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CAUSATION IN RETALIATION CLAIMS: CONFLICT BETWEEN THE PRIMA FACIE CASE AND THE PLAINTIFF'S ULTIMATE BURDEN OF PRETEXT

INTRODUCTION

Under section 704(a) of Title VII of the Civil Rights Act of 1964 (Title VII), an employer may not discriminate against an employee for participating in protected conduct or for opposing any unlawful employment conduct by the employer.¹ The Americans with Disabilities Act of 1990² (ADA) also prohibits retaliation, and Congress has amended the Rehabilitation Act³ (RA) to incorporate this provision of the ADA.⁴ Other statutes also have either provisions regarding retaliation or follow the provision in Title VII.⁵

1. 42 U.S.C. § 2000e-3(a) (2000) (“It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice . . . or . . . participated in any manner in an investigation, proceeding, or hearing under this subchapter.”).

2. 42 U.S.C. § 12203(a) (2000) (“No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.”).

3. 29 U.S.C. § 791 (2000).

4. *See* *Hooven-Lewis v. Caldera*, 249 F.3d 259, 272 (4th Cir. 2001) (“Adopting provisions of the ADA, the RA provides that no person shall retaliate against an individual because that individual engages in activity challenging an employer’s alleged discrimination.”).

5. *See, e.g.*, Fair Labor Standards Act, 29 U.S.C. § 215(a)(3) (2000) [hereinafter FLSA] (noting that it would be unlawful for any person “to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter”); *Morris v. Oldham County Fiscal Court*, 201 F.3d 784 (6th Cir. 2000) (determining that the same standard for a Title VII case applies to a claim brought under 42 U.S.C. § 1983); *Conner v. Schnuck Mkts., Inc.*, 121 F.3d 1390 (10th Cir. 1997) (determining that the prima facie case for retaliation brought under the FLSA was similar to that under Title VII); *Thomas v. Exxon, U.S.A.*, 943 F. Supp. 751 (S.D. Tex. 1996) (discussing a claim of retaliation brought under 42 U.S.C. § 1981a with a similar prima facie case as under Title VII).

See also Age Discrimination in Employment Act, 29 U.S.C. § 623(d) (2000) [hereinafter ADEA].

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

In the past decade, the Equal Employment Opportunity Commission (EEOC) has discovered a rise in the number of retaliation claims brought in employment discrimination cases.⁶ Retaliation does not need to be based on any actual discrimination; rather, the employee alleging retaliation must have a reasonable belief that he has been retaliated against.⁷ Furthermore, a charge of retaliation need not accompany a charge of unlawful discrimination; rather, retaliation encompasses a distinct claim.⁸

The Supreme Court, in *Clark County School District v. Breeden*,⁹ noted that courts examining temporal proximity as evidence of the causation element in the prima facie case of retaliation require the connection be “very close.”¹⁰ Otherwise, a great lapse in time can defeat an inference of causation.¹¹ Furthermore, viewed in the context of the burden-shifting framework developed in *McDonnell Douglas Corp. v. Green*,¹² a plaintiff must again show causation in the pretext stage in order to prevail against a defendant’s motion for summary judgment.¹³

6. See, e.g., Equal Employment Opportunity Commission, *Charge Statistics: FY 1992 Through FY 2001*, at <http://www.eeoc.gov/stats/charges.html> (last modified Feb. 22, 2002); Reed Belson, *Anti-Bias Agency Is Short of Will and Cash: Can the EEOC be More Aggressive?*, N.Y. TIMES, July 1, 2001, at C1 (“Claims of retaliation by employers against workers who have complained of discrimination have nearly tripled in the last decade, to about 22,000 a year.”).

7. See *Filipovic v. K & R Express Sys., Inc.*, 176 F.3d 390, 398 (7th Cir. 1999) (“Filipovic engaged in statutorily protected activity in filing charges with the EEOC, even if the harassment he complained of did not actually violate Title VII.”); *Brower v. Runyon*, 178 F.3d 1002, 1006 (8th Cir. 1999) (“The underlying charge need not be meritorious for related activity to be protected under the participation clause.”); *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 769 (2d Cir. 1998) (noting that “it is possible for an employee to reasonably believe that specified conduct amounts to harassment, even when that conduct would not actually qualify as harassment under the law”); *Petitti v. New England Tel. & Tel. Co.*, 909 F.2d 28, 33 (1st Cir. 1990) (noting that the violation does not have to be discrimination in fact—merely a reasonable belief that a violation of Title VII occurred); *Manoharan v. Columbia Univ. Coll. of Physicians & Surgeons*, 842 F.2d 590, 593 (2d Cir. 1988) (finding that the conduct complained of does not actually have to be a violation of Title VII, but “the plaintiff must have a ‘good faith, reasonable belief’” that a violation occurred (quoting *Abel v. Bonfanti*, 625 F. Supp. 263, 267 (S.D.N.Y. 1985)).

8. See Equal Employment Opportunity Commission, *Directives Transmittal No. 915.003*, § 8-I-B (May 20, 1998), available at <http://www.eeoc.gov/docs/retal.html> [hereinafter *Directives Transmittal*].

9. 532 U.S. 268 (2001).

10. *Id.* at 273 (quoting *O’Neal v. Ferguson Constr. Co.*, 237 F.3d 1248, 1253 (10th Cir. 2001)).

11. *Breeden*, 532 U.S. at 273-74.

12. 411 U.S. 792 (1973).

13. The Supreme Court created the *McDonnell Douglas* framework in response to a motion for summary judgment. A plaintiff can defeat a defendant’s motion for summary judgment by providing a sufficient circumstantial case to pass all three levels of the *McDonnell Douglas* framework. This burden-shifting framework has also been applied to motions under Rule 50. See *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000). The Court in *Reeves* discussed employment discrimination in the context of a Rule 50 motion for judgment as a matter of law. *Id.*

Part I of this Note addresses the prima facie case of retaliation in relation to the framework set out in *McDonnell Douglas*. A split in the circuits has developed surrounding all three elements of the prima facie case.¹⁴ Initially, this Note will discuss the recent Supreme Court decision in *Breeden* and will focus on the third element of the prima facie case; the causal connection. Next, Part II discusses the key considerations of a confused causal element and the conflict between the prima facie element of causation and the pretext element of causation. Part III outlines a possible resolution of the conflict. Finally, Part IV proposes that the prima facie and pretext showings of causation should be distinct in order to ensure that the *McDonnell Douglas* framework remains efficacious in the context of cases alleging retaliation.

I. THE PRIMA FACIE CASE OF RETALIATION

A. *Development of the McDonnell Douglas Framework*

Noting societal, as well as personal interests in keeping the workplace free of employment discrimination,¹⁵ the *McDonnell Douglas*¹⁶ Court developed a burden-shifting framework. This framework operates in the event a case of employment discrimination lacks direct evidence of discriminatory or retaliatory intent.¹⁷ In cases of employment discrimination, employees often bring their claims under a theory of disparate treatment.¹⁸ The *McDonnell Douglas* burden-shifting framework applies to cases of disparate treatment, and courts use the same framework for cases of retaliation.¹⁹

14. See *Gorman-Bakos v. Cornell Coop. Extension of Schenectady County*, 252 F.3d 545, 554-55 (2d Cir. 2001) (noting that the Second Circuit “has not drawn a bright line to define the outer limits beyond which a temporal relationship is too attenuated to establish a causal relationship between the exercise of a federal constitutional right and an allegedly retaliatory action” but that other circuits have done so); *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1302 (3d Cir. 1997) (finding an inter-circuit conflict concerning the element of causation and proving a causal connection through timing).

15. *McDonnell Douglas*, 411 U.S. at 801.

16. *Id.*

17. See *Contreras v. Suncast Corp.*, 237 F.3d 756, 765 (7th Cir. 2001) (“In order to prevail on a claim of retaliation, a plaintiff must either offer direct evidence of retaliation, or proceed under a burden-shifting method.”).

18. *McDonnell Douglas*, 411 U.S. at 802. The Court outlined the elements of a prima facie case for racial discrimination under Title VII of the Civil Rights Act. The plaintiff must show

(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.

Id.

19. The *McDonnell Douglas* framework applies to retaliation cases as well as cases for

First, the plaintiff must carry the initial burden of proving a prima facie case of retaliation.²⁰ The first element of the prima facie case is that the employee engaged in protected activity.²¹ Secondly, the employee must have suffered an adverse employment action.²² Finally, the employee must show

discrimination based on such characteristics as race, national origin, sex. *See, e.g., Conner*, 121 F.3d at 1394 (applying the *McDonnell Douglas* burden-shifting scheme to an FLSA retaliation claim); *Grant v. Bethlehem Steel Corp.*, 622 F.2d 43, 46 (2d Cir. 1980) (“It is well established that the order of proof in a retaliation case follows the rule in *McDonnell Douglas*.”).

20. *See McDonnell Douglas*, 411 U.S. at 802. The Courts of Appeals for the D.C., Second, Third, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits follow basically the same elements for the prima facie case of retaliation. *See, e.g., Penny Nathan Kahan & Lori L. Deem, Current Developments in Employment Law: Retaliation Update*, 3 INST. ON EMPL. LAW 1299, 1305 (2001) (“This standard appears to have been adopted in every federal circuit.”). The First Circuit developed its own prima facie case in 1976. *See Hochstadt v. Worcester Found. for Experimental Biology, Inc.*, 425 F. Supp. 318, 324 (D. Mass. 1976), *aff’d* 545 F.2d 222 (1st Cir. 1976); *see infra* note 42 and accompanying text. The Sixth Circuit has also developed a new prima facie showing in light of the Supreme Court’s decision in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998). *See Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 792 (6th Cir. 2000). The court added the requirements that a plaintiff to show the employer’s knowledge and an additional element of retaliatory harassment in the third and fourth elements of the plaintiff’s prima facie case.

In sum, we today modify our standard for proving a *prima facie* case of Title VII retaliation. A plaintiff must now prove that: (1) she engaged in activity protected by Title VII; (2) this exercise of protected rights was known to defendant; (3) defendant thereafter took adverse employment action against the plaintiff, or the plaintiff was subjected to severe or pervasive retaliatory harassment by a supervisor; and (4) there was a causal connection between the protected activity and the adverse employment action or harassment.

Morris, 201 F.3d at 792.

21. *Whatley v. Metro. Atlanta Rapid Transit Auth.*, 632 F.2d 1325, 1328 (5th Cir. 1980). *See also* 42 U.S.C. § 2000e-3(a), *supra* note 1. The first element has been broken into two clauses. *See Directives Transmittal*, *supra* note 8, § 8-I-A. A plaintiff may bring an action under either the participation clause or the opposition clause. *See supra* note 1 and accompanying text. Generally, a plaintiff must only have a reasonable belief that a violation of Title VII’s anti-retaliation provision exists in order to bring a charge under the opposition clause. *See supra* note 7. *See Breeden*, 532 U.S. at 268. The *Breeden* Court discussed the opposition clause and noted the Ninth Circuit’s interpretation that the opposition clause applies “to practices that the employee could reasonably believe were unlawful.” *Id.* at 270. The Court believed it had “no occasion to rule on the propriety of this interpretation” because in this case no reasonable juror could believe that the incident was a violation of Title VII. *Id.* at 268. *See also Kahan & Deem, supra* note 20, at 1307 (noting that not every circuit agrees with the interpretation that the filing of a formal complaint with the EEOC is the only form of protected activity but, additionally, that “unofficial complaints at work regarding suspected violations of statutory rights” would also trigger the application of Title VII’s opposition clause).

Furthermore, regarding the opposition clause, “the act must be in opposition to what is reasonably believed to be an unlawful employment practice by the employer.” *Kahan & Deem, supra* note 20, at 1310. On the other hand, in asserting rights under the participation clause, “participation activities are more likely to be protected regardless of the validity or reasonableness of the underlying alleged statutory violation.” *Kahan & Deem, supra* note 20, at 1313.

22. *See Whatley, supra* note 21, at 1328. For a discussion of the adverse employment action element and the current split over whether that element means only that the employee have suffered an ultimate employment decision, such as actions involving hiring, firing, refusals to reinstate, refusals to promote, or a less stringent definition, see *Robinson v. Shell Oil Co.*, 519 U.S. 337, 339 (1997) (finding that the term “employees” under section 704(a) of Title VII includes former employees, and thus liberally construing that provision of the Civil Rights Act to allow suits brought against former

that the adverse employment action was causally connected to the protected activity.²³ For this third element, the Court of Appeals for the Second Circuit, in *Gorman-Bakos v. Cornell Cooperative Extension of Schenectady County*,²⁴ recently noted a split in the federal circuits over the requirements for showing a causal connection and whether the court could rely on temporal proximity to raise an inference of causation.²⁵

1. Temporal Proximity

Recently the Supreme Court dealt with an issue of causation in *Breedon*.²⁶ In a per curiam opinion, the Court reversed the opinion of the Ninth Circuit Court of Appeals and held that the Clark County School District was entitled to summary judgment.²⁷

The basis for the complaint was sexual discrimination and retaliation based upon the opposition clause of § 2000e-3(a) of Title VII's anti-retaliation provision.²⁸ The Court determined the alleged incident did not

employers for post-employment adverse actions); *Von Gunten v. State of Md.*, 243 F.3d 858, 865 (4th Cir. 2001) (rejecting the ultimate employment decision standard and taking the view that “[w]hat is necessary in all [Title VII] retaliation cases is evidence that the challenged discriminatory acts or harassment adversely effected ‘the terms, conditions, or benefits’ of the plaintiff’s employment” (quoting *Munday v. Waste Mgmt. of N. Am., Inc.*, 126 F.3d 242, 243 (4th Cir. 1997)); *Richardson v. N.Y. State Dep’t of Corr. Serv.*, 180 F.3d 426, 445 (2d Cir. 1999) (noting that courts do not agree on the standard for what constitutes an adverse employment action); *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 708-09 (5th Cir. 1997) (holding that an expansion of adverse employment actions to include actions other than ultimate employment decisions “is unwarranted” and finding that “absent an ultimate employment decision . . . there can be no adverse employment action”).

The *Von Gunten* court also identified in a footnote that circuits have different views on the split over adverse employment actions. The First, Ninth, Tenth, and Eleventh Circuits have taken a liberal view that employer actions do not have to rise to the level of ultimate employment decisions. *Von Gunten*, 243 F.3d at 866 n.4.

See also Eric M.D. Zion, *Overcoming Adversity: Distinguishing Retaliation from General Prohibitions Under Federal Employment Discrimination Law*, 76 IND. L.J. 191 (2001); Kari Jahnke, *Protecting Employees from Employers: Applying Title VII’s Anti-Retaliation Provision to Coworker Harassment*, 19 LAW & INEQ. 101 (2001).

23. See *Whatley*, 632 F.2d at 1328. See *supra* notes 14, 20, 21 and accompanying text.

24. 252 F.3d at 545.

25. *Id.* at 554-55 (noting that the Second Circuit “has not drawn a bright line to define the outer limits beyond which a temporal relationship is too attenuated to establish a causal relationship between the exercise of a federal constitutional right and an allegedly retaliatory action” but that other circuits have found differently); *Robinson*, 120 F.3d at 1302 (finding an inter-circuit conflict concerning the element of causation and proving a causal connection through timing).

26. *Breedon*, 532 U.S. at 268.

27. *Id.* at 274. See also Carol Davis Zucker & Edwin A. Keller, Jr., *Clark County School District vs. Breedon: The U.S. Supreme Court Provides a Timely Reminder of the “Basics” of Employment Harassment and Retaliation*, 9 NEV. LAW. 6, 7 (October 2001).

28. 42 U.S.C. § 2000(e)-3(a) (2000). See *supra* note 1 and accompanying text.

amount to sexual harassment²⁹ and the retaliation claim did not have the requisite causal connection to withstand a motion for summary judgment.³⁰

Breeden alleged that, during a meeting to review the psychological evaluations of job applicants, held with a coworker and a supervisor, the supervisor and coworker engaged in sexual harassment.³¹ The supervisor asked Breeden what a comment, sexual in nature, on one of the applications meant because he did not understand the nature of the comment.³² The coworker turned to the supervisor and told him he would explain later, and then the two men laughed.³³ Because of this incident, Breeden later complained to her supervisor, George Ann Rice. She subsequently filed complaints to the Nevada Equal Rights Commission, the EEOC, and instituted the lawsuit.³⁴

Breeden alleged she was transferred in retaliation to filing those complaints.³⁵ The lawsuit was filed on April 1, 1997, and Rice suggested transferring Breeden on April 10, 1997.³⁶ Breeden relied on the temporal proximity of a ten-day time period between when she filed her lawsuit and when Rice suggested transferring Breeden to show the requisite causal connection between the adverse employment action and the protected activity.³⁷ Because of the twenty month gap between the filing of the initial complaints and Breeden's transfer in May, the Court determined that the time period involved was not close enough to infer a causal connection, and that the length of time showed that no causal connection existed at all.³⁸

29. *Breeden*, 532 U.S. at 269.

30. *Id.* at 273-74.

31. *Id.* at 269.

32. *Id.* (“The report for one of the applicants disclosed that the applicant had once commented to a coworker, ‘I hear making love to you is like making love to the Grand Canyon.’”).

33. *Id.* During the meeting at issue in *Breeden*, the supervisor “read the comment aloud, looked at respondent and stated, ‘I don’t know what that means.’” *Id.* (citation omitted). The co-worker at the meeting with Breeden said, “‘Well, I’ll tell you later,’ and both men chuckled.” *Id.*

34. *Id.* at 269, 271.

35. *Id.* at 271.

36. *Id.* at 271-72.

37. *Id.* at 272. Here, the Court discounted this argument because “petitioner concededly was contemplating the transfer before it learned of the suit.” *Id.* See *infra* note 39 and accompanying text.

38. *Id.* at 273. See also *Morris v. Lindau*, 196 F.3d 102, 113 (2d Cir. 1999) (two years was enough of a time lapse to defeat an inference of causation); *Richardson*, 180 F.3d at 447 (following the reasoning that a causal connection is established indirectly if the adverse action closely followed the protected activity, the court found that two years was too long to infer a causal connection and the plaintiff offered no evidence of disparate treatment to overcome the lack of temporal proximity).

The Court further noted that employers do not have to change previous employment plans when they are notified of lawsuits that has been filed by employees³⁹ and held the transfer did not constitute evidence of a causal connection because Rice did not learn of the instant lawsuit until April 11, 1997.⁴⁰

Courts of Appeals from the various circuits have also addressed the issue of temporal proximity in relation to the causation element of the prima facie case. The Court of Appeals for the Seventh Circuit stated, in *Filipovic v. K & R Express Systems, Inc.*,⁴¹ that “[g]enerally, a plaintiff may establish such a link through evidence that the discharge took place on the heels of protected activity.”⁴² Filipovic filed charges with the EEOC alleging discrimination based on national origin and was terminated four months after he filed the discrimination complaints.⁴³ The court found that the four month period was not close enough to suggest a causal connection, and, additionally, determined that a long temporal gap negated an inference of a causal connection.⁴⁴

39. *Id.* at 272. See Zucker & Keller, *supra* note 27, at 30 (“In no uncertain terms, the Court made clear that if a supervisor decides upon a course of action and does not know of the protected conduct, the decision couldn’t be ‘retaliatory.’”).

40. *Id.* The Supreme Court also discussed the right-to-sue letter that the EEOC sent to Breeden on April 11, 1997. The Court first noted that there existed “no indication that Rice even knew about the right-to-sue letter,” and even if she did know of the letter, the letter would have to be connected to the protected activity when she filed her complaints about 20 months prior to filing the lawsuit. *Id.*

41. 176 F.3d 390.

42. *Id.* at 399 (quoting *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1457 (7th Cir. 1994)). See also *Hochstadt*, 425 F. Supp. at 324, where the court developed the elements of a retaliation case:

The employee must make out a prima facie case by showing (1) that she engaged in protected activity, i.e., she opposed unlawful employment practices or participated in Title VII proceedings, (2) that her employer was aware of the protected activities, (3) that she was subsequently discharged, and (absent other evidence tending to establish a retaliatory motivation) (4) that her discharge followed her protected activities within such period of time that the court can infer retaliatory motivation.

Hochstadt, 425 F. Supp. at 324.

43. *Filipovic*, 176 F.3d at 398-99. See also *Donnellon v. Fruehauf Corp.*, 794 F.2d 598, 600-01 (11th Cir. 1986). In *Donnellon*, the Eleventh Circuit held that “[t]he short period of time, however, between the filing of the discrimination complaint and the plaintiff’s discharge belies any assertion by the defendant that the plaintiff failed to prove causation.” *Donnellon*, 794 F.3d at 601 (citation omitted). The plaintiff filed the complaint on August 12, 1980 and was terminated on September 12, 1980, one month later. *Id.* at 600.

44. See *Filipovic*, 176 F.3d at 399 (stating a general rule that temporal proximity is enough to establish a causal connection, but that a long delay, in this case four months, mitigates against a finding of causation) (internal citations omitted).

On the other hand, the Second Circuit Court of Appeals, in *Gorman-Bakos*,⁴⁵ held that even five months was not too long a time period to support an inference of causation.⁴⁶ After setting out a prima facie case for retaliation under § 1983⁴⁷ arising out of a First Amendment claim, the court focused on the third element of causation.⁴⁸ The court determined that “temporal proximity is sufficient to support an allegation of a causal connection strong enough to survive a summary judgment motion.”⁴⁹

In *Little v. Windermere Relocation, Inc.*,⁵⁰ the Court of Appeals for the Ninth Circuit found that timing alone does raise an inference of causation.⁵¹ During Little’s employment, a representative of a prospective client raped her after a dinner meeting.⁵² Little reported the rape—first to a coworker and then to Peggy Scott, the manager designated to receive complaints in Windermere’s Harassment Policy.⁵³ Scott recommended that Little stop working on the account but to take no other action.⁵⁴ Despite being removed from the account, Gayle Glew, President of Windermere, continued to ask

45. 252 F.3d at 545.

46. *Id.* at 555.

47. The claim for First Amendment retaliation is codified at 42 U.S.C. § 1983 (2000).

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects . . . any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . .

42 U.S.C. § 1983 (2000). To prove a prima facie case for First Amendment claims under section 1983 a plaintiff must establish that: “(1) his speech was constitutionally protected, (2) he suffered an adverse employment decision, and (3) a causal connection exists between his speech and the adverse employment determination against him. . . .” *Morris v. Lindau*, 196 F.3d 102, 110 (2d Cir. 1999).

48. *See Gorman-Bakos*, 252 F.3d at 555 (determining that “temporal proximity is sufficient to support an allegation of a causal connection strong enough to survive a summary judgment motion”); *Quinn*, 159 F.3d at 769 (finding that two months was enough to establish that the adverse employment action closely followed the protected activity and therefore showing a causal connection); *Manoharan*, 842 F.2d at 593 (“Proof of the causal connection can be established indirectly by showing that the protected activity was closely followed in time by the adverse action.”); *Burrus v. United Tel. Co. of Kan., Inc.*, 683 F.2d 339, 343 (10th Cir. 1982) (stating that causation is satisfied if employer’s action “closely followed” the employee’s protected activity (citations omitted)); *Grant*, 622 F.2d at 46 (followed closely).

49. *Gorman-Bakos*, 252 F.3d at 555. *See supra* note 43 and accompanying text. *See also* *Johnson v. Sullivan*, 945 F.2d 976, 980 (7th Cir. 1991) (noting that closeness in time permits an inference of causation).

50. 265 F.3d 903 (9th Cir. 2001).

51. *Id.* at 914.

52. *Id.* at 909.

53. *Id.*

54. *Id.*

Little about the status of the account.⁵⁵ Finally, Little's immediate supervisor advised Little to tell Glew about the rape.⁵⁶ Glew subsequently told Little that he was reducing her salary and that the pay reduction was immediate and not subject to renegotiation.⁵⁷ Little then brought suit against Windermere for retaliation based on the reduction in pay, as well as unlawful discrimination.⁵⁸ The court found that the temporal proximity "provides circumstantial evidence of retaliation that is sufficient to create a prima facie case of retaliation."⁵⁹

In *Conner v. Schnuck Markets, Inc.*,⁶⁰ Conner participated in a wage survey in order to claim overtime wages and returned the completed survey to his supervisor.⁶¹ Conner alleged that after filling out the survey he was treated differently on the job and, subsequently, was terminated from his employment with Schnuck Markets.⁶² The Court of Appeals for the Tenth Circuit found that a close temporal connection did satisfy causation,⁶³ but that in this case four months was not close enough in time to establish causation without other evidence of a connection,⁶⁴ including a pattern of retaliatory conduct.⁶⁵

While some Circuits rely on temporal proximity to show a causal connection in the prima facie case, other courts rely on other factors and find that temporal issues do not raise an inference of causation.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 910.

59. *Id.* at 914. See also *Ray v. Henderson*, 217 F.3d 1234, 1244 (9th Cir. 2000) (temporal proximity creates an inference that the retaliation happened because of the employee's protected activity (citations omitted)); *Passantino v. Johnson & Johnson Consumer Prod., Inc.*, 212 F.3d 493, 507 (9th Cir. 2000) ("Causation may be established based on the timing of the relevant actions."); *Gleklen v. Democratic Cong. Campaign Comm., Inc.*, 199 F.3d 1365, 1368 (D.C. Cir. 2000) (temporal proximity is sufficient to show causal connection when only a few weeks separated the adverse employment action and the disclosure of plaintiff's pregnancy).

60. 121 F.3d 1390 (10th Cir. 1997).

61. *Id.* at 1392.

62. *Id.* ("Specifically, Conner claims that Ringkamp became cold toward him, that he and his wife were no longer invited to social functions or company sporting events, that his hours and responsibilities were changed, and that he was not allowed to have lunch with vendors, although other employees were allowed to do so.").

63. *Id.* at 1395.

64. *Id.* The court noted that, although other courts have found an inference of causation where the adverse action closely followed the protected activity, in this case the period of four months negates an inference of causation. The court stated that "[u]nless the termination is very closely connected in time to the protected conduct, the plaintiff will need to rely on additional evidence beyond mere temporal proximity to establish causation." *Id.*

65. *Id.*

2. Temporal Proximity Is Not Enough

Other courts often look to evidence such as disparate treatment,⁶⁶ a pattern of antagonism,⁶⁷ or inconsistent reasons given for the adverse employment action⁶⁸ rather than relying on temporal proximity in establishing causation. The Court of Appeals for the Seventh Circuit, in *Hughes v. Derwinski*,⁶⁹ held that a four month period did not satisfy the causation element of the prima facie case.⁷⁰ Timing, “standing by itself, does not sufficiently raise the inference that Hughes’s filing was the reason for the adverse action.”⁷¹

Additionally, in *Richmond v. ONEOK, Inc.*,⁷² the Tenth Circuit Court of Appeals found that temporal proximity standing alone does not raise an inference of causation.⁷³ In looking at what constitutes “closely followed,”

66. Disparate treatment is in many cases where the plaintiff alleges unlawful discrimination. See *McDonnell Douglas*, 411 U.S. at 802. See also *Moon v. Transp. Drivers, Inc.*, 836 F.2d 226, 230 (6th Cir. 1987) (using evidence of disparate treatment to show the causal element of the prima facie case of retaliation); *Nguyen v. City of Cleveland*, 229 F.3d 559, 563 (6th Cir. 2000) (“Although no one factor is dispositive in establishing a causal connection, evidence that defendant treated the plaintiff differently from similarly situated employees or that the adverse action was taken shortly after the plaintiff’s exercise of protected rights is relevant to causation.”); *Nelson v. J.C. Penney Co.*, 75 F.3d 343, 346 (8th Cir. 1996) (“There is no evidence in the record that others who filed age discrimination charges were fired, that Mr. Nelson’s supervisors discussed the filing with each other, or that either of them even commented to Mr. Nelson on that filing.”). The Eighth Circuit, in *Nelson*, also noted that “close temporal proximity between the filing of age discrimination charges and firing of plaintiff was only a ‘slender reed of evidence’ for which ‘rank speculation’ would be required to assume causal connection between the two events. . . .” *Id.* at 346-47 (quoting *Caudill v. Farmland Indus., Inc.*, 919 F.2d 83, 86-87 (8th Cir. 1990)).

67. See *Weston v. Pa.*, 251 F.3d 420, 431 (3d Cir. 2001) (noting that time was not “unusual enough” to support a causal connection, the court went on to examine whether the facts supported a pattern of antagonism sufficient to discharge the plaintiff’s prima facie burden); *Kachmar v. Sungard Data Sys., Inc.*, 109 F.3d 173, 177 (3d Cir. 1997) (concluding that a pattern of antagonism overcame the doubts raised by a one-year separation between the adverse employment action and the protected activity).

68. See *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 286 (3d Cir. 2000) (finding that along with other evidence “the inconsistencies she raised in Planters’ explanation for her termination are sufficient to create the required inference”).

69. 967 F.2d 1168 (7th Cir. 1992).

70. *Id.* at 1174.

71. *Id.* at 1174-75. *Accord* *EEOC v. Fuchs Baking Co.*, 43 Fair Empl. Prac. Cas. (BNA) 752, 760 (S.D. Fla. 1987) (holding that temporal proximity was not enough standing alone to give an inference of causation (citing *Canino v. EEOC*, 707 F.2d 468 (11th Cir. 1983))). The *Fuchs* court then determined that the Eleventh Circuit requires strict proof of causation for the prima facie case. *Id.* at 760 (citing *Doyal v. Marsh*, 777 F.2d 1526 (11th Cir. 1985)). The passage of time was found to militate against a causal inference. *Id.* (citing *Friends v. Coca-Cola*, 37 Fair Empl. Prac. Cas. (BNA) 1153 (S.D. Fla. 1985) (one year militates against finding of causal connection)). See also *supra* note 38 and accompanying text.

72. 120 F.3d 205 (10th Cir. 1997).

73. *Id.* at 209.

the court determined that “closely followed” should include cases where a pattern of retaliatory conduct began shortly after the complaints were filed and continued until the adverse employment action.⁷⁴

3. “But for” Causation

In *Shirley v. Chrysler First, Inc.*,⁷⁵ Shirley filed a complaint against Chrysler with the EEOC alleging sex discrimination and was terminated from her employment fourteen months later.⁷⁶ The Court of Appeals for the Fifth Circuit determined that the plaintiff must show “but for” causation.⁷⁷ Citing a previous Fifth Circuit opinion, the court noted that “but for” causation is required for the third element of the prima facie case.⁷⁸ In responding to Chrysler’s argument that fourteen months should defeat an inference of causation,⁷⁹ the court determined that consideration of the timing involved was only one part of the causal connection analysis.⁸⁰

4. Knowledge

Furthermore, some courts have stated that, without a showing of the supervisor’s knowledge of the protected activity,⁸¹ no causal connection exists. In *Brower v. Runyon*,⁸² Brower filed a complaint with the EEOC

74. *Id.* (quoting *Marx v. Schnuck Mkts., Inc.*, 76 F.3d 324 (10th Cir. 1996), *cert. denied*, 518 U.S. 1019 (1996), for the proposition that “the phrase ‘closely followed’ must not be read too restrictively where *the pattern of retaliatory conduct* begins soon after the filing of the FLSA complaint and only culminates later in actual discharge”) (emphasis in original).

75. 970 F.2d 39 (5th Cir. 1992).

76. *Id.* at 41.

77. *Id.* at 43. The court held that the district court’s finding that the plaintiff showed “but for” causation was not clearly erroneous.

78. *Id.* (citing *Jack v. Texaco Research Ctr.*, 743 F.2d 1129, 1131 (5th Cir. 1984) (finding that “the connection required is causation-in-fact or ‘but for’ causation”).

79. *Id.* at 43. The court noted that Chrysler cited decisions from the Eighth, Sixth, Eleventh, and D.C. Circuits but did not show that any Fifth Circuit case discussed a long time lapse defeated any inference of causation. *Id.* The court disagreed that the passage of fourteen months in this case defeats an inference of causation. *Id.*

80. *Id.* at 44 (“The district court properly weighed the lapse of time as one of the elements in the entire calculation of whether Shirley had shown a causal connection between the protected activity and the subsequent firing.”). See also *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1092 (5th Cir. 1995) (stating that the evidence was insufficient for a “but for” standard for causation); *Jack*, 743 F.2d at 1131 (requiring “but for” causation for the prima facie case for retaliation).

81. See, e.g., 42 U.S.C. § 2000e-3(a) (2000); *Directives Transmittal*, *supra* note 8, § 8-I-A (defining protected activity to include “opposing a practice made unlawful by one of the employment discrimination statutes; or filing a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under the applicable statute”). See *supra* notes 1, 21 and accompanying text.

82. *Brower*, 178 F.3d at 1002.

alleging retaliation when she was not interviewed for a position at a higher level than the position she held with the United States Postal Service (USPS).⁸³ After demanding and not receiving an explanation as to why she was not interviewed for a position she was permitted to apply for, Brower became agitated and threatened legal action. USPS subsequently terminated her employment contract.⁸⁴ After filing the complaint with the EEOC,⁸⁵ Brower filed an action alleging a violation of Title VII for retaliation.⁸⁶ Although the district court found that Brower had not engaged in a statutorily protected activity, the court additionally found no causal connection existed between any protected activity and the adverse employment action.⁸⁷ The Court of Appeals for the Eighth Circuit determined that, even though temporal proximity existed between her termination and the visit to the EEO compliance office,⁸⁸ no evidence existed that any USPS officials knew about her contact with the EEO counselor.⁸⁹

83. *Id.* at 1003-04.

84. *Id.* at 1004. Brower had contacted Jan Smith, the Acting Manager for Human Resources, over the telephone the day after the initial informational meeting with an EEO counselor. *See infra* text accompanying note 88.

85. *Brower*, 178 F.3d at 1004 (“Brower filed a retaliation complaint with the EEO office in Omaha in May.”).

86. *Id.*

87. *Id.*

88. *Id.* Brower had contacted an EEO counselor on April 9, 1996 to obtain information but did not allege any discrimination at that meeting. She subsequently filed a formal complaint alleging retaliation the next month.

89. *Id.* During the phone call with Smith, Brower discussed filing a lawsuit but did not mention her previous visit with an EEO counselor. *See supra* notes 84 and 88. *See Yartzoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir. 1987). The Ninth Circuit, in *Yartzoff*, determined that the plaintiff could not survive a motion for summary judgment on one of the retaliation claims because the evidence showed that the adverse action alleged in the complaint was taken prior to the protected activity. *Id.* at 1375. The EPA had subjected Yartzoff to surprise performance tests, but the protected activity, letters to supervisors concerning the failure to promote him because of his national origin, did not begin until later. *Id.*

See also Hooven-Lewis, 249 F.3d at 273 (requiring temporal proximity plus a showing that the employer had knowledge that the employee engaged in the protected activity); *Brungart v. Bellsouth Telecomm., Inc.*, 231 F.3d 791, 799 (11th Cir. 2000) (noting that close temporal proximity is the general rule except where it is shown that the employer did not have knowledge of the employee’s protected conduct); *Carter v. Ball, III*, 33 F.3d 450, 460 (4th Cir. 1994) (holding that mere knowledge is not enough but a showing of temporal proximity plus a showing that the employer knew of the activities will defeat an allegation of retaliation); *Yartzoff*, 809 F.2d at 1376 (“Causation sufficient to establish the third element of the prima facie case may be inferred from circumstantial evidence, such as the employer’s knowledge that the plaintiff engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment decision.”).

B. *Legitimate, Non-Discriminatory Reasons*

After the plaintiff has shown the prima facie case of retaliation, under the *McDonnell Douglas* framework the burden shifts to the employer to give one or more legitimate, non-discriminatory reasons for taking action against the employee.⁹⁰ The employer's burden at this stage is only one of production.⁹¹ The burden of persuasion always rests with the plaintiff.⁹² Examples of legitimate reasons for termination that the employer could show include failure to maintain accurate attendance records,⁹³ participation in unlawful conduct,⁹⁴ or poor work performance⁹⁵ and the employee must rebut each of these.

C. *Pretext*

Finally, the burden shifts back to the plaintiff to show that the employer's proffered reasons were pretext for discrimination.⁹⁶ In *Texas Department of Community Affairs v. Burdine*,⁹⁷ the Supreme Court determined that the employer does not have to show that the proffered reason for taking action against the employee was the true or sole reason for the employer's decision.⁹⁸ Rather, the plaintiff has the burden of showing that the employer's reasons were merely pretext for the alleged discrimination.⁹⁹ In *St. Mary's Honor Center v. Hicks*,¹⁰⁰ the Court held that judgment for the

90. See *McDonnell Douglas*, 411 U.S. at 802. The Court stated that the employer refused to hire the employee because of participation in unlawful conduct. *Id.* at 803. The Court found that this satisfied the employer's burden to challenge the employee's prima facie case of racial discrimination. *Id.*

91. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509 (1993).

92. *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

93. See *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000).

94. See *McDonnell Douglas*, 411 U.S. at 803.

95. See *Quinn*, 159 F.3d at 769 ("This offer of proof satisfies Green Tree's burden of articulating a legitimate, non-retaliatory reason for terminating Quinn, and pointing to evidence to support that proffered reason."); *Petitti*, 909 F.2d at 34.

96. See *McDonnell Douglas*, 411 U.S. at 804. Finding that the employer had articulated a legitimate reason for the employee's rejection, the Court remanded the case in order that the employee have a chance to show that the employer's proffered reasons were in fact pretext for discrimination. *Id.* at 804. See also *Ross v. Communications Satellite Corp.*, 759 F.2d 355 (4th Cir. 1985) (noting that for pretext, the plaintiff must show "but for" causation). The Second Circuit also noted a trend in the circuits for an analysis of "but for" causation for the pretext element of the *McDonnell Douglas* framework. *Schnabel v. Abramson*, 232 F.3d 83, 90 (2d Cir. 2000). See *infra* note 106 and accompanying text.

97. 450 U.S. 248 (1981).

98. *Id.* at 254.

99. *Id.* at 256.

100. 509 U.S. 502 (1993).

plaintiff should not be compelled solely because the jury does not credit the employer's non-discriminatory reasons.¹⁰¹ Rather, the jury must find that the plaintiff has shown intentional discrimination on behalf of the employer.¹⁰² The circuit courts have interpreted this requirement as, on the one hand, a burden on the plaintiff to show "pretext plus," and on the other, to show pretext only.¹⁰³

After *Hicks*, the Supreme Court decided *Reeves v. Sanderson Plumbing Products*.¹⁰⁴ Discussing the weight of a plaintiff's rebuttal of the employer's legitimate reasons, the Court stated "it may be quite persuasive."¹⁰⁵ The Court found that "a plaintiff's prima facie case, combined with evidence that is sufficient to find the employer's asserted justification false, may permit the trier of fact to conclude that the employer unlawfully discriminated."¹⁰⁶

I. Pretext and Timing

In determining causation, courts have looked at the entire record and circumstances in addition to temporal proximity. The Court of Appeals for the Eleventh Circuit, in *Wacsura v. City of South Miami*,¹⁰⁷ discussed evidence of temporal proximity in the pretext element of the burden-shifting formula and found that a three and one-half month period alone did not show causation.¹⁰⁸ In addition to the evidence of timing, the court examined evidence including Wacsura's lengthy employment with the City of South

101. *Id.* at 509-11.

102. *Id.* at 524.

103. See Ryan Vantrease, *The Aftermath of St. Mary's Honor Center v. Hicks and Reeves v. Sanderson Plumbing Products, Inc.: A Call For Clarification*, 39 BRANDEIS L.J. 747 (Spring 2001).

104. 530 U.S. 133 (2000).

105. *Id.* at 147 ("In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose.").

106. *Id.* at 148. See also *Schnabel*, 232 F.3d at 90. The court held that "the Supreme Court's decision in *Reeves* clearly mandates a case-by-case approach, with a court examining the entire record to determine whether the plaintiff could satisfy his 'ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff.'" *Id.*

Still, the circuits have not come to a cohesive interpretation of what showing the plaintiff must make in order to prevail in a summary judgment motion. See Vantrease, *supra* note 103. For instance, the Fifth Circuit has modified the previous pretext plus standard to conform to the opinion in *Reeves* to examine more evidence than "the additional evidence of discrimination in order to determine if a reasonable jury could find discrimination." Brandy S. Parrish, *Walking an Evidentiary Tightrope: The Aftermath of Reeves v. Sanderson Plumbing Products, Inc.*, 31 U. MEM. L. REV. 677, 697 (2001). On the other hand, the Second Circuit has not followed the holding in *Reeves*, and, rather, "has attempted to explain away *Reeves* and continue to analyze circumstantial evidence in intentional discrimination cases just as it had before *Reeves*." *Id.*

107. 257 F.3d 1238 (11th Cir. 2001).

108. *Id.* at 1245.

Miami¹⁰⁹ and the employer's failure to explain why the adverse employment action was taken.¹¹⁰ The court found that Wacsura ultimately proffered little evidence of discriminatory intent¹¹¹ outside of the evidence that the adverse employment action occurred three and one-half months later.¹¹²

In *Shackelford v. Deloitte & Touche*,¹¹³ the Court of Appeals for the Fifth Circuit also discussed timing in relation to the pretext stage of the case for retaliation.¹¹⁴ On the same day that Shackelford alleged that her supervisor overheard her telephone conversation with a class action lawyer, she was fired.¹¹⁵ Shackelford was fired one day after arranging a meeting with a lawyer to discuss her claims of racial discrimination.¹¹⁶ Further, the firing came one week after notice of her participation in a class action suit.¹¹⁷ The Fifth Circuit found that "Shackelford has demonstrated a tight temporal proximity between her protected activity and her termination."¹¹⁸ Therefore, the court relied on timing in the examination of Shackelford's ultimate burden of showing pretext.¹¹⁹ Additionally, the Fifth Circuit stated that the employer must also rebut the element of timing as part of the legitimate reasons for the adverse employment action.¹²⁰

109. *Id.* ("While the lack of complaints or disciplinary reports in an employee's personnel file may support a finding of pretext, it is undisputed that there was no formal review process of the City Clerk.") (internal citations omitted).

110. *Id.* at 1245-46.

111. *Id.* at 1246 ("It is also significant in this case that Wascura has been able to adduce virtually no evidence of discriminatory intent.")

112. *Id.* at 1247 ("In light of the ample legitimate reasons for the termination decision proffered by the City, . . . and in light of the fact that Wascura adduced virtually no evidence of discrimination, we cannot conclude that a reasonable jury could find for the Plaintiff based merely on the three and one-half month temporal proximity and the very weak inference from the Mayor's alleged comment . . .").

113. 190 F.3d 398 (5th Cir. 1999).

114. *Id.* at 409 ("Indeed, the combination of suspicious timing with other significant evidence of pretext, can be sufficient to survive summary judgment.")

115. *Id.* at 408.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 409. The court also looked at other evidence to show pretext including rebutting the supervisor's claims of her hoarding tax returns, evidence of disparate treatment in regards to white employees, and evidence that other employees warned Shackelford not to participate in the class action lawsuit against Deloitte & Touche. The court also noted that Shackelford raised sufficient doubt as to the employer's legitimate reasons for terminating her employment and, combined with the close timing, discharged her burden of proving pretext. *See also Conner*, 121 F.3d at 1398 (10th Cir. 1997). After discussing the prima facie case, the *Conner* court addressed whether or not "protected conduct closely followed by adverse action *always* justifies an inference of retaliatory motive, and thus summary judgment is always inappropriate when temporal proximity is established." *Id.* at 1398. The court refused to find for *Conner*. *Id.*

120. *Shackelford*, 190 F.3d at 409 ("In addition, this circuit has held that where there is a close timing between an employee's protected activity and an adverse employment action, the employer

2. *Pretext and the Prima Facie Case*

In *Farrell v. Planters Lifesavers Co.*,¹²¹ the Court of Appeals for the Third Circuit discussed the two different showings of causation at the prima facie stage of the plaintiff's case and the pretext stage.¹²² The court evaluated the supervisor's behavior, the temporal proximity between the protected activity and the adverse employment action, and Farrell's rebuttal of the defendant's legitimate reasons as the evidence establishing the causal element of Farrell's prima facie case.¹²³ In so doing the court noted: "We recognize that by acknowledging that evidence in the causal chain can include more than demonstrative acts of antagonism or acts actually reflecting animus, we may possibly conflate the test for causation under the prima facie case with that for pretext."¹²⁴

D. *Third Party Actions*

Furthermore, courts have allowed third party claims of retaliation. Husbands have brought claims of retaliation for their wives' protected activity.¹²⁵ In *Holt v. JTM Industries, Inc.*,¹²⁶ a husband filed a claim of retaliation against his employer because his wife had filed a claim of discrimination under the ADEA.¹²⁷ The Fifth Circuit held that the husband lacked standing to sue because he had not participated in his wife's protected activity, but recognized that persons who assist in filing claims for discrimination should have standing to sue for retaliation.¹²⁸

must offer 'a legitimate, non-discriminatory reason that explains both the adverse action *and the timing.*' (quoting *Swanson v. Gen. Serv. Admin.*, 110 F.3d 1180, 1188 (5th Cir. 1997)).

121. 206 F.3d 271 (3d Cir. 2000).

122. *Id.* at 286.

123. *Id.* The court noted that "we must consider the evidence taken in the light most favorable to the non-movant and determine whether Farrell can show the causation required for a prima facie case of retaliation. . . ." *Id.* Although this evidence looks similar to evidence that courts examine in the pretext stage, the court then discussed the evidence for the prima facie case. *Id.*

124. *Id.* See *Long v. Eastfield Coll.*, 88 F.3d 300, 305 n.4 (5th Cir. 1996) ("At first glance, the ultimate issue in an unlawful retaliation case—whether the defendant discriminated against the plaintiff *because* the plaintiff engaged in conduct protected by Title VII—seems identical to the third element of the plaintiff's prima facie case—whether a *causal* link exists between the adverse employment action and the protected activity."); Lee A. Kraftchick & Thomas A. Tucker Ronzetti, *Dodging the Extra Arrow*, 75 FLA. B.J. 26, 33 n.36 (Oct. 2001).

125. See *infra* note 131 and accompanying text.

126. 89 F.3d 1224 (5th Cir. 1996).

127. *Id.* at 1226 (holding that automatic standing to sue for the protected activity of a close friend or relative was contrary to the plain language of the ADEA retaliation provision). See *Brower*, 178 F.3d at 1006 ("It is also required that the plaintiff have personally engaged in protected conduct.") (citing *Smith v. Riceland Foods, Inc.*, 151 F.3d 813, 819 (8th Cir. 1998)).

128. *Holt*, 89 F.3d at 1226-27.

On the other hand, in *Murphy v. Cadillac Rubber & Plastics, Inc.*,¹²⁹ a husband filed a claim of retaliation and the court upheld the claim because a “close relative” engaged in protected activity and the time frame of events indicated that a causal connection existed.¹³⁰ The Eleventh Circuit likewise allowed a husband to state a claim of retaliation based on his wife’s discrimination action.¹³¹

Additionally, the Sixth Circuit currently allows claims by third parties, interpreting the retaliation provision to include claims by representatives of the employees who were discriminated against.¹³² The Seventh Circuit adopted a position that collective punishment is actionable, and assisting someone with a discrimination claim can give rise to actionable retaliation.¹³³

II. TIMING IN THE PRIMA FACIE CASE AND THE PLAINTIFF’S BURDEN OF PRETEXT

A. Causation

1. Temporal Proximity

In *Breeden*, the Court found that courts relying on temporal proximity generally hold that the timing must be very close.¹³⁴ Still, the exact limits of

129. 946 F. Supp. 1108 (W.D.N.Y. 1996).

130. *Id.* at 1118. The court in *Murphy* also noted that John Murphy had “alleged protected activity by a close relative, disadvantageous employment action, and a timeframe indicating a causal connection between the two.” *Id.*

131. *See Wu v. Thomas*, 863 F.2d 1543, 1548 (11th Cir. 1989) (noting that the husband’s “claim also is properly before the court, despite his failure to file an individual charge with the EEOC”). *See also Murphy*, 946 F. Supp. at 1118 (husband stated “a claim of retaliation under Title VII sufficient to defeat a motion to dismiss”); *DeMedina v. Reinhardt*, 444 F. Supp. 573, 580 (D.D.C. 1978) (holding that a cause of action existed for retaliation of a relative or close friend engaging in protected activity).

132. *EEOC v. Ohio Edison Co.*, 7 F.3d 541, 545-46 (6th Cir. 1993). The court in *Ohio Edison* interpreted the retaliation provision in Title VII broadly, and, thus, concluded that “an employee, or his representative” may allege retaliation against an employer if that representative engaged in protected activity. *Id.* The court further explained that “the complaint must indicate the causal connection in order to fit the person allegedly being retaliated against . . . within the meaning of the statute.” *Id.* Therefore, while broadly construing section 704(a) to include suits by third parties, the court also mandates that a strict causal connection exist in order to ensure that not every employee have a cause of action against an employer for an adverse employment action when another employee engages in protected activity. *Id.*

133. *See McDonnell v. Cisneros*, 84 F.3d 256, 262 (7th Cir. 1996) (acknowledging “collective punishment”). On the other hand, the Fourth Circuit did not allow a third party action for retaliation where white police officers attempted to protest discrimination of female and African American officers. The court determined that they did not have standing to sue. *See Childress v. City of Richmond*, 907 F. Supp. 934 (E.D. Va. 1995), *aff’d* 134 F.3d 1205 (4th Cir. 1998).

134. *Breeden*, 532 U.S. at 273. *See also Zucker & Keller*, *supra* note 27, at 30 (“By holding the temporal relationship must be ‘very close,’ the Supreme Court has undoubtedly signaled that more

what defines very close timing remains a question. In *Little*, the adverse action happened at the same time as the protected activity.¹³⁵ At the same meeting where Little told a supervisor about the rape, that supervisor cut her pay, and the Ninth Circuit found causation based on temporal proximity.¹³⁶ In *Gorman-Bakos*, the Second Circuit held that five months was not too long to infer causation.¹³⁷ On the other hand, the court in *Conner* refused to find causation based on a four month time period without evidence of a pattern of retaliatory conduct.¹³⁸ Additionally, the Seventh Circuit, in *Filipovic*, held that a four month time period was too long of a gap between the protected activity and the adverse action to constitute a causal connection.¹³⁹

Further, the *Breeden* Court did not address cases that held timing alone insufficient,¹⁴⁰ and the question remains whether evidence of temporal proximity will suffice in the plaintiff's prima facie case. The *Hughes* court held that four months was not enough to infer a causal connection.¹⁴¹ The *Richmond* court held that there must be a pattern of retaliatory conduct during the time period between the adverse action and the protected activity.¹⁴² In *Shirley*, the Fifth Circuit decided that the appropriate standard for causation under the prima facie case was "but for" causation.¹⁴³

Additionally, the *Breeden* Court held that a long time span, without determining how long is too long, negated an inference of causation.¹⁴⁴ The *Filipovic* court determined that a four month delay invalidated the plaintiff's prima facie case.¹⁴⁵ If this is true, and a long time period causes a case to fail, the plaintiff arguably will not even get a chance to show the "but for"

summary judgments will be affirmed where the only causation argument made is temporal proximity.").

135. See *Little*, 265 F.3d at 903. See also *supra* note 59.

136. See *Little*, 265 F.3d at 914.

137. See *Gorman-Bakos*, 252 F.3d at 554-55. See also *supra* note 48.

138. See *Conner*, 121 F.3d at 1395.

139. See *Filipovic*, 176 F.3d at 398-99.

140. See *Breeden*, 532 U.S. at 268.

141. See *Hughes*, 967 F.2d at 1168. See also *supra* note 71. But see *Gorman-Bakos*, 252 F.3d at 555 (holding that five months was enough to infer causation).

142. See *supra* note 74 and accompanying text.

143. See *McMillan v. Rust Coll., Inc.*, 710 F.2d 1112, 1116-17 (5th Cir. 1983). See also *Ross*, 759 F.2d at 366 (noting a trend among the circuits to follow the "but for" standard in the pretext showing).

144. See *Lindau*, 196 F.3d at 113 (noting that "since two years elapsed between Morris' letter of support for Pavone and his discharge, no inference of causation is justified"); *Filipovic*, 176 F.3d at 399 ("A substantial time lapse between the protected activity and the adverse employment action is counter-evidence of any causal connection." (quoting *Johnson v. Univ. of Wis-Eau Claire*, 70 F.3d 469, 480 (7th Cir. 1995)); *Conner*, 121 F.3d at 1395 (a time lapse of four months defeats causation). See also *supra* note 38 and accompanying text.

145. On the other hand, the Fifth Circuit declined to hold that a fourteen month period negated an inference of retaliation. See *Shirley*, 970 F.2d at 43. Cf. *supra* notes 38 and 144.

causation required for the pretext stage.¹⁴⁶ Further still, some circuits, such as the Fifth Circuit in *Shirley*, determine that “but for” causation is needed to show the prima facie element of causation,¹⁴⁷ while others reserve a showing of “but for” causation for the pretext stage.¹⁴⁸

2. Pretext

Furthermore, courts examine the temporal proximity concept in relation to the plaintiff’s burden to show pretext.¹⁴⁹ *Wacura* and *Shackelford* discussed the element of temporal proximity in regards to the pretext showing.¹⁵⁰ For example, in *Wacura*, the Eleventh Circuit discussed a three and one-half month lapse in the pretext stage of the plaintiff’s case and held that the time period negated causation.¹⁵¹ If the same evidence that the plaintiff may use to show pretext was offered as part of the prima facie case,¹⁵² and the plaintiff must ultimately bear the burden of showing that the employer did in fact retaliate against the employee, then the question arises whether courts should even follow the *McDonnell Douglas* framework.¹⁵³

146. See, e.g., *Breedon*, 532 U.S. at 274.

147. The Fifth Circuit requires “but for” causation. See *supra* text accompanying note 77 and *infra* note 154.

148. See Melissa A. Essary & Terence D. Friedman, *Retaliation Claims Under Title VII, the ADEA, and the ADA: Untouchable Employees, Uncertain Employers, Unresolved Courts*, 63 MO. L. REV. 115, 148 (1998). Professors Essary and Friedman state that after the employer shows some legitimate reasons for the action against the employee, “the burden of production shifts back to the employee to rebut the employer’s explanation with evidence showing that, but for her protected activity, her employer would not have carried out its adverse action.” *Id.*

149. See *Wacura*, 257 F.3d at 1244-45 (discussing temporal proximity in regards to pretext as a general rule of causation but finding that three and one-half months mitigated against a finding of pretext).

150. See *supra* notes 112 and 119. See also *Passatino*, 212 F.3d at 507 (“Moreover, we have held that evidence based on timing can be sufficient to let the issue go to the jury, even in the face of alternative reasons proffered by the defendant.”); *Quinn*, 159 F.3d at 770 (looking at evidence of a strong temporal connection to establish that the employer’s proffered legitimate reasons were pretext for retaliatory discharge). Additionally, courts look to knowledge as an element of showing pretext. See *Johnson*, 945 F.2d at 981 (“[K]nowledge by the defendant of a pending suit does not provide, as a matter of law, that the suit is a motive.”).

151. See *supra* note 149.

152. See *Farrell*, 206 F.3d at 286 (“As our cases have recognized, almost in passing, evidence supporting the prima facie case is often helpful in the pretext stage and nothing about the *McDonnell Douglas* formula requires us to ration the evidence between one stage or the other.”). See also *supra* notes 123 and 124.

153. Some scholars even question the applicability of *McDonnell Douglas* in employment discrimination cases while others defend its continued acceptance. See, e.g., Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229 (1995). See also William R. Corbett, *Of Babies, Bathwater, and Throwing Out Proof Structures: It is not Time to Jettison McDonnell Douglas*, 2 EMPL. RTS. & EMPLOY. POL’Y J. 361 (1998). For example, Professor Corbett asks: “Is a post-*Hicks McDonnell Douglas* analysis worth maintaining? Professor Malamud answers

Shirley required “but for” causation in regards to the prima facie element of causation,¹⁵⁴ while the Fifth Circuit required a similar determination for the pretext stage of the plaintiff’s case.¹⁵⁵ On one hand, the *McDonnell Douglas* framework may become truly burdensome when courts require “but for” causation in the prima facie case and evidence of causation in addition to a rebuttal of the employer’s legitimate reasons in the pretext stage. On the other hand, the framework may make it harder for employers to survive motions for summary judgment if evidence of timing will suffice in both stages.

After *Reeves*, the courts have still discussed the proper means to show pretext after the employer has articulated legitimate, non-discriminatory reasons for the adverse action.¹⁵⁶ Some cases state that the prima facie case is not enough for the plaintiff to discharge the burden for pretext.¹⁵⁷ The prima facie case in some courts, though, requires a greater showing than just temporal proximity, and the plaintiff must include other evidence for the causal connection.¹⁵⁸

3. Third Party Claims and Causation

Courts that allow third party claims also stretch the boundaries of causation.¹⁵⁹ Courts refusing to recognize third party claims by those who did not themselves engage in the protected activity are most likely to correctly

that it is not, and she further argues that plaintiffs would benefit from an open-ended, unrestricted inquiry regarding discrimination. I disagree.” *Id.* at 379. An additional criticism: “Professor Malamud reaches her second conclusion largely because she thinks that *Hicks* has rendered the *McDonnell Douglas* proof structure meaningless, and she believes that *McDonnell Douglas* interferes with courts’ and juries’ ability to focus on the real issue in intentional discrimination cases.” *Id.* at 368.

154. *Shirley*, 970 F.2d at 43 (the district court was not clearly erroneous in finding that the plaintiff must show “but for” causation). See *Mayberry*, 55 F.3d at 1092 (requiring but for causation for the prima facie case).

155. See *McMillan*, 710 F.2d at 1116 (final burden on the plaintiff to show but for causation).

156. See *supra* note 106 and accompanying text. See also Vantrease, *supra* note 103, at 769 (noting that inconsistencies between the rulings in *Hicks* and *Reeves* have “only served to superficially bridge the divide between the pretext only and pretext plus jurisdictions”).

157. See *Schnabel*, 232 F.3d at 90 (stating that “following *Reeves*, we decline to hold that *no* ADEA defendant may succeed on a summary judgment motion so long as the plaintiff has established a prima facie case and presented evidence of pretext.”).

158. See, e.g., *supra* notes 66-67 and text accompanying note 64.

159. See *Holt*, 89 F.3d at 1232 (Dennis, J., dissenting) (stating that “the crucial issue is whether there is a causal connection between the employer’s adverse employment action against the victim and the protected conduct engaged in by the relative or friend”); *Murphy*, 946 F. Supp. at 1118 (noting that “[t]he cases that have allowed third-party claims under Title VII appear to have focused on whether there was a causal relationship between the protected activity engaged in by one person and the adverse actions taken against another”); Kimberly Messinger Murray, Case Note, 36 J. FAM. L. 138, 140 (Winter 1997/1998) (noting that, in discussing the opinion in *Murphy*, the court focused on the “causal connection and the detrimental action”).

interpret the anti-retaliation provisions.¹⁶⁰ Close friends,¹⁶¹ relatives,¹⁶² and representatives¹⁶³ should have cognizable claims, though, where the third party assists in the victim's protected activity.¹⁶⁴ If courts mandate more than mere temporal proximity for the third element of the prima facie case, then third party claims might indeed be too tenuous to support as another connection between the victim of discrimination would need to be shown.¹⁶⁵ For example, the third party may not be able to point to a pattern of retaliatory conduct.¹⁶⁶ On the other hand, if a link between the victim and the employee alleging retaliation can be shown, the prima facie burden should not be construed so stringently as to bar these claims.¹⁶⁷ Thus, while third party actions may provide only a tenuous causal connection, courts may continue to construe statutes to allow claims where the third party has assisted in the victim's protected activity.¹⁶⁸

160. See Essary & Friedman, *supra* note 148, at 152-53 (stating that "the plain language of the employment statutes, providing as it does that an employee is protected only for his own activity, does not support a broad, more equitable reading of the anti-retaliation clauses").

161. See *supra* text accompanying note 130.

162. See *supra* notes 130 and 131.

163. *Ohio Edison*, 7 F.3d at 545-46.

164. See *Holt*, 89 F.3d at 1227 (noting that claims of retaliation where the employee did not aid in the protected activity do not have automatic standing, but stating that the "plain language of [the ADEA] will protect [employees that did participate 'in some manner'] from retaliation for their protected activities").

165. See *supra* note 127. See also Essary & Friedman, *supra* note 148, at 132 ("Regardless of the arguably more equitable outcome under *De Medina*, the plain language of the statutes is clearly on the side of a more restrictive reading in this area. . .").

166. For examples of cases looking towards a pattern of antagonism, see *supra* note 67. The third party may in fact produce evidence of a pattern of retaliatory conduct where the employer knew of the assistance in the protected activity and antagonized the third party based on another employee's claim. Though it seems this determination requires an element of knowledge.

167. See *Robinson*, 519 U.S. at 337. Indeed, after the Supreme Court's decision in *Robinson*, a more liberal interpretation may take hold regarding third party claims as it did for former employees. In *Robinson*, the Court was asked to determine if former employees could bring suits for post-employment acts of retaliation. *Id.* The Court held that a plaintiff could bring an action as a former employee under section 704 of Title VII. *Id.* at 345. Robinson filed an initial complaint with the EEOC after he was fired in 1991 alleging race discrimination. *Id.* at 344. The post-employment action that petitioner alleged was a negative recommendation in response to his EEOC complaint. *Id.* In determining whether former employees may sue for retaliation, the court discussed section 704 and determined that "several sections of the statute plainly contemplate that former employees will make use of the remedial mechanisms of Title VII." *Id.* at 345. Ultimately the Court decided that "it is far more consistent to include former employees within the scope of 'employees' protected by section 704(a)." *Id.* See *supra* note 22 and accompanying text.

168. See *supra* note 164.

III. SEPARATING THE PRIMA FACIE CASE FROM THE PRETEXT BURDEN

The pretext standard might make the plaintiff's showing all but impossible if the plaintiff cannot use the prima facie case as evidence of pretext¹⁶⁹ and is required to show more in order to discharge the ultimate burden of proving causation.¹⁷⁰

In this sense, the two-fold causation requirement in the *McDonnell Douglas* framework seems an impossible burden for the plaintiff.¹⁷¹ In *Farrell*, the court recognized that the two showings of causation are similar but that evidence for one could be used as evidence for the other.¹⁷² Further, if the prima facie causal burden is light, as some courts recognize, the question then becomes, why have two showings at all? This becomes especially pertinent when looking at the need to show pretext using evidence, in addition to rebutting the defendant's proffered non-discriminatory reasons and the causation evidence supplied in the prima facie case.¹⁷³

Therefore, the *McDonnell Douglas* framework should not be utilized in retaliation cases.¹⁷⁴ The plaintiff's burden should include the elements of the

169. In regards to the pretext plus arguments, the First Circuit still requires more than the prima facie case and the Fifth Circuit continues to maintain a somewhat more stringent reliance on the pre-Reeves pretext plus language. See *supra* note 106.

170. See *supra* note 124. See *Long v. Eastfield Coll.*, 88 F.3d 300, 305 n.4 (5th Cir. 1996). The court in *Long* goes on to note the differences between the light burden of the prima facie case and that of pretext, "but for" causation. *Id.* Yet this does not seem to be the case in practice in all of the courts. For instance, what makes the prima facie burden light? Some courts have held that a long period of time negates an inference of causation. Furthermore, many courts require more than just temporal proximity to discharge the burden of proving a causal link in the prima facie case.

171. See *Essary & Friedman*, *supra* note 148, at 142 ("Because there are two independent showings of causation under the McDonnell Douglas scheme, there are two-times as many pitfalls for the unwary employee in asserting the third prima facie element of a retaliation case."). See also Melissa Kotun, *Applying the Erie Doctrine and the McDonnell Douglas Burden-Shifting Analysis When a Conflict with State Law Arises Through a Retaliatory Discharge Claim*, 35 GA. L. REV. 1251, 1271 (2001) ("If a plaintiff has proof showing a causal connection between his protected expression and the adverse employment action, then McDonnell Douglas is unnecessary."); Douglas E. Ray, *Title VII Retaliation Cases: Creating a New Protected Class*, 58 U. PITT. L. REV. 405, 423-24 (1997) ("It is important to note that the formula for establishing a prima facie case of retaliatory discrimination appears somewhat more difficult than the standards for establishing a prima facie case of racial discrimination set forth in *McDonnell Douglas*. The requirement that a plaintiff demonstrate [a causal connection in the prima facie case] seems to demand proof of the ultimate issue.")

172. See *Farrell*, 206 F.3d at 286 (3d Cir. 2000). After discussing the possibility that problems between the two showings of causation may arise, the court in *Farrell* noted that "evidence supporting the prima facie case is often helpful in the pretext stage and nothing about the *McDonnell Douglas* formula requires us to ration the evidence between one stage or the other." *Id.* at 286.

173. See Kotun, *supra* note 171, at 1273 (noting that generally a lighter burden for the prima facie stage than but for causation at the pretext stage); *Essary & Friedman*, *supra* note 148, at 148 (stating that "the first showing of causation in a plaintiff's prima facie case [is] 'much less stringent' than [the] second 'rigorous' causation standard").

174. This is not to say that the *McDonnell Douglas* framework should not be used in

prima facie case, but instead of requiring the plaintiff to show pretext, the standard for causation in the prima facie case ought to be heavier than just showing temporal proximity and should include the overall pattern of antagonism.¹⁷⁵

IV. CONCLUSION

After *Reeves*, most courts have relaxed their pretext standard to a requirement that the plaintiff need only show that the evidence that the employer raised was pretextual, thereby rebutting the employer's claims and the prima facie case.¹⁷⁶ If the prima facie causal showing requires that the plaintiff provide evidence in addition to temporal proximity, such as evidence that similarly situated employees were treated differently; the supervisor had knowledge of the protected activity; or a pattern of antagonism, then the burden-shifting formula may provide an appropriate means for plaintiffs to prove cases of retaliation.¹⁷⁷ Still, the two requirements of causation make the *McDonnell Douglas* framework unworkable for retaliation cases, especially if surpassing summary judgment depends on which circuit hears the case.¹⁷⁸

discrimination cases based upon disparate treatment or impact cases. *See supra* note 66 and accompanying text.

175. Of course the employer should be able to rebut the employee's claims with legitimate reasons for taking action, but the plaintiff could then rely on the evidence introduced to prove the prima facie case to show that the employer's actions were retaliation. Therefore, a plaintiff will have a strong case to overcome a motion for summary judgment, but the burden for the prima facie case will not be light. The burden ultimately remains with the plaintiff, and, yet, at the summary judgment stage, the plaintiff only need to raise an issue of fact in order to take the case to trial.

176. *See Vantrease, supra* note 103, at 771.

To incorporate this with the harmonization approach of the Eleventh Circuit, the D.C. Circuit's framework could be better worded as such: a plaintiff must show, in order to survive summary judgment, a combination of any of the following: (1) the plaintiff's prima facie case; (2) any evidence the plaintiff presents to attack the employer's proffered explanation for its actions; or (3) any further evidence of discrimination that may be available to the plaintiff.

Id.

177. *Id.* Both the defendant and the plaintiff could benefit from the approach outlined in the Vantrease article and in *Reeves*. "Thus a plaintiff who presented an exceptionally strong prima facie case with a good showing of pretext could survive summary judgment without having to show any further evidence of discrimination." *Id.* at 771. "On the other hand, a defendant could enjoy protection from a frivolous finding based on a plaintiff's weak prima facie case and lack of further evidence of discrimination." *Id.* With "but for" causation in the prima facie case, claims without merit would get dismissed without any need for further evidence. It would also seem that, in rebutting the employer's reasons, the plaintiff would flush out circumstantial evidence of retaliatory motive.

178. *See supra* note 157. *See also* *Kiel v. Select Artificials*, 169 F.3d 1131, 1140 (8th Cir. 1999) (Heaney, J., dissenting) ("Additionally, I would hold that *Price Waterhouse* analysis applies to retaliation claims."). *See also* *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241-52 (1989). The Court in *Price Waterhouse* laid the groundwork for mixed-motives decisions—decisions "based on a mixture

Adding more to the prima facie showing of a causal connection than just temporal proximity is not inconsistent with *Breeden* either. In *Breeden*, the Court noted that temporal proximity had to be close, which would have the effect of throwing out cases where the plaintiff would not be able to show pretext.¹⁷⁹ Still, the prima facie burden should be higher than mere temporal proximity.

*Rhea Gertken**

of legitimate and illegitimate considerations.” *Price Waterhouse*, 490 U.S. at 241. The Court held that when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff’s gender into account.

Id. at 258.

The Court determined that this holding did not disrupt the burden-shifting formula from its previous decision in *Burdine*. Addressing the employer’s burden to show legitimate reasons, the Court stated “the employer’s burden is most appropriately deemed an affirmative defense: the plaintiff must persuade the factfinder on one point, and then the employer, if it wishes to prevail, must persuade it on another.” *Id.* at 246.

179. See Zucker & Keller, *supra* notes 27, 134.

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