I. INTRODUCTION

Moberly v. Midcontinent Commc'n provides a unique lens to view recent developments in the interpretation of Title VII's anti-retaliation provision.[1] The main purpose of the provision is to encourage employees to report workplace discrimination without fear of repercussion from their employers.[2] This objective led the Supreme Court to embrace a broad interpretation of both the type of employee activities protected by the provision and the scope of employer activities recognized as actionable.[3] *Moberly* shows that these broad interpretations skew the balance between the competing interests of 1) protecting individual employees who report discrimination in the workplace from retaliation and 2) avoiding punishment for employers who had no notice of the discrimination beyond the knowledge of a perpetrating supervisor.

In *Moberly*, the plaintiff accused Midcontinent, her employer, of retaliating against her after she told Powell, her supervisor's supervisor, that his comments made her feel "uncomfortable" once or twice.[4] Moberly asserted Midcontinent retaliated in four ways: by disciplining her in writing, giving her a poor performance evaluation,

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[1] Moberly v. Midcontinent Commc'n, 711 F. Supp. 2d 1028, 1041 (S.D. 2010); 42 U.S.C. § 2000e-3(a).

[2] Burlington N. & Santa Fe R.R. Co. v. White, 548 U.S. 53, 63-64 (2006).

[3] Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn., 555 U.S. 271 (2009) (holding speaking out about discrimination during an employer's internal investigation is protected by the anti-retaliation provision even when not on an employee's initiative); *Burlington*, 548 U.S. at 57 (holding the anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace).

[4] *Moberly*, 711 F. Supp. at 1043.

denying her a bonus and, ultimately, terminating her.[5] Notably, the plaintiff failed to make her opposition to these advances known to anyone but Powell, not even her direct supervisor, until after she was terminated.[6]

On motion from the defendant, the trial court denied summary judgment on the retaliation claim.[7] After applying the *McDonnell Douglas* burden-shifting framework, the court ruled that the plaintiff's resistance was indeed protected conduct.[8] Also, after inferring causation through temporal proximity between Moberly's complaints and the retaliation, the court ruled that Moberly offered sufficient evidence for a reasonable jury to conclude her opposition to her supervisor's advances was a determinative factor in his decision to deny her a bonus and terminate her.[9] Further, on a separate issue of sexual harassment, the trial court denied the defendant's assertion that they were not vicariously liable for their supervisor's sexual harassment via the *Ellerth/Faragher* defense as the discrimination culminated in the plaintiff's termination.[10]

The *Moberly* decision highlights certain concerns that arise when a plaintiff fails to provide notice of the discrimination to anyone but an offending supervisor, but still invokes temporal proximity to show causation. Part II of this note examines two recent

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[5] *Id.*

[6] *Id.* at 1036.

[7] *Id.* at 1046.

[8] *Id.*

[9] *Id.*

[10] *Id.* at 1041.

Supreme Court decisions that shape the application of Title VII at the trial court level. Part III analyzes *Moberly* in light of these new developments. Finally, Part IV concludes that the practice of inferring causation from temporal proximity when the evidence shows only the perpetrating supervisor was aware of the opposition shifts the balance of interests implicated at the expense of unaware employers.

II. BACKGROUND

The Supreme Court's recent decisions in *Crawford* and *Burlington* help define those employee and employer activities which are actionable under Title VII.[11] However, these decisions still leave many disputed issues unresolved.

Title VII's anti-retaliation provision prohibits discrimination against any employee if that employee "opposed" any employment practice made illegal by the Act.[12] To establish retaliation, a plaintiff must prove: 1) that she engaged in a protected activity, 2) a reasonable person would have perceived the retaliatory action materially adverse, and 3) this adverse action was causally linked to her protected conduct.[13] Some jurisdictions add a fourth element that requires the defendant to be aware of the plaintiff's participation in the protected activity.[14] Many jurisdictions allow temporal

[11] *Crawford*, 555 U.S. 271; *Burlington*, 548 U.S. 53.

[12] 42 U.S.C. § 2000e-3(a).

[13] *Moberly*, 711 F. Supp. 2d 1028.

[14] Little v. NBC, 210 F. Supp. 2d 330, 384 (S.D.N.Y. 2002).

proximity between the opposition and the retaliation to establish an inference of causation for a *prima facie* case.[15]

Concerning the first element, an employee's behavior need not rise to the level of formal charges of discrimination, but must put the employer on notice as to the illegality of the discriminatory workplace activity.[16] The opposition clause of the anti-retaliation provision requires employees to "oppose" the discriminatory practices of their employers in order to establish a claim.[17] The term "oppose" carries its ordinary meaning, "to resist or antagonize; to contend against; to confront; withstand; to be hostile or adverse to, as in opposition".[18] Opposition is always found when an employee "communicates to her employer a belief that the employer has engaged in a form of employment discrimination".[19] This type of communication is satisfied when an employee uses an employer's grievance procedures, complains to unions, other employees or media or testifies about unlawful conduct in an internal investigation.[20]

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[15] *Moberly*, 711 F. Supp. 2d at 1045 (quoting O'Bryan v. KTIV Television, 64 F.3d 1188, 1193-94 (8th Cir. 1995)); *Little*, 210 F. Supp. 2d at 386; Black v. City & Cnty. Of Honolulu, 112 F. Supp. 2d 1041, 1054 (HA 2000).

[16] *Crawford*, 555 U.S. 271, 277 (ruling opposition is not limited to "consistent" activities "instigated or initiated" by the employee); Curay-Cramer v. The Ursuline Academy of Wilmington, Del., Inc., 450 F.3d 130, 135 (3d Cir. 2006) (ruling opposition to an illegal employment practice must identify the employer and the practice); Smith v. FTData, Inc., 247 F. Supp. 2d 734, 748 (MD 2003) (ruling protected behavior must satisfy a "speaking out" requirement to give an employer on notice).

[17] 42 U.S.C. § 2000e-3(a).

[18] *Crawford*, 555 U.S. 271, 276 (quoting Webster's New International dictionary 1710 (2d ed. 1957) and Random House Dictionary of the English Language 1359 (2d ed. 1987).

[19] *Id.* (citing 2 EEOC Compliance Manual §§ 8-II-B(1), (2), p 614:0003 (Mar. 2003)).

[20] *Id.* at 273.

Whether opposition is established when an employee resists the advances of a supervisor without notifying anyone else is still disputed among different jurisdictions.[21] While the Supreme Court weighed in on the scope of employee activities protected by the opposition clause in *Crawford*, Justice Alito's concurrence suggests the holding of the opinion is relatively narrow and leaves the issue of "whether the opposition clause shields employees who do not communicate their views to their employers through purposive conduct" off the table.[22] As the issue remains unresolved, lower courts are free to determine whether general rebuffs are protected or not.

Concerning the second and third elements, an employer's discrimination must be both materially adverse and casually linked to the employee's protected action.[23] Employer actions need not relate solely to employment or the workplace, but must be "materially adverse to a reasonable employee or job applicant", meaning, they "must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination."[24] Casual connection may be established indirectly by showing "the protected activity was followed closely by discriminatory

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[21] *Compare Smith*, 247 F. Supp. 2d at 748-49 (ruling plaintiff failed to establish opposition by telling her supervisor to "cease all kissing and other sexual episodes" as she failed to show she believed his advances to be illegal and communicated her protests to him only), *and* Fitzgerald v. Henderson, 36 F. Supp. 2d 490, 499 (ruling rejection of sexual advances is not a protected activity under Title VII), *with Black*, 112 F. Supp. 2d at 1049 (ruling plaintiff established opposition by requesting a transfer from her supervisor's command as "avoidance of sexual harassment constitutes opposition").

[22] *Crawford*, 555 U.S. at 281-283 (Alito, J., concurring) (suggesting the term "oppose" requires "active and purposive" conduct and does not extend to "silent opposition").

[23] *Burlington*, 548 U.S. 53; *Little*, 210 F. Supp. 2d at 385.

[24] *Burlington*, 548 U.S. at 57.

treatment" so long as the temporal proximity between the two events is "very close" and not too attenuated.[25] The determinations of whether an employer's action is "materially adverse" and casually related are questions of fact for the jury.[26]

Jurisdictions that adopt both actionable "silent opposition" and inferred causation through "temporal proximity" present plaintiffs with a much lower barrier to bringing a claim of retaliation, raising concerns about the amount of notice afforded employers.[27] In his concurrence, Justice Alito warned of the practical implications of such a scheme, foreshadowing "it would open the door to retaliation claims by employees who never expressed a word of opposition to their employers".[28] While such a claim may be curtailed by a plaintiff's inability to show an employer's awareness of the discrimination, and thus causation, Justice Alito proposed the causation requirement may be met by showing "mere temporal proximity", which could result from a informal chat at the "proverbial water cooler".[29] Such inferences, while technically satisfying the causation requirement, result in a problematic uncertainty

[25] *Little*, 210 F. Supp. 2d at 385 (citing Clark County Sch. Dist. v. Breedon, 532 U.S. 268, 273).

[26] *Burlington*, 548 U.S. at 68-69 (ruling the anti-retaliation provision's standard for judging harm must be objective); *Black*, 112 F. Supp. 2d at 1054 (ruling causation is a factual issue that must be resolved by a jury for every incident of retaliation alleged).

[27] *Crawford*, 555 U.S. at 282-283.

[28] *Id.*

[29] *Id.*

regarding the employer's awareness of the discriminatory actions and may open the floodgates to an inundation of retaliation claims.[30]

Additionally, inferring causation through temporal proximity implicates the availability of the *Ellerth/Faragher* defense to employers in sexual harassment cases.[31] The *Ellerth/Faragher* defense establishes that an employer is not vicariously liable for discrimination caused by a supervisor with authority over the plaintiff employee when 1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior and 2) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.[32] Reasonable care by an employer may be established by the distribution of an anti-harassment policy.[33]

However, the *Ellerth/Faragher* defense is not available to an employer when the discrimination culminates in a tangible employment action such as discharge or demotion.[34] Thus, finding causation through temporal proximity risks precluding employers that may unknowingly dismiss an employee who failed to provide notice of discrimination to anyone but a perpetrating supervisor from asserting the defense. To

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[30] *Id.* (Alito, J., concurring) (citing EEOC charge statistics showing retaliation charges filed with the EEOC doubled from 1992 to 2007 and predicting that "[a]n expansive interpretation of protected opposition conduct would likely cause this trend to accelerate").

[31] *Crawford*, 555 U.S. at 278-279.

[32] *Smith*, 247 F. Supp. 2d at 750. (citing Faragher v. Boca Raton, 524 U.S. 775, 807 (1998)).

[33] *Id.* at 751.

[34] *Id.* at 750.

avoid this, the defense should remain relevant when there is a material dispute of fact concerning the tangible employment action.[35]

III. ANALYSIS

The *Moberly* case offers four points of interest to examine these recent developments in Title VII case law: 1) whether Moberly's rebuffs of Powell were indeed protected conduct under the anti-retaliation provision, 2) whether the court correctly excluded the disciplinary warning and the negative performance evaluation as not "materially adverse", 3) whether it was proper to infer causation through temporal proximity for each retaliatory action alleged and 4) whether the *Ellerth/Faragher* defense was incorrectly dismissed for the claim of *quid pro quo* sexual harassment.

First, the court correctly decided that the Moberly's conduct was protected activity as it fell under the opposition clause as interpreted by the Eighth Circuit.[36] The Eighth Circuit has held that "an employee may be found to have engaged in protected opposition when she tells her supervisor to stop offensive conduct".[37] Here, Moberly told her supervisor at least one or twice that his comments made her feel uncomfortable.[38] While broad in its interpretation of the opposition clause, the Moberly

[35] *Id.*

[36] *Moberly*, 711 F. Supp. at 1044.

[37] *Id.* (citing *Ogden*, 214 F.3d at 1007).

[38] *Id.* at 1034.

court's decision is technically congruent with the Supreme Court's holding in *Crawford*, though it hints at some of the concerns voiced by Justice Alito in his concurrence.[39]

Second, the court correctly ruled that the denial of a bonus and the plaintiff's termination established a "materially adverse retaliatory action", but incorrectly precluded the written warning and negative performance evaluation as a jury could find that the context of the situation made them "materially adverse" as well.[40] Unwarranted disciplinary letters may constitute materially adverse employment actions.[41] This is consistent with the Supreme Court's language in *Burlington*, ruling that the determination of material adversity must be objective and based in the context of the situation.[42] Receiving a written warning or a negative performance evaluation could result in severe consequences for those employees, like Moberly, who are looking to advance or change positions. The court erred in dismissing these employer actions as a matter of law as the determination should have been left to a jury.[43]

Third, the court correctly inferred causation to find a *prima facie* case of retaliation, but failed to include the "very close" language required by the Supreme Court for temporal proximity cases.[44] In *Breedon*, the Court cited approvingly cases that

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[39] *See supra* notes 27-30.

[40] *Moberly*, 711 F. Supp. at 1044; *Burlington*, 548 U.S. at 68-69.

[41] *Little*, 210 F. Supp. 2d at 387.

[42] *Burlington*, 548 U.S. at 69 ("an act that would be immaterial in some situations is material in others").

[43] *Moberly*, 711 F. Supp. at 1044.

[44] *See supra* note 25.

dismissed retaliation claims with three or four month periods between the protected activity and the retaliation.[45] Moberly complained to her supervisor about his comments making her feel "uncomfortable" in December 2006.[46] The first three retaliatory acts in question all occurred comfortably within the three months following these complaints.[47] However, Midcontinent did not terminate Moberly until March 2007. Depending on the exact days Moberly asserted her opposition to Powell, the retaliation could be too attenuated for a jury to find causation. While this reasoning may not have prevented Moberly from asserting her *prima facie* case, it makes her eventual rebuttal more difficult.[48]

Finally, the court incorrectly precluded Midcontinent from asserting the *Ellerth/Faragher* defense as the termination was a disputed question of fact to be determined by a jury.[49] The *Ellerth/Faragher* defense may still be relevant if "a fact-finder has to determine whether, aside from the tangible employment action, there was" sexual harassment.[50] After Moberly established her *prima facie* case of *quid pro quo* sexual harassment, Midcontinent countered with legitimate reasons for the denial of Moberly's bonus and her ultimate dismissal, arguing employees with unsatisfactory

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[45] *Id.* at 387.

[46] *Moberly*, 711 F. Supp. at 1033.

[47] *Id.* at 1034-1035.

[48] *Id.* at 1045-1046.

[49] *Id.* at 1041; *see supra* note 26.

[50] *Smith*, 247 F. Supp. 2d at 751.

performance evaluations are not eligible for a bonus and that Moberly was dismissed for poor work performance.[51] Thus, the reason for Moberly's termination remained disputed and could potentially be decided in Midcontinent's favor by a jury. In that case, with no termination to preclude the affirmative defense, *Ellerth/Faragher* could still remain viable for Midcontinent for the other acts of sexual harassment as Midcontinent did have an anti-discrimination policy and Moberly failed to observe it before filing her claim.[52]

IV. CONCLUSION

Inferring causation from temporal proximity when the evidence shows only the perpetrating supervisor was aware of the opposition skews the balance between the competing interests of protecting individual employees from retaliation and avoiding punishment for employers that received no notice of discrimination. This imbalance is highlighted through the decision of the *Moberly* court. While the evidence does show Moberly opposed Powell's advances, she failed to report multiple incidents of discrimination for months and only did so retroactively, despite being aware of Midcontinent's anti-discrimination policies.[53] Midcontinent was only put on notice of the discrimination after Moberly's termination, at which point they had no chance to remedy the situation.

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[51] *Id.*

[52] *Moberly*, 711 F. Supp. at 1032.
[53] *Id.* at 1036.

While it is important to ensure employees are safe to report discrimination without repercussion, punishing employers with no knowledge of discrimination does not advance this purpose. The *Moberly* decision suggests that the pendulum may have swung too far. The Court has ruled that employees who have the opportunity to fix discrimination by "taking advantage of any preventive or corrective opportunities provided by the employer" have a duty to do so.[54] The Supreme Court's decisions in *Crawford* and *Burlington* do provide some guidance on the outer parameters of retaliation claims, but more must be done to clarify the role of using temporal proximity to determine causation, particularly in cases where the only opposition was to rebuff a supervisor's advances.

[54] *Crawford*, 555 U.S. at 279 (quoting *Faragher*, 524 U.S. at 807).