, they can settle the case with willing employees, thereby hopefully making more damaged employees whole.

CONCLUSION

Although the idea of applying a standard that has been labeled "broad" strikes fear into the hearts of many employers, the reality is that courts applying the broad rule "have done so cautiously."[138] The Third Circuit perhaps articulated the spirit of the broad rule best in stating that "[a]n employer who retaliates can not [*sic*] escape liability merely because the retaliation falls short of its intended result."[139] Both policy and legal arguments support the universal adoption of the broad rule. Although the advantages of the narrow, bright-line rule are clear, the end result is unacceptable if Title VII is to remain a meaningful protection for employees. Even those employees, like Terrie Hillig, who were inappropriately retaliated against would be unable to make valid retaliation claims if the narrow rule were adopted. Ultimately, when the broad rule is situated within the potentially weakened *McDonnell Douglas* framework, the resulting test is as fair and reasonable as can be imagined within the strictures of the current law.

138. Eddy, *supra* note 54, at 377; *see, e.g.*, Annett v. Univ. of Kan., 371 F.3d 1233, 1238–39 (10th Cir. 2004) (applying the broad rule and finding that the employee's failure to achieve Principal Investigator status was not an adverse action).

139. EEOC v. L.B. Foster Co., 123 F.3d 746, 754 (3d Cir. 1997).