

WEIGHING TEMPORAL PROXIMITY IN TITLE VII RETALIATION CLAIMS

Abstract: In recent years, employment discrimination retaliation claims have been a growing focus of federal employment law. The primary source of this protection has been § 704(a) of Title VII of the Civil Rights Act of 1964. Title VII retaliation claims are litigated using a common judicial framework originally developed for discrimination claims. Courts differ, however, in their individual application of this framework and, as a result, vary significantly in their standards for litigating a Title VII retaliation claim. A significant source of this disparity has been the way in which courts treat the time that elapses between an employee's anti-discrimination activity and an employer's allegedly retaliatory action ("temporal proximity"). This Note evaluates the conflicting approaches to the element of temporal proximity. It concludes that despite the conflicting treatment of temporal proximity evidence by different federal jurisdictions, a single, optimal rule for such evidence can be identified.

INTRODUCTION

In recent years, employment discrimination retaliation claims have been a growing focus of federal employment law.¹ Employees seeking legal recourse for employment discrimination have increasingly sought protection from employers attempting to retaliate against their anti-discrimination efforts.² The primary source of this protection has been § 704(a) of Title VII of the Civil Rights Act of 1964.³ Ti-

¹ SAMUEL ESTREICHER & MICHAEL C. HARPER, *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION AND EMPLOYMENT LAW* 658 (2000); Penny Nathan Kahan & Lori L. Deem, *Retaliation Update*, A.L.I.-A.B.A. Course of Study, Current Developments in Employment Law 431, 434 (July 26-28, 2001).

² See ESTREICHER & HARPER, *supra* note 1, at 658; Kahan & Deem, *supra* note 1, at 434.

³ 42 U.S.C. § 2000e-3(a) (1994); see Kahan & Deem, *supra* note 1, at 434. Most federal anti-retaliation provisions contain the same basic protections as the Title VII provision. See, e.g., Age Discrimination in Employment Act (ADEA) of 1967, 29 U.S.C. § 623(d) (1994); Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. § 12203(a) (1994). Courts employ the same framework in adjudicating claims pursuant to each of these statutes. See, e.g., *Casumpang v. Int'l Longshoremen's and Warehousemen's Union, Local 142*, No. 99-16674, 2001 WL 1265226, at *14 (9th Cir. 2001) (Labor-Management Reporting and Disclosure Act); *Gribcheck v. Runyon*, 245 F.3d 547, 550 (6th Cir. 2001) (Rehabilitation Act); *Hudson v. Norris*, 227 F.3d 1047, 1050-51 (8th Cir. 2000) (42 U.S.C. § 1983); *Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499, 511 (7th Cir. 1998) (ADA); *Moon v. Transp. Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987) (Surface Transportation Assistance

title VII protects employees both from discriminatory treatment in employment and from retaliation by employers for asserting their rights against alleged discrimination.⁴ In a discrimination claim, an employee alleges that an employer treated the employee differently because of a statutorily protected characteristic.⁵ In a retaliation claim, an employee alleges that an employer treated the employee adversely because the employee protested alleged discrimination.⁶ Title VII retaliation claims are litigated using a common judicial framework originally developed for discrimination claims.⁷ Courts differ, however, in their individual application of this framework and, as a result, vary significantly in their standards for litigating a Title VII retaliation claim.⁸ A significant source of this disparity has been the way in which courts treat the time that elapses between an employee's anti-discrimination activity and an employer's allegedly retaliatory action ("temporal proximity").⁹

Temporal proximity is crucial in many retaliation claims because retaliatory employers rarely memorialize their retaliatory motives.¹⁰ In

F.2d 226, 229 (6th Cir. 1987) (Surface Transportation Assistance Act). Although this Note focuses on Title VII, many of the cases discussed involve claims pursuant to other federal statutes. See, e.g., *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142-48 (2000) (ADEA). Indeed, the analysis is applicable to these statutes as well. See *id.*

⁴ See 42 U.S.C. §§ 2000e-2(a), -3(a) (1994).

⁵ Mark S. Brodin, *The Demise of Circumstantial Proof in Employment Discrimination Litigation*: *St. Mary's Honor Center v. Hicks*, *Pretext*, and the "Personality" Excuse, 18 *BERKELEY J. EMP. & LAB. L.* 183, 187 (1997).

⁶ See, e.g., *Reed v. A.W. Lawrence & Co.*, 95 F.3d 1170, 1177 (2d Cir. 1996); see also *infra* note 29 and accompanying text (discussing the relationship of retaliation claims to underlying allegations of discrimination).

⁷ Kahan & Deem, *supra* note 1, at 435. The United States Supreme Court has developed this common framework in the discrimination context based on Title VII as well as other statutes. See *Reeves*, 530 U.S. at 142-48; *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-11 (1993); *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-05 (1973); see also *supra* note 3 (discussing anti-retaliation context).

⁸ See Edward T. Ellis & Suzanne O. Rudder, *Current Developments in the Law of Retaliation*, A.L.I.-A.B.A. Course of Study, *Current Developments in Employment Law* 241, 246-57 (July 27, 2000); 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, 125-27 (1998); Debbie Rodman Sandler & Laura W. Brewer, *Retaliation Claims Under the Civil Rights Acts: Treacherous Waters for Employers*, 13 *LAB. LAW.* 107, 107-15 (1997); Stephen W. Smith, *Title VII's National Anthem: Is There a Prima Facie Case for the Prima Facie Case?*, 12 *LAB. LAW.* 371, 381 (1997).

⁹ See Ellis & Rudder, *supra* note 8, at 257.

¹⁰ See *Hicks*, 509 U.S. at 534 (Souter, J., dissenting) ("employers who discriminate are not likely to announce their discriminatory motive"); Ann Clarke Snell & Lisa R. Eskow, *What Motivates the Ultimate Decisionmaker? An Analysis of Legal Standards for Proving Causation and Malice in Employment Retaliation Suits*, 50 *BAYLOR L. REV.* 381, 396 (1998).

the absence of such "smoking gun" evidence, many retaliation claims are mostly, if not entirely, built on circumstantial evidence including temporal proximity.¹¹ Furthermore, temporal proximity has been recognized as particularly powerful circumstantial evidence of retaliation.¹² Short intervals of time between an employee's anti-discrimination efforts and an employer's allegedly retaliatory action can create powerful inferences of retaliation.¹³ Yet courts have not adopted consistent standards for weighing temporal proximity evidence.¹⁴ As a result, temporal proximity is not given the same weight among courts, nor even, on occasion, in different cases within the same jurisdiction.¹⁵ Although the standards for evaluating temporal proximity are often defined in similar terms, the differences in the application of those definitions are significant and may be crucial to the success of a retaliation claim.¹⁶

This Note proposes a framework for assessing the appropriate weight that should be given to temporal proximity evidence in Title VII retaliation claims. Part I examines the structure of retaliation claims and identifies the role of temporal proximity within that framework.¹⁷ Part II explores the various ways in which courts currently weigh temporal proximity and defines three broad categories of rules for the treatment of such evidence ("temporal proximity rules").¹⁸ Part III analyzes the components of these rules and establishes from them the basic principles determining the appropriate weight for temporal proximity.¹⁹ Finally, Part IV defines and proposes

¹¹ Snell & Eskow, *supra* note 10, at 396; see Ellis & Rudder, *supra* note 8, at 257.

¹² See Ellis & Rudder, *supra* note 8, at 257 (identifying temporal proximity as the "single most important factor in a circumstantial retaliation case"); see also Essary & Friedman, *supra* note 8, at 143; Kahan & Deem, *supra* note 1, at 445; Peter M. Panken, *Retaliation Update: Don't Get Mad, Don't Get Even, Just Be Savvy*, A.L.L.-A.B.A. Course of Study, Basic Employment and Labor Law—in-Depth 547, 571 (Aug. 13–17, 2001); Sandler & Brewer, *supra* note 8, at 119; Snell & Eskow, *supra* note 10, at 401.

¹³ See, e.g., Sandler & Brewer, *supra* note 8, at 119.

¹⁴ Ellis & Rudder, *supra* note 8, at 257.

¹⁵ See *id.*; see also *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 279 (3d Cir. 2000) (noting court precedents "split" on weight of temporal proximity).

¹⁶ Compare, e.g., *O'Neal v. Ferguson Constr. Co.*, 237 F.3d 1248, 1253 (10th Cir. 2001) (finding three months not "very close" and therefore not sufficient evidence of temporal proximity, but one and one-half months "very close" and therefore sufficient), with *Holava-Brown v. Gen. Elec. Co.*, No. 98-9661, 1999 WL 642966, at *4 (2d Cir. 1999) (holding less than three months "close" and therefore sufficient).

¹⁷ See *infra* notes 21–89 and accompanying text.

¹⁸ See *infra* notes 90–122 and accompanying text.

¹⁹ See *infra* notes 123–238 and accompanying text.

a single rule for weighing temporal proximity evidence based on those principles.²⁰

I. THE ROLE OF TEMPORAL PROXIMITY IN A TITLE VII RETALIATION CLAIM

A. *The Retaliation Framework: Title VII and the Burden Shift*

Title VII has long been the cornerstone of federal employment discrimination law.²¹ Title VII prohibits discrimination by employers based on race, color, religion, sex, or national origin.²² The statute provides employees with an administrative procedure for pursuing claims through the Equal Employment Opportunity Commission (EEOC) and creates a private right of action for employees seeking damages or relief for employment discrimination.²³ Title VII, therefore, not only prohibits employment discrimination, but also enables employees to seek recourse for discrimination.²⁴

In addition to prohibiting discrimination, Title VII protects employees from retaliation in response to their anti-discrimination activity.²⁵ A retaliation claim begins with alleged employment discrimination.²⁶ The employee responds to the alleged discrimination by protesting the discrimination in some way.²⁷ This may be as informal as discussing it with the employer or as formal as filing an official complaint with the EEOC.²⁸ The focus of a Title VII retaliation claim, however, is an employment action, such as firing, demotion, or reduction in pay, that allegedly occurs in response to the employee's anti-discrimination activity.²⁹ Specifically, Title VII prohibits an employer

²⁰ See *infra* notes 239-392 and accompanying text.

²¹ See 42 U.S.C. § 2000e (1994); Kahan & Deem, *supra* note 1, at 434.

²² 42 U.S.C. § 2000e-2(a).

²³ *Id.* § 2000e-5(a)-(f).

²⁴ See *id.*

²⁵ *Id.* § 2000e-3(a); see Essary & Friedman, *supra* note 8, at 116.

²⁶ See, e.g., *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 500 (9th Cir. 2000).

²⁷ See *id.* at 500-01.

²⁸ See *id.* at 500-01, 506.

²⁹ See *id.* at 500-03; Kahan & Deem, *supra* note 1, at 441. Because a retaliation claim is based on facts and legal protections independent of an underlying discrimination claim, a retaliation claim can succeed regardless of the success of the underlying discrimination claim. See Douglas E. Ray, *Title VII Retaliation Cases: Creating a New Protected Class*, 58 U. PITT. L. REV. 405, 407 (1997); Sandler & Brewer, *supra* note 8, at 109-10. As a result, the potential for frivolous retaliation claims has been a significant concern of courts and critics. See Ray, *supra*, at 407 n.9; see also *Dowe v. Total Action Against Poverty in Roanoke Val-*

from retaliating against an employee because that employee has "opposed" unlawful discrimination in the workplace or has "participated" in any process or investigation directed against such discrimination.³⁰ The rationale for these provisions is to ensure employees full access to Title VII's anti-discrimination protections.³¹ Protecting employees from employment discrimination, after all, would be meaningless if an employer could simply fire an employee who sought to protest discriminatory behavior.³²

Title VII also establishes the basic requirements for proving retaliation.³³ In defining these requirements, the statute attempts a careful balance between employee rights and employer interests that courts struggle to maintain.³⁴ To succeed in a Title VII retaliation claim, a plaintiff must prove three elements: (1) the plaintiff engaged in a statutorily protected anti-discrimination activity ("protected activity"); (2) the plaintiff's employer took adverse employment action against the plaintiff ("adverse action"); and (3) a causal connection existed between the plaintiff's protected activity and the employer's adverse action ("causal connection").³⁵ Retaliation claims proceed in one of two ways, depending on the nature of the evidence available.³⁶ Plaintiffs with direct evidence of retaliation present such evidence without the benefit of a shifting burden of production ("burden

ley, 145 F.3d 653, 657 (4th Cir. 1998) (discussing impact of this concern on evaluation of temporal proximity evidence).

³⁰ 42 U.S.C. § 2000e-3(a). For comparison of opposition and participation clauses, see Ellis & Rudder, *supra* note 8, at 244-46; Essary & Friedman, *supra* note 8, at 121-29; Kahan & Deem, *supra* note 1, at 436-41; Sandler & Brewer, *supra* note 8, at 112-15. Both for discrimination and retaliation claims, Title VII provides for injunctive relief and "such affirmative action as may be appropriate," including reinstatement, back pay, and other equitable relief. 42 U.S.C. § 2000e-5(g).

³¹ See Ellis & Rudder, *supra* note 8, at 243. Like the anti-discrimination provisions, however, Title VII's anti-retaliation provisions are not intended to interfere with "traditional management prerogatives" of employers or protect employees beyond the specific context of retaliation. See *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 259 (1981) (citing *Steelworkers v. Weber*, 443 U.S. 193, 205-06 (1979)); see also *Dowe*, 145 F.3d at 657 ("Title VII was not enacted to guarantee tenure in the workplace."); *Swanson v. Gen. Servs. Admin.*, 110 F.3d 1180, 1188 n.3 (5th Cir. 1997) ("Title VII's protection . . . does not permit EEOC complainants to disregard work rules or job requirements.").

³² See Ellis & Rudder, *supra* note 8, at 243.

³³ See 42 U.S.C. § 2000e-3(a).

³⁴ See Snell & Eskow, *supra* note 10, at 382.

³⁵ See Essary & Friedman, *supra* note 8, at 120; see also, e.g., *Passantino*, 212 F.3d at 506. Although courts describe these proof requirements as necessary to establish a *prima facie* case, they are the same elements required ultimately to prove retaliation according to the terms of the statute. See 42 U.S.C. § 2000e-3(a).

³⁶ See Essary & Friedman, *supra* note 8, at 120.

shift").³⁷ Plaintiffs with only circumstantial evidence, however, experience this benefit.³⁸

In 1973, in *McDonnell Douglas Corp. v. Green*, the Supreme Court of the United States adopted a burden shift for Title VII discrimination cases.³⁹ Since *McDonnell Douglas*, all United States Courts of Appeals have adopted the burden shift for retaliation claims under Title VII as well.⁴⁰ The burden shift involves three steps.⁴¹ First, the plaintiff must make a showing of a prima facie case of retaliation.⁴² If the plaintiff's showing is sufficient, the burden shifts to the defendant to articulate a legitimate, non-retaliatory reason for the adverse action taken against the plaintiff.⁴³ If the defendant articulates such a reason, the burden shifts back to the plaintiff to prove that the stated reason for the adverse action is actually a pretext for retaliation.⁴⁴ Under the burden shift, therefore, proving pretext satisfies the plaintiff's ultimate burden of proof in a retaliation claim.⁴⁵

Since *McDonnell Douglas*, the burden shift has provided the framework for presenting and evaluating the circumstantial evidence so common to Title VII claims.⁴⁶ The Supreme Court introduced the burden shift as the best means to fulfill Title VII's purpose of protect-

³⁷ See Brodin, *supra* note 5, at 188-89; Smith, *supra* note 8, at 382.

³⁸ See Brodin, *supra* note 5, at 188-89. Although courts implicitly adopt this distinction, they usually begin explicitly analyzing a claim with the burden shift analysis. See *infra* notes 39-45 and accompanying text; see also, e.g., *O'Neal v. Ferguson Constr. Co.*, 237 F.3d 1248, 1252 (10th Cir. 2001) (beginning analysis with prima facie case requirements).

³⁹ See 411 U.S. 792, 802-04 (1973).

⁴⁰ See Kahan & Deem, *supra* note 1, at 435-36.

⁴¹ *Burdine*, 450 U.S. at 252-53; see Essary & Friedman, *supra* note 8, at 120-21.

⁴² *Burdine*, 450 U.S. at 252-53; see *infra* notes 50-52 and accompanying text.

⁴³ *Burdine*, 450 U.S. at 252-53; see Essary & Friedman, *supra* note 8, at 120. If the defendant is unable to produce evidence of legitimate, non-retaliatory motive after the plaintiff has established a prima facie case, then the plaintiff wins the claim as a matter of law. See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510 n.3 (1993); see also *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 146-48 (2000) (elaborating on the standard adopted in *Hicks*).

⁴⁴ *Burdine*, 450 U.S. at 252-53; see Essary & Friedman, *supra* note 8, at 121.

⁴⁵ See Brodin, *supra* note 5, at 192. At the pretext stage, the plaintiff's burden "merges with the ultimate burden" of proving the claim. *Burdine*, 450 U.S. at 256. The plaintiff thus satisfies the ultimate burden of proof with circumstantial evidence as fully under the burden shift as might have been possible if the plaintiff had direct evidence of retaliation. See *id.*

⁴⁶ See Brodin, *supra* note 5, at 190-91 (citing *Burdine*, 450 U.S. at 255 n.8); Smith, *supra* note 8, at 383 (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring) ("[T]he entire purpose of the McDonnell Douglas prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by.")); see also *Hicks*, 509 U.S. at 525 (Souter, J., dissenting).

ing equality in the workplace.⁴⁷ It "is intended progressively to sharpen the inquiry into the elusive factual question" of a Title VII claim by creating an "intermediate" burden of production—the *prima facie* burden—distinct from the plaintiff's "ultimate" burden.⁴⁸ In doing so, the burden shift facilitates access to Title VII protection for plaintiffs with no direct evidence of retaliation.⁴⁹

B. Temporal Proximity in the Burden Shift Proof Scheme: The Prima Facie Case and the Causal Connection Requirement

In most jurisdictions, the elements required to establish a *prima facie* case of retaliation are the same as those required ultimately to prove retaliation: protected activity, adverse action, and a causal connection.⁵⁰ Because of the burden shift, however, the plaintiff's entire burden of proof need not be satisfied at the *prima facie* stage.⁵¹ Instead, the plaintiff need only raise an inference of retaliation to state a *prima facie* case, a burden that the Supreme Court has defined as "not onerous."⁵² The plaintiff may then fulfill the burden by proving pretext.⁵³

Determining the point at which a plaintiff has established a *prima facie* case, therefore, is essential for two reasons.⁵⁴ First, it enables a plaintiff with no direct evidence of retaliation to proceed with a claim—thereby fulfilling the original rationale for the burden shift.⁵⁵ Second, establishing a *prima facie* case shifts not only the burden but the entire battle.⁵⁶ Although the plaintiff still bears the ultimate burden of proof, the plaintiff need not produce the same kind or amount of evidence under the burden shift as would be necessary

⁴⁷ See *McDonnell Douglas*, 411 U.S. at 800.

⁴⁸ See *Burdine*, 450 U.S. at 253–55.

⁴⁹ See Brodin, *supra* note 5, at 192; Smith, *supra* note 8, at 383. For a critique of the burden shift, see generally Smith, *supra* note 8.

⁵⁰ See, e.g., *Burns v. Uninet, Inc.*, No. 99–1264, 2000 WL 349763, at *4 (4th Cir. 2000); *Shackelford v. Deloitte & Touche, L.L.P.*, 190 F.3d 398, 407–08 (5th Cir. 1999). Some courts, however, have enumerated an employer's awareness of the employee's protected activity as a separate element of a *prima facie* case. See, e.g., *Jeffries v. Wal-Mart Stores, Inc.*, No. 99–4150, 2001 WL 845486, at *4 (6th Cir. 2001); *Cifra v. Gen. Elec. Co.*, 252 F.3d 205, 216 (2d Cir. 2001). For further discussion of the knowledge requirement, see *infra* notes 215–238 and accompanying text.

⁵¹ See *Burdine*, 450 U.S. at 253–54.

⁵² See *id.* at 253.

⁵³ See Brodin, *supra* note 5, at 189–92; Kahan & Deem, *supra* note 1, at 447–48.

⁵⁴ See Essary & Friedman, *supra* note 8, at 120–21.

⁵⁵ See Brodin, *supra* note 5, at 187–89; Essary & Friedman, *supra* note 8, at 120–21.

⁵⁶ See Brodin, *supra* note 5, at 192.

to prove retaliation directly.⁵⁷ At the outset, a plaintiff needs only enough evidence of protected activity, adverse action, and a causal connection to create an inference of retaliation.⁵⁸ The fight then moves to the issue of whether the employer's stated non-retaliatory motive is pretextual.⁵⁹

The burden does not shift, however, unless the plaintiff establishes a *prima facie* case.⁶⁰ Courts do not necessarily agree on the amount and nature of evidence sufficient to establish a *prima facie* case.⁶¹ Each proof requirement for a retaliation claim has generated varied court interpretation, including the definitions of both protected activity and adverse action.⁶² The causal connection requirement, however, has generated the most intense debate because it is the linchpin of a retaliation claim.⁶³ Title VII, after all, only prohibits adverse action taken *because of* protected activity.⁶⁴ Without a causal connection requirement, Title VII would in practice require an employer to prove affirmatively legitimate reasons for every adverse action taken against an employee who at any previous point had engaged in a protected activity.⁶⁵ The causal connection, therefore, is often the pivotal and most contentious issue in retaliation claims.⁶⁶

The issue, then, is determining the level of proof required for a causal connection in the *prima facie* case.⁶⁷ Requiring minimal evidence might undermine the ultimate proof of a causal connection or enable baseless claims to proceed.⁶⁸ Requiring too much evidence, in contrast, would defeat the purpose of the burden shift by forcing the plaintiff to prove the paramount issue of retaliation at the outset.⁶⁹ Moreover, courts must determine not only the level of proof, but also the kind of proof that satisfies both the *prima facie* case and ultimate

⁵⁷ See *id.* at 191-92.

⁵⁸ See Kahan & Deem, *supra* note 1, at 435.

⁵⁹ See *id.*

⁶⁰ See *Burdine*, 450 U.S. at 253-55.

⁶¹ See Essary & Friedman, *supra* note 8, at 116-17; Sandler & Brewer, *supra* note 8, at 108.

⁶² See Essary & Friedman, *supra* note 8, at 121, 133-34.

⁶³ See Snell & Eskow, *supra* note 10, at 384-86.

⁶⁴ See *id.* at 384.

⁶⁵ See Snell & Eskow, *supra* note 10, at 382; Smith, *supra* note 8, at 392.

⁶⁶ See Donna Smith Cude & Brian M. Steger, *Does Justice Need Glasses? Unlawful Retaliation Under the Title VII Following Mattern: Will Courts Know It When They See It?*, 14 LAB. LAW. 373, 380 n.37 (1998).

⁶⁷ See *id.* at 380.

⁶⁸ See Smith, *supra* note 8, at 377-78; Snell & Eskow, *supra* note 10, at 382-83.

⁶⁹ See Brodin, *supra* note 5, at 191-92; Ray, *supra* note 29, at 423-24.

burdens.⁷⁰ For example, an employer's comments or expressions of dislike for an employee, failure to follow standard practices in dealing with an employee, and disparate treatment of employees each may be circumstantial evidence of a causal connection.⁷¹

But perhaps the most important and most common circumstantial evidence of a causal connection is temporal proximity.⁷² The reasons are straightforward.⁷³ The sooner adverse action is taken after protected activity, the stronger the implication that the protected activity caused the adverse action, particularly if no legitimate reason for the adverse action is evident.⁷⁴ In addition, every retaliation claim bears evidence of some interval between protected activity and adverse action, whether that interval is measured in minutes or months.⁷⁵

Courts have spent considerable time and energy evaluating temporal proximity evidence in retaliation claims.⁷⁶ In the process, they have found several areas of agreement regarding its treatment.⁷⁷ For example, courts typically agree that temporal proximity is significant circumstantial evidence of retaliation.⁷⁸ Moreover, courts generally agree that temporal proximity alone *can* be sufficient to establish a prima facie case, even though some do not consider it sufficient per se.⁷⁹ Additionally, although no jurisdiction has adopted a bright line test for determining the amount of time that is probative of a causal connection, courts recognize that a very short interval between protected activity and adverse action is highly probative of a causal connection.⁸⁰ Conversely, courts also agree that extended intervals may disprove a causal connection.⁸¹

⁷⁰ See Snell & Eskow, *supra* note 10, at 385, 396-405.

⁷¹ See Ray, *supra* note 29, at 425-29; Snell & Eskow, *supra* note 10, at 396-405.

⁷² See Ellis & Rudder, *supra* note 8, at 257; Essary & Friedman, *supra* note 8, at 143; Sandler & Brewer, *supra* note 8, at 119.

⁷³ See Ellis & Rudder, *supra* note 8, at 257; Essary & Friedman, *supra* note 8, at 143; Sandler & Brewer, *supra* note 8, at 119.

⁷⁴ See Ellis & Rudder, *supra* note 8, at 257; Sandler & Brewer, *supra* note 8, at 119.

⁷⁵ See Ellis & Rudder, *supra* note 8, at 257; Sandler & Brewer, *supra* note 8, at 119.

⁷⁶ See *infra* notes 123-238 and accompanying text.

⁷⁷ See Ellis & Rudder, *supra* note 8, at 257; Sandler & Brewer, *supra* note 8, at 119.

⁷⁸ See Ellis & Rudder, *supra* note 8, at 257; Sandler & Brewer, *supra* note 8, at 119.

⁷⁹ See Kahan & Deem, *supra* note 1, at 445; see also *infra* notes 148-181 and accompanying text (discussing sufficiency of temporal proximity for prima facie causal connection).

⁸⁰ See *Oest v. Ill. Dep't of Corr.*, 240 F.3d 605, 616 (7th Cir. 2001) (opposing adoption of "a mechanistically applied time frame"); Ellis & Rudder, *supra* note 8, at 257; Essary & Friedman, *supra* note 8, at 119.

⁸¹ See Kahan & Deem, *supra* note 1, at 445; Snell & Eskow, *supra* note 10, at 401.

In 2001, in *Clark County School District v. Breeden*, the Supreme Court cemented the areas of general agreement among lower courts on temporal proximity.⁸² The Court held that very close temporal proximity alone *could be* sufficient evidence for a prima facie causal connection.⁸³ The Court further held, however, that the twenty-month period between protected activity and adverse action in the instant case was too long by itself to establish a causal connection.⁸⁴ The Court also identified an additional element necessary to prove retaliation under Title VII, agreeing with many lower courts and holding that a plaintiff must prove that the employer knew about the protected activity ("knowledge requirement").⁸⁵

The Supreme Court, however, left unresolved a number of issues regarding the appropriate weight for temporal proximity in retaliation claims.⁸⁶ The Court did not explicitly define temporal proximity nor establish a mechanism for determining the length of time sufficient to establish a prima facie case, but held only that twenty months was too long in the factual context of *Breeden*.⁸⁷ Additionally, the Court did not identify the circumstances in which temporal proximity alone would be sufficient to establish a causal connection in a prima facie case.⁸⁸ Finally, the Court did not determine what weight temporal proximity should be given beyond the prima facie case stage.⁸⁹

II. TEMPORAL PROXIMITY RULES: THREE APPROACHES TO TEMPORAL PROXIMITY

Lower federal courts have taken a variety of approaches to the issues left unresolved in *Clark County School District v. Breeden*.⁹⁰ A number of factors contribute to the relative weight that courts considering retaliation claims give to temporal proximity evidence.⁹¹ In general, however, the ways in which courts weigh temporal proximity can be

⁸² See 532 U.S. 268, 273-74 (2001).

⁸³ See *id.* at 273.

⁸⁴ See *id.* at 274.

⁸⁵ See *id.* at 273; see also Cude & Steger, *supra* note 66, at 380; Ellis & Rudder, *supra* note 8, at 258.

⁸⁶ See *Breeden*, 532 U.S. at 273-74.

⁸⁷ See *id.*

⁸⁸ See *id.*

⁸⁹ See *id.*

⁹⁰ See *infra* notes 123-238 and accompanying text.

⁹¹ See *infra* notes 123-238 and accompanying text.

categorized into three types of rules: strong proximity rules, weak proximity rules, and case by case rules.⁹²

A. Strong Proximity Rules

Some courts give substantial weight to temporal proximity evidence and have adopted corresponding rules in their case law ("strong proximity rules").⁹³ A strong proximity rule reflects two underlying principles.⁹⁴ First, courts with strong proximity rules recognize temporal proximity as highly probative of a causal connection—that is, evidence that an employer took adverse action soon after protected activity raises a significant inference that the employer took the adverse action *because of* the protected activity.⁹⁵ Second, courts with strong proximity rules recognize the prima facie burden as lower than the ultimate burden of proof.⁹⁶ In these jurisdictions, temporal proximity is sufficient to establish a prima facie causal connection because the plaintiff does not bear the full burden of proof at the prima facie stage.⁹⁷ Courts that have strong proximity rules, therefore, generally treat the establishment of a prima facie case as "de minimis."⁹⁸ As a result, a strong proximity rule enables some plaintiffs to proceed with claims that would otherwise fail for insufficient evidence.⁹⁹

For example, in 2001, in *Cifra v. General Electric Co.*, the United States Court of Appeals for the Second Circuit held temporal proximity evidence sufficient to establish a prima facie causal connection.¹⁰⁰ In *Cifra*, the plaintiff alleged that she had been fired because of her complaints that her supervisor had discriminated against her on the

⁹² See *infra* notes 93–214 and accompanying text.

⁹³ See *Bass v. Bd. of County Comm'rs*, 242 F.3d 996, 1015–16 (11th Cir. 2001); *Passantino v. Johnson & Johnson Consumer Prod., Inc.*, 212 F.3d 493, 507 (9th Cir. 2000); *Holava-Brown v. Gen. Elec. Co.*, No. 98–9661, 1999 WL 642966, at *4–5 (2d Cir. 1999); *Oliver v. Digital Equip. Corp.*, 846 F.2d 103, 110 (1st Cir. 1988); *Mitchell v. Baldridge*, 759 F.2d 80, 86 (D.C. Cir. 1985).

⁹⁴ See *Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87, 95 (2d Cir. 2001); *Yartsoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987); *Mitchell*, 759 F.2d at 86.

⁹⁵ See *Slattery*, 248 F.3d at 95; *Yartsoff*, 809 F.2d at 1376; *Mitchell*, 759 F.2d at 86.

⁹⁶ See *Slattery*, 248 F.3d at 95; *Yartsoff*, 809 F.2d at 1376; *Mitchell*, 759 F.2d at 86.

⁹⁷ See *Slattery*, 248 F.3d at 95; *Yartsoff*, 809 F.2d at 1376; *Mitchell*, 759 F.2d at 86.

⁹⁸ See *Slattery*, 248 F.3d at 94 (defining prima facie burden as "de minimis" (quoting *Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 37 (2d Cir. 1994))); *Mitchell*, 759 F.2d at 86 (describing prima facie burden as "not great" (quoting *McKenna v. Weinberger*, 729 F.2d 783, 790 (D.C. Cir. 1984))).

⁹⁹ See *Cifra v. Gen. Elec. Co.*, 252 F.3d 205, 217 (2d Cir. 2001); *Passantino*, 212 F.3d at 507.

¹⁰⁰ 252 F.3d at 217.

basis of gender.¹⁰¹ Her termination occurred twenty days after her employer learned that she had retained an attorney to pursue a discrimination claim against the employer.¹⁰² Applying a strong proximity rule, the court held that twenty days between the protected activity and adverse action was sufficient evidence of a causal connection to establish a *prima facie* case of retaliation.¹⁰³

B. Weak Proximity Rules

A number of jurisdictions have adopted rules giving temporal proximity evidence significantly less weight in retaliation claims ("weak proximity rules").¹⁰⁴ Courts with weak proximity rules harbor significant concern for the limited purposes of Title VII's anti-retaliation provisions.¹⁰⁵ These courts give less weight to temporal proximity evidence to prevent plaintiffs from pursuing retaliation claims based on insufficient evidence.¹⁰⁶ Jurisdictions with weak proximity rules are similar to those with strong proximity rules in several important ways.¹⁰⁷ Both types of jurisdictions assign some probative value to temporal proximity evidence and recognize its sufficiency to establish a *prima facie* case in at least some contexts.¹⁰⁸ Moreover, courts with weak proximity rules, like those with strong proximity rules, still vary among themselves in their treatment of temporal proximity.¹⁰⁹ Yet plaintiffs who rely substantially on temporal proximity evidence may face appreciably greater challenges in pursuing their claims under weak proximity rules.¹¹⁰

¹⁰¹ *Id.* at 210.

¹⁰² *Id.* at 217.

¹⁰³ *Id.*

¹⁰⁴ See *Warren v. Ohio Dep't of Pub. Safety*, No. 00-3560, 2001 WL 1216979, at *4 (6th Cir. 2001); *O'Neal v. Ferguson Constr. Co.*, 237 F.3d 1248, 1253 (10th Cir. 2001); *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653, 657 (4th Cir. 1998); *Swanson v. Gen. Servs. Admin.*, 110 F.3d 1180, 1188, 1188 n.3 (5th Cir. 1997).

¹⁰⁵ See *Dowe*, 145 F.3d at 657 ("Title VII was not enacted to guarantee tenure in the workplace."); *Swanson*, 110 F.3d at 1188 n.3 ("Title VII's protection against retaliation does not permit EEOC complainants to disregard work rules or job requirements.")

¹⁰⁶ See *Dowe*, 145 F.3d at 657; *Swanson*, 110 F.3d at 1188 n.3.

¹⁰⁷ See *Warren*, 2001 WL 1216979, at *4; *Slattery*, 248 F.3d at 95; *O'Neal*, 237 F.3d at 1253; *Dowe*, 145 F.3d at 657; *Swanson*, 110 F.3d at 1188, 1188 n.3; *Yartsoff*, 809 F.2d at 1376.

¹⁰⁸ See *Warren*, 2001 WL 1216979, at *4; *Slattery*, 248 F.3d at 95; *O'Neal*, 237 F.3d at 1253; *Dowe*, 145 F.3d at 657; *Swanson*, 110 F.3d at 1188, 1188 n.3; *Yartsoff*, 809 F.2d at 1376.

¹⁰⁹ See *Warren*, 2001 WL 1216979, at *4; *O'Neal*, 237 F.3d at 1253; *Dowe*, 145 F.3d at 657; *Swanson*, 110 F.3d at 1188, 1188 n.3.

¹¹⁰ See *Warren*, 2001 WL 1216979, at *4; *O'Neal*, 237 F.3d at 1253; *Dowe*, 145 F.3d at 657; *Swanson*, 110 F.3d at 1188, 1188 n.3.

For example, in 1989, in *Fenton v. HiSAN, Inc.*, the United States Court of Appeals for the Sixth Circuit, applying a weak proximity rule, held that temporal proximity evidence was insufficient to establish a prima facie causal connection.¹¹¹ In *Fenton*, the plaintiff's employer withdrew an allowance for the plaintiff to schedule mandatory overtime hours before her regular shift within eight days of her complaint about sexual harassment by a co-worker.¹¹² In light of evidence that the employer had encouraged complaints like the plaintiff's, however, the court held eight days between protected activity and adverse action insufficient evidence to establish a prima facie causal connection.¹¹³

C. Case by Case Rules

Some courts have declined to adopt definitive rules regarding temporal proximity.¹¹⁴ Instead, these courts have held that the appropriate treatment of temporal proximity depends on the context of each case ("case by case rule").¹¹⁵ The factors considered in making the determination might include the length of the time interval, the number and nature of protected activities and adverse actions, and any additional relevant circumstances, as well as the burden shift stage and procedural disposition of the case.¹¹⁶ In general, such rules are a product of judicial attempts to reconcile distinct lines of holdings within their own precedents rather than to choose a single rule for temporal proximity.¹¹⁷ Case by case rules, as a result, generally do not produce clear standards of proof for retaliation claims.¹¹⁸

¹¹¹ 174 F.3d 827, 832 (6th Cir. 1999). Although *Fenton* involved state discrimination law, the court analyzed the case according to federal case law and standards developed for federal discrimination statutes. See *id.* at 829.

¹¹² See *id.* at 830, 832.

¹¹³ See *id.* at 832.

¹¹⁴ See *Oest v. Ill. Dep't of Corr.*, 240 F.3d 605, 616 (7th Cir. 2001); *Hudson v. Norris*, 227 F.3d 1047, 1051 (8th Cir. 2000); *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 279 (3d Cir. 2000).

¹¹⁵ See *Oest*, 240 F.3d at 616; *Hudson*, 227 F.3d at 1051; *Farrell*, 206 F.3d at 279.

¹¹⁶ See *Oest*, 240 F.3d at 616; *Hudson*, 227 F.3d at 1051; *Farrell*, 206 F.3d at 279.

¹¹⁷ See, e.g., *Farrell*, 206 F.3d at 279. "[W]e caution that this 'split' is not an inconsistency in our analysis but is essentially fact-based." *Id.* These courts also express some of the same concerns about the strong proximity rule approach as courts with weak proximity rules. See *Bermudez v. TRC Holdings, Inc.*, 138 F.3d 1176, 1179 (7th Cir. 1998) ("*Post hoc ergo propter hoc* is not enough to support a finding of retaliation—if it were, every employee would file a charge just to get a little unemployment insurance.>").

¹¹⁸ See *Oest*, 240 F.3d at 616; *Hudson*, 227 F.3d at 1051; *Farrell*, 206 F.3d at 279, 279 n.5.

For example, in 2000, in *Hudson v. Norris*, the United States Court of Appeals for the Eighth Circuit held that the sufficiency of temporal proximity to establish a prima facie case varies "depending on the circumstances" of each case.¹¹⁹ In *Hudson*, the plaintiff alleged that his employer retaliated against him because he had testified in a co-worker's lawsuit against the employer.¹²⁰ Within four months of his testimony, the plaintiff was subjected to multiple adverse actions, including two internal affairs investigations and denial of a promotion.¹²¹ Although the court acknowledged that temporal proximity is "generally not enough" to establish a prima facie case of retaliation, it held temporal proximity sufficient to do so in *Hudson*.¹²²

III. THE ELEMENTS OF A TEMPORAL PROXIMITY RULE

Several fundamental issues determine the relative strength of a jurisdiction's proximity rule: the court's definition of temporal proximity, its assessment of the sufficiency of temporal proximity for establishing a prima facie case, the weight it gives temporal proximity at summary judgment, and its treatment of the knowledge requirement.¹²³ Individually, these issues define the way in which temporal proximity is evaluated at a particular point in the litigation of a retaliation claim.¹²⁴ Collectively, they indicate a court's attitude towards temporal proximity and determine the category into which a court's rule fits.¹²⁵

A. Defining Temporal Proximity

The foundational element of a temporal proximity rule is its definition of temporal proximity.¹²⁶ Determining the length of time that constitutes temporal proximity is essential to determining its ap-

¹¹⁹ 227 F.3d at 1051.

¹²⁰ *Id.* at 1049-50.

¹²¹ *Id.* at 1051.

¹²² *Id.*

¹²³ See *infra* notes 126-238 and accompanying text.

¹²⁴ See *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 279 n.5 (3d Cir. 2000).

¹²⁵ See *supra* notes 90-122 and accompanying text.

¹²⁶ See Charles A. Shanor, *Preventing and Defending Against Retaliation Claims*, A.L.I.-A.B.A. Course of Study, Advanced Employment Law & Litigation 547, 586-91 (Dec. 2, 1999) (discussing generally length of time that courts have found constituted temporal proximity).

propriate treatment in retaliation claims.¹²⁷ But courts have not adopted bright line standards for defining temporal proximity.¹²⁸ For example, in *Clark County School District v. Breeden*, the Supreme Court of the United States accepted the United States Court of Appeals for the Tenth Circuit's definition of temporal proximity as "very close" timing between protected activity and adverse action.¹²⁹ Similarly, lower federal courts consider the timing of adverse action to be probative of retaliation, and therefore to constitute temporal proximity, only in relation to the circumstances of a particular claim.¹³⁰

Courts with strong proximity rules, however, can be distinguished somewhat from those with weak proximity rules by their definitions of temporal proximity.¹³¹ Courts with strong proximity rules define temporal proximity as a short time interval between protected activity and adverse action.¹³² This standard is commonly stated as adverse action "close in time" to protected activity or "within a reasonable period of time."¹³³ In the absence of a bright line, however, this standard requires an analysis of what might reasonably be considered "close" under the circumstances of a particular case.¹³⁴ Courts with strong proximity rules consider a range of intervals from as short as a few minutes

¹²⁷ See, e.g., *O'Neal v. Ferguson Constr. Co.*, 237 F.3d 1248, 1253 (10th Cir. 2001) (distinguishing precedents in which one-and-one-half months constituted sufficient temporal proximity but three months did not).

¹²⁸ See, e.g., *Oest v. Ill. Dep't of Corr.*, 240 F.3d 605, 616 (7th Cir. 2001) ("A mechanistically applied time frame would ill serve our obligation to be faithful to the legislative purpose of Title VII.").

¹²⁹ 532 U.S. 268, 273 (2001). The Court, however, did not expressly adopt the Tenth Circuit's definition. See *id.*

¹³⁰ See, e.g., *Oest*, 240 F.3d at 616; see also *Hudson v. Norris*, 227 F.3d 1047, 1051 (8th Cir. 2000) (holding that temporal proximity depends on the circumstances of each case); *Brodetski v. Duffey*, 199 F.R.D. 14, 20 (D.D.C. 2001) (noting that courts have not adopted bright line standard for temporal proximity).

¹³¹ Compare, e.g., *Warren v. Ohio Dep't of Pub. Safety*, No. 00-3560, 2001 WL 1216979, at *4 (6th Cir. 2001) (requiring "very close" temporal proximity), with *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 507 (9th Cir. 2000) (defining standard as "within a reasonable period of time").

¹³² See *Cifra v. Gen. Elec. Co.*, 252 F.3d 205, 217 (2d Cir. 2001); *Passantino*, 212 F.3d at 507; *Wyatt v. City of Boston*, 35 F.3d 13, 16 (1st Cir. 1994).

¹³³ *Passantino*, 212 F.3d at 507 ("within a reasonable period of time"); *Wyatt*, 35 F.3d at 16 ("close in time"); see also *Cifra*, 252 F.3d at 217 (defining standard as "closely followed in time").

¹³⁴ See *Passantino*, 212 F.3d at 507; *Wyatt*, 35 F.3d at 16.

to as long as a few months sufficiently close to constitute temporal proximity.¹³⁵

Courts adopting weak proximity rules are more restrictive in defining temporal proximity.¹³⁶ For example, in 2001, in *Warren v. Ohio Department of Public Safety*, the Sixth Circuit emphasized that only a "very close" interval constitutes temporal proximity and, therefore, is sufficient to establish a prima facie case.¹³⁷ The court cited precedent in which an interval as short as two months was insufficient alone to establish a prima facie causal connection.¹³⁸ Similarly, in 2001, in *O'Neal v. Ferguson Construction Co.*, the Tenth Circuit held that additional evidence is required to establish a prima facie causal connection when temporal proximity is not "very close."¹³⁹ The court noted that it had previously held three months alone insufficient evidence of temporal proximity.¹⁴⁰

Courts with case by case rules display the most range in defining temporal proximity.¹⁴¹ In some cases, these courts evaluate the timing of protected activity on a sliding scale, allowing for varying degrees of temporal proximity.¹⁴² For example, in 2001, in *Oest v. Illinois Department of Corrections*, the United States Court of Appeals for the Seventh Circuit linked the probative value of a time interval to the length of the interval.¹⁴³ Yet, like jurisdictions with other types of proximity rules, the court provided no explicit means of determining the appropriate weight to accord a given length of time.¹⁴⁴ Other courts with case by case rules, in contrast, severely restrict the definition of temporal proximity.¹⁴⁵ For example, in 2000, in *Farrell v. Planters Lifesavers Co.*, the United States Court of Appeals for the Third Circuit held that

¹³⁵ See *Holava-Brown v. Gen. Elec. Co.*, No. 98-9661, 1999 WL 642966, at *4 (2d Cir. 1999) (less than three months sufficient); *Wyatt*, 35 F.3d at 16 (finding protected activity and adverse action almost simultaneous).

¹³⁶ See *Warren*, 2001 WL 1216979, at *4; *O'Neal*, 237 F.3d at 1253.

¹³⁷ 2001 WL 1216979, at *4 (emphasis added).

¹³⁸ *Id.* (citing *Hafford v. Seidner*, 183 F.3d 506, 515 (6th Cir. 1999)).

¹³⁹ 237 F.3d at 1253 (emphasis added).

¹⁴⁰ *Id.* (citing *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1179 (10th Cir. 1999)). The court also declined to rule whether the time frame of approximately two-and-one-half months in *O'Neal* constituted evidence of temporal proximity. See *id.*

¹⁴¹ See *Oest*, 240 F.3d at 616; *Hudson*, 227 F.3d at 1051; *Farrell*, 206 F.3d at 279.

¹⁴² See *Oest*, 240 F.3d at 616.

¹⁴³ See *id.* "The inference of causation weakens as the time between the protected expression and the adverse action increases, and then 'additional proof of a causal nexus is necessary.'" *Id.* (quoting *Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499, 511 (7th Cir. 1998)).

¹⁴⁴ See *id.*

¹⁴⁵ See *Farrell*, 206 F.3d at 280.

a time interval does not constitute temporal proximity evidence unless it is "unusually suggestive."¹⁴⁶ In any court, however, a retaliation claim will fail at the outset if the plaintiff's only evidence of a causal connection is a time interval that fails to meet the standard for temporal proximity.¹⁴⁷

*B. The First Hurdle: The Sufficiency of Temporal Proximity
for the Prima Facie Case*

The second distinction among courts with different types of proximity rules is their evaluation of the sufficiency of temporal proximity for establishing a prima facie case.¹⁴⁸ As previously noted, temporal proximity is often a plaintiff's only evidence of a causal connection.¹⁴⁹ Courts with strong proximity rules generally hold temporal proximity alone sufficient to establish a prima facie causal connection.¹⁵⁰ For example, in 1999, in *Holava-Brown v. General Electric Co.*, the Second Circuit held that temporal proximity constituted sufficient circumstantial evidence of a causal connection to establish a prima facie case.¹⁵¹ In *Holava-Brown*, approximately two months had passed between the plaintiff's complaint about sexual harassment by a co-worker and notification by the plaintiff's supervisor that she would be dismissed when her contract ended.¹⁵² The court held that a two-month interval was sufficiently probative of a causal connection and, therefore, required no additional evidence for the burden of production to shift to the defendant.¹⁵³

Initially, weak proximity rules appear very similar to strong proximity rules in evaluating the sufficiency of temporal proximity at the prima facie stage.¹⁵⁴ In at least some circumstances, courts with weak

¹⁴⁶ *Id.* (quoting *Krouse v. Am. Sterilizer Co.*, 126 F.3d 494, 503 (3d Cir. 1997)).

¹⁴⁷ See, e.g., *Oliver v. Digital Equip. Corp.*, 846 F.2d 103, 110-11 (1st Cir. 1988) (concluding retaliation claim failed because eighteen months had passed between plaintiff's EEOC complaint and firing).

¹⁴⁸ See *Hudson*, 227 F.3d at 1051; *Holava-Brown*, 1999 WL 642966, at *4; *Swanson v. Gen. Servs. Admin.*, 110 F.3d 1180, 1188 n.3 (5th Cir. 1997).

¹⁴⁹ See *Ellis & Rudder*, *supra* note 8, at 257; *Essary & Friedman*, *supra* note 8, at 143; *Sandler & Brewer*, *supra* note 8, at 119.

¹⁵⁰ See *Bass v. Bd. of County Comm'rs*, 242 F.3d 996, 1015-16 (11th Cir. 2001); *Passantino*, 212 F.3d at 507; *Holava-Brown*, 1999 WL 642966, at *3; *Wyatt*, 35 F.3d at 16; *Mitchell v. Baldridge*, 759 F.2d 80, 86 (D.C. Cir. 1985).

¹⁵¹ 1999 WL 642966, at *3.

¹⁵² *Id.* at *1, *4.

¹⁵³ See *id.* at *3, *4.

¹⁵⁴ Compare *Evans v. City of Houston*, 246 F.3d 344, 354 (5th Cir. 2001), with *Bass*, 242 F.3d at 1015-16.

proximity rules have held that temporal proximity alone *may* be sufficient to establish a prima facie causal connection.¹⁵⁵ For example, in 2001 in *Evans v. City of Houston*, the United States Court of Appeals for the Fifth Circuit held that five days between the plaintiff's appearance at a co-worker's grievance hearing and his being recommended for demotion was sufficient evidence of a causal connection to establish a prima facie case.¹⁵⁶ The Fifth Circuit recognized the fundamental probative value of temporal proximity, reasoning that adverse action taken so soon after protected activity raises an inference of a causal connection.¹⁵⁷

Under some weak proximity rules, however, temporal proximity may not suffice to establish a prima facie case.¹⁵⁸ For example, in 1997, in *Swanson v. General Services Administration*, the Fifth Circuit stated that temporal proximity alone is not always sufficient to establish a prima facie causal connection.¹⁵⁹ The court noted that the plaintiff had engaged in protected activities throughout his employment.¹⁶⁰ The court expressed concern that allowing temporal proximity establish a prima facie case per se would encourage employees to seek job protection by regularly engaging in unnecessary protected activities.¹⁶¹

Compared to courts with strong proximity rules, those with weak proximity rules, like the Fifth Circuit, reflect a different understanding of a plaintiff's burden at the prima facie stage.¹⁶² Courts with strong proximity rules recognize the prima facie burden as lower, if not significantly lower, than the ultimate burden of proof.¹⁶³ Some courts with weak proximity rules, however, blur the distinction between these two burdens.¹⁶⁴ In 1998, in *Dowe v. Total Action Against Poverty in Roanoke Valley*, the United States Court of Appeals for the

¹⁵⁵ See *Evans*, 246 F.3d at 354.

¹⁵⁶ *Id.*

¹⁵⁷ See *id.*

¹⁵⁸ See *Swanson*, 110 F.3d at 1188 n.3.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ See *id.* The court's concern in *Swanson* ignored the requirement that a plaintiff does not succeed in a retaliation claim merely by establishing a prima facie case. See *id.* A plaintiff who has successfully established a prima facie case must still meet the burden at the pretext stage to prove retaliation. See *supra* notes 44-45 and accompanying text.

¹⁶² Compare *Swanson*, 110 F.3d at 1188 n.3, with *Wyatt*, 35 F.3d at 16.

¹⁶³ See *Bass*, 242 F.3d at 1015-16; *Passantino*, 212 F.3d at 507; *Holava-Brown*, 1999 WL 642966, at *3; *Wyatt*, 35 F.3d at 16; *Mitchell*, 759 F.2d at 86.

¹⁶⁴ See *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d at 653, 656-57 (4th Cir. 1998); *Swanson*, 110 F.3d at 1188 n.3.

Fourth Circuit held that the plaintiff must establish a prima facie case by a preponderance of the evidence.¹⁶⁵ Although later in the case the court described the plaintiff's prima facie burden as "less onerous" than the ultimate burden, the court seemed to require the same level of proof to establish a prima facie case as is necessary to prove the ultimate issue of retaliation.¹⁶⁶ Moreover, the court appeared to require more proof than those courts with strong proximity rules that have described the prima facie burden as "de minimis."¹⁶⁷

In 2000, in *Harris v. King*, the Sixth Circuit likewise limited the sufficiency of temporal proximity for the prima facie case by diminishing the distinction between the prima facie burden and the ultimate burden of proof.¹⁶⁸ Unlike the Fourth Circuit, however, the court did not qualify its assessment of the plaintiff's prima facie burden.¹⁶⁹ The Sixth Circuit further stated that "no one factor is dispositive" in establishing a prima facie causal connection and that temporal proximity is merely "relevant" to determining such a connection.¹⁷⁰

¹⁶⁵ 145 F.3d at 656.

¹⁶⁶ See *id.* at 657.

¹⁶⁷ See *id.* at 656-57. The Supreme Court discussed the prima facie and ultimate burdens at length in *St. Mary's Honor Center v. Hicks*. See 509 U.S. 502, 509-11 (1993). The Court stated that a plaintiff must prove a prima facie case by a preponderance of the evidence. *Id.* at 506. The Court further noted, however, that a plaintiff must meet this burden in order to prevail ultimately in a claim, *not* to establish a prima facie case *per se*. See *id.* at 510 n.3; see also *Yartzoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir. 1987) ("At the summary judgment stage, the prima facie case need not be proved by a preponderance of the evidence."); *Mitchell*, 759 F.2d at 86 (noting that the ultimate burden of persuasion "[b]y definition . . . cannot also be the threshold test of what a plaintiff must show to make out a prima facie case of reprisal.").

This treatment of the prima facie burden occasionally confuses the very courts that adhere to it. See *Norman v. Rubin*, No. 99-1231, 1999 WL 739433, at *2 (4th Cir. 1999). For example, in 1999, in *Norman v. Rubin*, the Fourth Circuit interpreted *Dowe* to support the proposition that temporal proximity alone cannot establish a prima facie case, despite an explicit statement in *Dowe* to the contrary. See *id.* (citing *Dowe*, 145 F.3d at 657). According to the *Dowe* court, "evidence that the alleged adverse action occurred *shortly* after the employer became aware of the protected activity is sufficient to 'satisf[y] the less onerous burden of making a prima facie case of caus[ation]'.¹⁶⁸" *Dowe*, 145 F.3d at 657 (quoting *Williams v. Cerberonics, Inc.*, 871 F.2d 452, 457 (4th Cir. 1989)).

¹⁶⁸ See *Harris v. King*, No. 98-5826, 2000 WL 353676, at *2-3 (6th Cir. 2000). "[T]he employee must produce sufficient evidence that the adverse action would not have been taken had the employee not engaged in the protected activity." *Id.* at *3.

¹⁶⁹ See *id.* at *2-3. The Sixth Circuit had previously noted that the prima facie burden is "easily met." *Wrenn v. Gould*, 808 F.2d 493, 500 (6th Cir. 1987).

¹⁷⁰ See *Harris*, 2000 WL 353676, at *3. Similarly, in 1999, in *Stein v. Kent State University*, the Sixth Circuit held that temporal proximity may only "bolster" a causal connection and may not itself support an inference of such a connection. See No. 98-3278, 1999 WL 357752, at *7 (6th Cir. 1999). Although the Sixth Circuit had held previously that temporal proximity may suffice to establish a prima facie causal connection, the *Harris* court, too,

Moreover, the Sixth Circuit has incorporated a significant qualification into its rule that temporal proximity *may* be sufficient to establish a *prima facie* case.¹⁷¹ The court has held that temporal proximity alone does not suffice in the face of compelling evidence that the defendant encouraged protected activity.¹⁷² If the defendant presents evidence of such encouragement during the plaintiff's *prima facie* case, even before the burden shift occurs, then the *prima facie* case fails.¹⁷³ Although some courts with strong proximity rules allow the particular context of a case to defeat a *prima facie* case based solely on temporal proximity, they have not expressly incorporated such a qualification into their standards for establishing a *prima facie* case.¹⁷⁴

Similar to courts with weak proximity rules, courts with case by case rules significantly limit the sufficiency of temporal proximity for establishing a *prima facie* causal connection.¹⁷⁵ Courts with case by case rules provide few explicit standards for determining the appropriate weight of temporal proximity at the *prima facie* stage.¹⁷⁶ Instead, such jurisdictions identify the entire *prima facie* causal connection as a reasonableness inquiry.¹⁷⁷ Courts with case by case rules reason that temporal proximity is sufficient to establish a *prima facie* case if it raises a reasonable inference of a causal connection in the context of a particular case.¹⁷⁸

Like the definition of temporal proximity, determining its sufficiency for establishing a *prima facie* causal connection is crucial

seemed to require something more than courts with strong proximity rules adhering to a "de minimis" *prima facie* burden. See 2000 WL 353676, at *3; see also *Moon v. Transp. Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987) ("proximity . . . may give rise to an inference of a causal connection").

¹⁷¹ See *Moon*, 836 F.2d at 229.

¹⁷² See *id.* In 1987, in *Moon v. Transport Drivers, Inc.*, the Sixth Circuit held temporal proximity insufficient for a truck driver to establish a causal connection in light of evidence that the employer encouraged complaints about safety issues. See *id.*; see also *Fenton v. HiSAN, Inc.*, 174 F.3d 827, 832 (6th Cir. 1999) (following the rule in *Moon*).

¹⁷³ See *Moon*, 836 F.2d at 229. This qualification may be the source of holdings in more recent Sixth Circuit cases that limit the possibility that temporal proximity alone can establish a *prima facie* causal connection. See *Harris*, 2000 WL 353676, at *3; *Stein*, 1999 WL 357752, at *7.

¹⁷⁴ See *Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12, 16-17 (1st Cir. 1997).

¹⁷⁵ See *Oest*, 240 F.3d at 616; *Hudson*, 227 F.3d at 1051; *Farrell*, 206 F.3d at 279, 280.

¹⁷⁶ See *Oest*, 240 F.3d at 616; *Hudson*, 227 F.3d at 1051; *Farrell*, 206 F.3d at 279, 280.

¹⁷⁷ See *Oest*, 240 F.3d at 616; *Hudson*, 227 F.3d at 1051; *Farrell*, 206 F.3d at 279, 280.

¹⁷⁸ See *Oest*, 240 F.3d at 616; *Hudson*, 227 F.3d at 1051; *Farrell*, 206 F.3d at 279, 280.

to allowing a retaliation claim to proceed.¹⁷⁹ If a plaintiff cannot establish a *prima facie* case, the burden will not shift to the defendant and the claim will fail.¹⁸⁰ For plaintiffs whose only evidence of a causal connection is a time interval, the sufficiency of temporal proximity at the *prima facie* stage may make or break the entire retaliation claim.¹⁸¹

C. The Second Hurdle: Temporal Proximity & Summary Judgment

Some courts with strong proximity rules have held temporal proximity sufficient not only for establishing a *prima facie* case, but also for ultimately proving a retaliation claim.¹⁸² These courts have held that temporal proximity can create a genuine issue of material fact for the jury by raising an inference of pretext.¹⁸³ Without such an inference, a plaintiff's retaliation claim fails because the plaintiff has not met the burden of producing sufficient evidence of pretext under the burden shift.¹⁸⁴ If the plaintiff cannot produce sufficient evidence that the defendant's stated, non-retaliatory reasons for adverse action are pretextual, then the defendant will win a motion for summary judgment.¹⁸⁵ If temporal proximity is considered sufficient evidence to prove pretext, however, then plaintiffs armed only with temporal proximity evidence of a causal connection are able to get their retaliation claim to a jury.¹⁸⁶

For example, in 1996, in *Strother v. Southern California Permanente Medical Group*, the United States Court of Appeals for the Ninth Circuit found that the plaintiff had established a *prima facie* case of retaliation.¹⁸⁷ In *Strother*, one day passed between the plaintiff's filing of a claim of race and gender discrimination and her replacement as personal physician coordinator.¹⁸⁸ The defendant, however, offered a variety of non-retaliatory reasons for this and other adverse actions.¹⁸⁹ The Ninth Circuit stated that a *prima facie* case is, in itself, in-

¹⁷⁹ See, e.g., *Farrell*, 206 F.3d at 279 n.5 (declining to decide whether a three to four week interval would be sufficient alone to establish a *prima facie* causal connection).

¹⁸⁰ See *Kahan & Deem*, *supra* note 1, at 435.

¹⁸¹ See *id.*

¹⁸² See *Passantino*, 212 F.3d at 507.

¹⁸³ See *id.*

¹⁸⁴ See *Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87, 95 (2d Cir. 2001).

¹⁸⁵ See *Soileau*, 105 F.3d at 16-17.

¹⁸⁶ See *Passantino*, 212 F.3d at 507.

¹⁸⁷ See generally 79 F.3d 859 (9th Cir. 1996).

¹⁸⁸ See *id.* at 864, 869-70.

¹⁸⁹ See *id.* at 870.

sufficient to raise a genuine issue for the fact-finder.¹⁹⁰ The court reasoned, however, that the same evidence that establishes a prima facie case, if it is strong enough, might also create a genuine issue of pretext for the jury.¹⁹¹ The court concluded that temporal proximity is sufficient to get a case to the jury "even in the face of" the defendant's evidence of non-retaliatory motives.¹⁹²

Other courts with strong proximity rules, however, have not gone so far.¹⁹³ Some give substantial weight to temporal proximity but still enable summary judgment resolution of cases in which temporal proximity is the sole evidence of a causal connection.¹⁹⁴ These courts consider temporal proximity more in the context of other evidence in the record, reasoning that other evidence may outweigh temporal proximity, even when temporal proximity is viewed in the light most favorable to the plaintiff.¹⁹⁵ Unlike courts with weak proximity rules, however, these courts do not expressly require summary judgment at the point at which temporal proximity meets evidence of non-retaliatory motive.¹⁹⁶

For example, in 2001, in *Cifra v. General Electric Co.*, the Second Circuit held that temporal proximity alone could satisfy a plaintiff's ultimate burden of proof of a causal connection.¹⁹⁷ The court noted that twenty days between protected activity and adverse action was purely circumstantial evidence, but also noted that in ruling on a summary judgment motion it must credit the record in the light most favorable to the plaintiff.¹⁹⁸ Under this standard, the court held temporal proximity evidence sufficient to prove pretext, and therefore, to find the defendant liable for retaliation.¹⁹⁹ In 2001, in *Slattery v. Swiss Reinsurance America Corp.*, however, the Second Circuit held temporal proximity insufficient in the factual context of the case to meet the plaintiff's ultimate burden of proof of a causal connection.²⁰⁰ In *Slattery*, the plaintiff alleged that he had been put on probation and later

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *See id.*; see also *Sandoval v. Rubin*, No. 98-56831, 2000 WL 1643941, at *1 (9th Cir. 2000); *Passantino*, 212 F.3d at 507 (citing *Strother*, 79 F.3d at 870-71).

¹⁹³ *See Gupta v. Fla. Bd. of Regents*, 212 F.3d 571, 590-92 (11th Cir. 2000); *Soileau*, 105 F.3d at 16-17.

¹⁹⁴ *See Soileau*, 105 F.3d at 16-17.

¹⁹⁵ *See id.*

¹⁹⁶ *See id.*

¹⁹⁷ *See* 252 F.3d at 217.

¹⁹⁸ *Id.* at 217-18.

¹⁹⁹ *See id.* at 218.

²⁰⁰ *See* 248 F.3d at 95.

terminated because he had filed an EEOC complaint of age discrimination.²⁰¹ In considering the defendant's motion for summary judgment, the court evaluated evidence that the adverse action was part of an extended disciplinary process.²⁰² Considering this other evidence, the Second Circuit held that temporal proximity was not sufficient for a rational jury to find for the plaintiff.²⁰³

Unlike courts with strong proximity rules, courts with weak proximity rules generally have held temporal proximity alone insufficient for a plaintiff to survive summary judgment.²⁰⁴ Under the burden shift, therefore, a plaintiff needs additional evidence of pretext to rebut a defendant's proffered non-retaliatory reason or reasons for adverse action.²⁰⁵ For example, in 1997, in *Conner v. Schnuck Markets, Inc.*, the Tenth Circuit emphasized that the inference of a causal connection at the prima facie stage "drops from the case" once the defendant has offered a non-retaliatory rationale for the adverse action.²⁰⁶ Unlike the Ninth Circuit in *Strother*, which emphasized the potential vitality of prima facie evidence at the pretext stage, the Tenth Circuit emphasized the pretext stage as a distinct inquiry requiring proof, if not evidence, separate from that employed at the prima facie stage.²⁰⁷

Although they evaluate temporal proximity evidence in the context of each case, courts with case by case rules are even more restrictive of temporal proximity at summary judgment than other courts.²⁰⁸ For example, in 2000, in *Buettner v. Arch Coal Sales Co.*, the Eighth Circuit held that temporal proximity generally is insufficient to create an

²⁰¹ See *id.*

²⁰² See *id.*

²⁰³ See *id.*

²⁰⁴ See, e.g., Harris, 2000 WL 353676, at *3 ("[T]emporal proximity alone is insufficient to create a genuine issue of material fact on the issue of causation.").

²⁰⁵ See *id.*; *Conner v. Schnuck Mkts., Inc.*, 121 F.3d 1390, 1396 (10th Cir. 1997).

²⁰⁶ 121 F.3d at 1396.

²⁰⁷ See *id.*; see also *Dowe*, 145 F.3d at 656 (stating that prima facie case "drops from the case" after burden shift (citing *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981))); *Swanson*, 110 F.3d at 1188 (requiring evidence other than prima facie temporal proximity to prove pretext). In 2000, in *Reeves v. Sanderson Plumbing Products, Inc.*, the Supreme Court recognized that the prima facie presumption "drops out of the picture" after the burden shift. 530 U.S. 133, 143. (2000) (quoting *Hicks*, 509 U.S. at 511). The Court held, however, that the factfinder "may still consider the evidence establishing the plaintiff's prima facie case 'and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual.'" *Id.* (quoting *Burdine*, 450 U.S. at 255 n.10).

²⁰⁸ See *Buettner v. Arch Coal Sales Co.*, 216 F.3d 707, 716 (8th Cir. 2000); *Farrell*, 206 F.3d at 279 n.5; *Bermudez v. TRC Holdings, Inc.*, 138 F.3d 1176, 1179 (7th Cir. 1998).

issue for the jury.²⁰⁹ In *Farrell*, the Third Circuit went even further, citing the limited sufficiency of temporal proximity at summary judgment as support for its case by case rule.²¹⁰ The court noted that the appropriate weight of temporal proximity evidence depends not only on the "specific facts and circumstances" of a case but also on the burden shift stage and "procedural circumstance" of the case.²¹¹

A defendant's motion for summary judgment puts a court's attitude towards temporal proximity evidence in sharp focus.²¹² In many courts, a defendant's motion for summary judgment represents a daunting if not overwhelming hurdle for plaintiffs relying on temporal proximity evidence to prove a causal connection.²¹³ In those courts, therefore, even the burden shift—designed to aid plaintiffs relying substantially on circumstantial evidence—will not enable a plaintiff to survive summary judgment resolution in the defendant's favor.²¹⁴

D. One More Hurdle: The Knowledge Requirement

The Supreme Court's adoption of a knowledge requirement in *Breedon* potentially added another hurdle to the sufficiency of temporal proximity, for both establishing a prima facie case and surviving summary judgment.²¹⁵ The knowledge requirement derives from the reality that an employer cannot take retaliatory action *because of* a protected activity of which the employer had no knowledge.²¹⁶ Proving retaliation, therefore, requires proof of the employer's knowledge.²¹⁷ Most courts, however, regardless of the type of proximity rule they

²⁰⁹ 216 F.3d at 716; see also *Bermudez*, 138 F.3d at 1179 (requiring more than temporal proximity to satisfy ultimate burden of causal connection); *Johnson v. Univ. of Wis.-Eau Claire*, 70 F.3d 469, 480–81 (7th Cir. 1995) (holding temporal proximity with additional evidence may create issue for jury).

²¹⁰ See 206 F.3d at 279 n.5.

²¹¹ *Id.*

²¹² Compare *Harris*, 2000 WL 353676, at *3 (weak proximity rule), with *Strother*, 79 F.3d at 870 (strong proximity rule).

²¹³ See, e.g., *Bermudez*, 138 F.3d at 1179.

²¹⁴ See *id.*; see also *Smith*, *supra* note 8, at 383 (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring) ("[T]he entire purpose of the McDonnell Douglas prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by.")).

²¹⁵ See 532 U.S. at 273.

²¹⁶ See *id.*

²¹⁷ See *id.*

have adopted, had previously adopted the knowledge requirement in some form and, practically, treat it in a common manner.²¹⁸

Some courts with strong proximity rules require a showing of knowledge as part of the proof of a causal connection.²¹⁹ In these courts, temporal proximity, without a separate showing of knowledge, fails to establish a *prima facie* case, let alone raise a genuine issue of a causal connection for a jury.²²⁰ In 1998, in *Hazward v. Runyon*, the United States District Court for the District of Columbia utilized such a standard.²²¹ In *Hazward*, the plaintiff alleged he had been the subject of adverse action during the two months between filing a request for counseling in response to alleged gender discrimination and filing a formal complaint.²²² The plaintiff produced no evidence, however, that his employer knew of the original request.²²³ The plaintiff, therefore, was unable to prove that the employer knew about the protected activity when the adverse action occurred.²²⁴ The court held that temporal proximity, without evidence of knowledge, was insufficient to establish a *prima facie* causal connection.²²⁵ Similarly, the United States Court of Appeals for the First Circuit expressly requires a separate showing of knowledge in its strong proximity rule.²²⁶ Both for the *prima facie* case and ultimate proof of retaliation, the First Circuit's rule states that "*the employer's knowledge* of the protected activity," not the protected activity itself, must be "close in time to the employer's adverse action."²²⁷

Under weak proximity rules and case by case rules, as under most strong proximity rules, a plaintiff cannot establish a *prima facie* case based on temporal proximity evidence without a separate showing of knowledge.²²⁸ The Sixth Circuit has adopted the knowledge requirement as a fourth element of the *prima facie* case, separate from the

²¹⁸ See, e.g., *Dowe*, 145 F.3d at 657; *Wyatt*, 35 F.3d at 16; *Hazward v. Runyon*, 14 F. Supp. 2d 120, 124–25 (D.D.C. 1998).

²¹⁹ See *Wyatt*, 35 F.3d at 16; *Hazward*, 14 F. Supp. 2d at 124–25.

²²⁰ See *Wyatt*, 35 F.3d at 16; *Hazward*, 14 F. Supp. 2d at 124–25.

²²¹ See 14 F. Supp. 2d at 124–25.

²²² See *id.* at 123–25.

²²³ *Id.* at 124–25.

²²⁴ *Id.*

²²⁵ *Id.*; see also *Mitchell*, 759 F.2d at 86 ("The causal connection . . . may be established by showing that the employer had knowledge of the employee's protected activity, and that the adverse personnel action took place shortly after that activity.").

²²⁶ See *Wyatt*, 35 F.3d at 16.

²²⁷ *Id.* (emphasis added).

²²⁸ See *Jeffries v. Wal-Mart Stores, Inc.*, No. 99–4150, 2001 WL 845486, at *4 (6th Cir. 2001) (weak proximity rule); *Hazward*, 14 F. Supp. 2d at 124–25 (strong proximity rule).

causal connection.²²⁹ Therefore, even if a plaintiff is able to establish a prima facie causal connection based on temporal proximity, the prima facie case fails without a separate showing of knowledge.²³⁰ The Fourth Circuit, in contrast, has incorporated knowledge into the causal connection requirement, but still requires a separate showing of knowledge.²³¹ In practice, there is no difference between the two approaches—both require a separate showing of knowledge.²³²

Not every jurisdiction, however, requires a separate showing of knowledge per se.²³³ The United States Court of Appeals for the Eleventh Circuit has integrated the knowledge requirement into a single required showing of a causal connection.²³⁴ The Eleventh Circuit has reasoned that proving knowledge is part of proving a causal connection.²³⁵ Temporal proximity, therefore, imputes knowledge of protected activity to an employer in the same way that it raises an inference of a causal connection.²³⁶ As a result, the court has held that a plaintiff may prove both knowledge and a causal connection circumstantially using the same temporal proximity evidence.²³⁷ The court, therefore, allows a plaintiff with no direct evidence of knowledge or a causal connection other than temporal proximity to survive a defendant's motion for summary judgment and, potentially, to win a jury verdict of retaliation.²³⁸

IV. SHAPING A SINGLE RULE FOR TEMPORAL PROXIMITY

As the preceding discussion demonstrates, temporal proximity receives different treatment in different jurisdictions.²³⁹ Even those courts that share one type of rule for temporal proximity often differ in their specific definitions or applications of that rule.²⁴⁰ Determin-

²²⁹ See *Jeffries*, 2001 WL 845486, at *4.

²³⁰ See *id.*

²³¹ See *Dowe*, 145 F.3d at 656–57. In *Dowe*, the court described this showing as “absolutely necessary” to establish a prima facie case. *Id.*

²³² See *Jeffries*, 2001 WL 845486, at *4; *Dowe*, 145 F.3d at 656–57.

²³³ See *Bass*, 242 F.3d at 1015.

²³⁴ See *id.*

²³⁵ See *id.*

²³⁶ See *id.*

²³⁷ See *id.*

²³⁸ See *Bass*, 242 F.3d at 1015.

²³⁹ See, e.g., *Ellis & Rudder*, *supra* note 8, at 257.

²⁴⁰ Compare, e.g., *Bass v. Bd. of County Comm'rs*, 242 F.3d 996, 1015 (11th Cir. 2001) (allowing temporal proximity evidence as circumstantial evidence of knowledge), with *Hazward*, 14 F. Supp. 2d at 124–25 (requiring showing of knowledge separate from temporal proximity).

ing an appropriate single standard for temporal proximity evidence, therefore, depends on an analysis of the specific elements of temporal proximity rules as identified in Part III.²⁴¹

Such an analysis produces a single, optimal standard for temporal proximity.²⁴² This standard borrows elements from the temporal proximity rules in a number of jurisdictions and is basically a strong proximity rule.²⁴³ According to this standard, courts should define temporal proximity as adverse action close in time to protected activity.²⁴⁴ In addition, courts should recognize the sufficiency of temporal proximity evidence to establish a *prima facie* causal connection.²⁴⁵ Depending on the circumstances of a particular case, courts should also recognize the sufficiency of temporal proximity evidence for ultimate proof of a causal connection at the summary judgment stage.²⁴⁶ Finally, courts should incorporate the approach of the Eleventh Circuit to the knowledge requirement, merging it with the causal connection requirement into one element of proof of retaliation for which temporal proximity is sufficient.²⁴⁷

A. Defining Temporal Proximity

Formulating a single rule for temporal proximity first requires defining temporal proximity.²⁴⁸ Courts provide a variety of alternatives.²⁴⁹ Despite the variation, however, some elements are common to

²⁴¹ See *supra* notes 123–238 and accompanying text.

²⁴² See *infra* notes 248–392 and accompanying text.

²⁴³ See *Bass*, 242 F.3d at 1015–16; *Passantino v. Johnson & Johnson Consumer Prod., Inc.*, 212 F.3d 493, 507 (9th Cir. 2000); *Holava-Brown v. Gen. Elec. Co.*, No. 98–9661, 1999 WL 642966, at *4 (2d Cir. 1999); *Oliver v. Digital Equip. Corp.*, 846 F.2d 103, 110–11 (1st Cir. 1988); *Mitchell v. Baldrige*, 759 F.2d 80, 86 (D.C. Cir. 1985).

²⁴⁴ See *infra* notes 248–283 and accompanying text.

²⁴⁵ See *infra* notes 284–328 and accompanying text.

²⁴⁶ See *infra* notes 329–362 and accompanying text.

²⁴⁷ See *infra* notes 363–392 and accompanying text.

²⁴⁸ See *Warren v. Ohio Dep't of Pub. Safety*, No. 00–3560, 2001 WL 1216979, at *4 (6th Cir. 2001) (“very close”); *Oest v. Ill. Dep't of Corr.*, 240 F.3d 605, 616 (7th Cir. 2001) (defining temporal proximity on a sliding scale); *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 280 (3d Cir. 2000) (“unusually suggestive” (quoting *Krouse v. Amer. Sterilizer Co.*, 126 F.3d 494, 503 (3d Cir. 1997))); *Passantino*, 212 F.3d at 507 (“within a reasonable period of time”).

²⁴⁹ See *Warren*, 2001 WL 1216979, at *4 (“very close”); *Oest*, 240 F.3d at 616 (defining temporal proximity on a sliding scale); *Farrell*, 206 F.3d at 280 (“unusually suggestive” (quoting *Krouse*, 126 F.3d at 503)); *Passantino*, 212 F.3d at 507 (“within a reasonable period of time”).

each definition.²⁵⁰ Considering both the common and varying elements of each definition, the optimal definition for temporal proximity is adverse action close in time to protected activity.²⁵¹

In general, regardless of the type of temporal proximity rule employed, each court's standard for temporal proximity requires that the protected activity be, to some extent, close in time to the adverse action.²⁵² Moreover, each requires that the time interval indicate, by itself, some degree of causal connection to be considered probative of retaliation.²⁵³ Also, each courts' standard is essentially a reasonableness inquiry, probing whether the time interval might reasonably be probative of retaliation in the circumstances of a given case.²⁵⁴ Most significantly, no court has adopted a bright line standard for defining temporal proximity.²⁵⁵

A bright line standard is ill-suited to temporal proximity evidence.²⁵⁶ Although such a standard might provide uniformity to Title VII retaliation litigation, it would also be impractical, given the context-specific nature of temporal proximity evidence.²⁵⁷ A time interval of a particular length may be probative of retaliation in the circumstances of one case but not in the circumstances of another.²⁵⁸ Moreover, a bright line rule could defeat the purpose of anti-retaliation protection.²⁵⁹ For example, it might encourage employers harboring

²⁵⁰ See *Warren*, 2001 WL 1216979, at *4; *Oest*, 240 F.3d at 616; *Farrell*, 206 F.3d at 280; *Passantino*, 212 F.3d at 507.

²⁵¹ See *Wyatt v. City of Boston*, 35 F.3d 13, 16 (1st Cir. 1994) (utilizing "close in time" standard).

²⁵² See *Warren*, 2001 WL 1216979, at *4; *Oest*, 240 F.3d at 616; *Farrell*, 206 F.3d at 280; *Passantino*, 212 F.3d at 507.

²⁵³ See *Warren*, 2001 WL 1216979, at *4; *Oest*, 240 F.3d at 616; *Farrell*, 206 F.3d at 280; *Passantino*, 212 F.3d at 507.

²⁵⁴ See *Warren*, 2001 WL 1216979, at *4; *Oest*, 240 F.3d at 616; *Farrell*, 206 F.3d at 280; *Passantino*, 212 F.3d at 507.

²⁵⁵ See *Jeffries v. Wal-Mart Stores, Inc.*, No. 99-4150, 2001 WL 845486, at *4 (6th Cir. 2001); *Cifra v. Gen. Elec. Co.*, 252 F.3d 205, 217 (2d Cir. 2001); *Bass*, 242 F.3d at 1015-16 (Eleventh Circuit); *Oest*, 240 F.3d at 616 (Seventh Circuit); *O'Neal v. Ferguson Constr. Co.*, 237 F.3d 1248, 1253 (10th Cir. 2001); *Sandoval v. Rubin*, No. 98-56831, 2000 WL 1643941, at *1 (9th Cir. 2000); *Hudson v. Norris*, 227 F.3d 1047, 1051 (8th Cir. 2000); *Farrell*, 206 F.3d at 279 (Third Circuit); *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653, 657 (4th Cir. 1998); *Swanson v. Gen. Servs. Admin.*, 110 F.3d 1180, 1188 (5th Cir. 1997); *Wyatt*, 35 F.3d at 16 (First Circuit); *Brodetski v. Duffey*, 199 F.R.D. 14, 20 (D.D.C. 2001).

²⁵⁶ *Oest*, 240 F.3d at 616 ("A mechanistically applied time frame would ill serve our obligation to be faithful to the legislative purpose of Title VII.").

²⁵⁷ See *id.*

²⁵⁸ See *id.*

²⁵⁹ See *id.*

retaliatory motives merely to delay adverse action until the length of time defined by the standard had passed.²⁶⁰ The employer could thus deny an employee use of temporal proximity evidence in establishing a *prima facie* case of retaliation.²⁶¹ Conversely, a bright line standard might encourage employees to attempt to insulate themselves from legitimate, non-retaliatory adverse action by regularly engaging in needless protected activity.²⁶² Therefore, any adverse action would occur within the period of time defined as probative of retaliation.²⁶³

The same concerns apply, to some extent, to the reasonableness standards that courts currently employ.²⁶⁴ Shrewd employees or patient but retaliatory employers might still manipulate the timing of their protected activity or adverse action to their advantage.²⁶⁵ Avoiding this outcome to the extent possible, however, appears to be the central rationale for use of a reasonableness standard.²⁶⁶ The circumstances of any particular case enable a reasonable assessment of the time interval within the context of the case.²⁶⁷ Therefore, a reasonableness standard is better suited to weighing temporal proximity than the bright line alternative.²⁶⁸

The next step, then, is defining the terms of an appropriate reasonableness standard for temporal proximity.²⁶⁹ Although courts generally adopt similar definitions of temporal proximity, the terms employed differ in their restrictions on the length of time that can be considered evidence of temporal proximity.²⁷⁰ For example, courts

²⁶⁰ See Shanor, *supra* note 126, at 586 (citing *Coutu v. Martin County Bd. of Comm'rs*, 47 F.3d 1068, 1074 (11th Cir. 1995) (suggesting that the absence of adverse action within the time interval considered temporally proximate negates inference of retaliation)). Some courts give considerable weight to a lack of temporal proximity, allowing it essentially to defeat a retaliation claim despite other evidence of a causal connection. See *Oest*, 240 F.3d at 616 (citing *Johnson v. Univ. of Wis.-Eau Claire*, 70 F.3d 469, 480 (7th Cir. 1995)); *Dowe*, 145 F.3d at 657.

²⁶¹ See *Dowe*, 145 F.3d at 657 (noting negative incentives associated with bright line rule).

²⁶² *Id.*

²⁶³ See *id.*

²⁶⁴ See *Oest*, 240 F.3d at 616; *Dowe*, 145 F.3d at 657.

²⁶⁵ See *Oest*, 240 F.3d at 616; *Dowe*, 145 F.3d at 657.

²⁶⁶ See *Oest*, 240 F.3d at 616; *Dowe*, 145 F.3d at 657.

²⁶⁷ See *Oest*, 240 F.3d at 616; *Dowe*, 145 F.3d at 657.

²⁶⁸ See *Oest*, 240 F.3d at 616; *Dowe*, 145 F.3d at 657.

²⁶⁹ See *Warren*, 2001 WL 1216979, at *4 ("very close"); *Oest*, 240 F.3d at 616 (defining temporal proximity on a sliding scale); *Farrell*, 206 F.3d at 280 ("unusually suggestive" (quoting *Krouse*, 126 F.3d at 503)); *Passantino*, 212 F.3d at 507 ("within a reasonable period of time").

²⁷⁰ See *Warren*, 2001 WL 1216979, at *4 ("very close"); *Oest*, 240 F.3d at 616 (defining temporal proximity on a sliding scale); *Farrell*, 206 F.3d at 280 ("unusually suggestive")

with strong proximity rules generally require only that adverse action be "close" in time to protected activity, or that the interval between the two be "reasonable."²⁷¹ Alternatively, courts with weak proximity rules generally require that the two be "very close."²⁷² Although courts with case by case rules have not adopted common standards, at least one such jurisdiction uses even more restrictive language, requiring that the interval be "unusually suggestive."²⁷³

The difference among these definitions might be largely semantic.²⁷⁴ It is not necessarily certain that courts with weak proximity rules are significantly more restrictive per se in applying their definitions of temporal proximity than courts with strong proximity rules.²⁷⁵ The difference, to the extent that there is one, is significant more because it reflects broader differences between courts with different types of proximity rules.²⁷⁶ It is more a difference of attitude than application.²⁷⁷ Courts define their standards in terms that reflect the weight they assign to temporal proximity, even though their interpretations of what evidence constitutes temporal proximity may be essentially the same.²⁷⁸ Courts that give more weight to temporal proximity evidence—those with strong proximity rules—define temporal proximity more expansively.²⁷⁹ Courts that give less weight to temporal proxim-

(quoting *Krouse*, 126 F.3d at 503)); *Passantino*, 212 F.3d at 507 ("within a reasonable period of time").

²⁷¹ See *Cifra*, 252 F.3d at 217 ("closely followed in time"); *Bass*, 242 F.3d at 1016 ("close"); *Passantino*, 212 F.3d at 507 ("within a reasonable period of time"); *Wyatt*, 35 F.3d at 16 ("close in time").

²⁷² *Warren*, 2001 WL 1216979, at *4; *O'Neal*, 237 F.3d at 1253 (emphasis added).

²⁷³ *Farrell*, 206 F.3d at 280 (emphasis added) (quoting *Krouse*, 126 F.3d at 503).

²⁷⁴ See *Warren*, 2001 WL 1216979, at *4 ("very close"); *Oest*, 240 F.3d at 616 (defining temporal proximity on a sliding scale); *Farrell*, 206 F.3d at 280 ("unusually suggestive" (quoting *Krouse*, 126 F.3d at 503)); *Passantino*, 212 F.3d at 507 ("within a reasonable period of time").

²⁷⁵ Compare, e.g., *O'Neal*, 237 F.3d at 1253 (noting precedent that held three months not "very close" and therefore not sufficient evidence of temporal proximity, but one and one-half months "very close" and therefore sufficient), with *Holava-Brown*, 1999 WL 642966, at *4 (holding less than three months "close" and therefore sufficient). For a general discussion of the lengths of time considered evidence of temporal proximity by different courts, see Shanor, *supra* note 126, at 586-94; see also *Timing of Adverse Actions*, in EMPLOYMENT DISCRIMINATION COORDINATOR § 20,947 (2001).

²⁷⁶ See, e.g., *O'Neal*, 237 F.3d at 1253; *Holava-Brown*, 1999 WL 642966, at *4.

²⁷⁷ See, e.g., *O'Neal*, 237 F.3d at 1253; *Holava-Brown*, 1999 WL 642966, at *4.

²⁷⁸ See, e.g., *O'Neal*, 237 F.3d at 1253; *Holava-Brown*, 1999 WL 642966, at *4.

²⁷⁹ See *Cifra*, 252 F.3d at 217 ("closely followed in time"); *Bass*, 242 F.3d at 1016 ("close"); *Passantino*, 212 F.3d at 507 ("within a reasonable period of time"); *Wyatt*, 35 F.3d at 16 ("close in time").

ity—those with weak proximity rules—define it more narrowly.²⁸⁰ Likewise, at least one court with a case by case rule has declined to define temporal proximity.²⁸¹ Therefore, determining the most appropriate definition for temporal proximity requires a determination of the optimal weight that courts should give temporal proximity evidence.²⁸² As the following discussion indicates, a strong proximity rule definition, requiring simply that protected activity and adverse action be close in time, probably provides both an appropriate, workable standard and the flexibility necessary to apply it.²⁸³

B. Sufficiency for the *Prima Facie* Case

Most courts recognize at least some circumstances under which temporal proximity alone is sufficient to establish a *prima facie* causal connection.²⁸⁴ One of the central differences among courts with different types of proximity rules, however, is their restrictions on those circumstances.²⁸⁵ Courts with strong proximity rules generally hold that temporal proximity alone is sufficient to establish a *prima facie* case.²⁸⁶ In contrast, courts with weak proximity rules restrict the potential sufficiency of temporal proximity for establishing a *prima facie* case.²⁸⁷ Courts with case by case rules, by definition, determine the sufficiency of temporal proximity evidence according to the facts of each case.²⁸⁸ Although each of the alternatives represents different concerns about the scope of Title VII and the role of the burden shift

²⁸⁰ See *Warren*, 2001 WL 1216979, at *4 (“very close”); *O’Neal*, 237 F.3d at 1253 (“very close”).

²⁸¹ See *Oest*, 240 F.3d at 616.

²⁸² See *Warren*, 2001 WL 1216979, at *4 (“very close”); *Oest*, 240 F.3d at 616 (defining temporal proximity on a sliding scale); *Farrell*, 206 F.3d at 280 (“unusually suggestive” (quoting *Krouse*, 126 F.3d at 503)); *Passantino*, 212 F.3d at 507 (“within a reasonable period of time”).

²⁸³ See *infra* notes 284–362 and accompanying text.

²⁸⁴ See, e.g., *Cifra*, 252 F.3d at 217–18 (strong proximity rule); *Evans v. City of Houston*, 246 F.3d 344, 354 (5th Cir. 2001) (weak proximity rule); *Farrell*, 206 F.3d at 279 (case by case rule).

²⁸⁵ See, e.g., *Cifra*, 252 F.3d at 217–18 (strong proximity rule); *Evans*, 246 F.3d at 354 (weak proximity rule); *Farrell*, 206 F.3d at 279 (case by case rule).

²⁸⁶ See, e.g., *Cifra*, 252 F.3d at 218; see also *supra* notes 148–181 and accompanying text (discussing sufficiency for *prima facie* case).

²⁸⁷ See, e.g., *Swanson*, 110 F.3d at 1188 n.3; see also *supra* notes 148–181 and accompanying text (discussing sufficiency for *prima facie* case).

²⁸⁸ See, e.g., *Farrell*, 206 F.3d at 279; see also *supra* notes 148–181 and accompanying text (discussing sufficiency for *prima facie* case).

in retaliation claims, an appropriately defined strong proximity rule could successfully meet all of these concerns.²⁸⁹

A strong proximity rule best serves the purpose of the burden shift.²⁹⁰ The burden shift "is intended progressively to sharpen the inquiry into the elusive factual question" of retaliation.²⁹¹ It achieves this progression by creating an intermediate burden of production at the prima facie case stage that is "not onerous" and requires the plaintiff merely to establish an inference of retaliation.²⁹² In the absence of any other evidence, temporal proximity creates such an inference.²⁹³ Adverse action taken soon after protected activity creates an inference of a causal connection between the two events.²⁹⁴ Indeed, most courts, regardless of the type of proximity rule they have adopted, recognize at least some circumstances in which temporal proximity alone suffices to establish a prima facie causal connection.²⁹⁵ Although temporal proximity is itself not conclusive proof of a causal connection, such proof is not required to establish a prima facie case.²⁹⁶

A strong proximity rule for the prima facie case, however, raises a significant concern.²⁹⁷ A strong proximity rule enables an employee to establish a prima facie case of retaliation, even in response to purely legitimate adverse action.²⁹⁸ Allowing mere temporal proximity to establish a prima facie causal connection, therefore, might encourage employees to engage in frivolous protected activity regularly.²⁹⁹ Moreover, a strong proximity rule requires employers to defend any adverse action taken against an employee who has recently engaged

²⁸⁹ See *Cifra*, 252 F.3d at 218; *Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87, 95 (2d Cir. 2001).

²⁹⁰ See *Cifra*, 252 F.3d at 218; *Slattery*, 248 F.3d at 95.

²⁹¹ See *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 n.8 (1981) (referring to discrimination claims rather than retaliation claims).

²⁹² *Id.* at 253-54; see *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); see also *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 526 (1993) (Souter, J., dissenting) (describing the relationship of the burden shift to the purpose of Title VII).

²⁹³ See *Oliver*, 846 F.2d at 110 ("A showing of discharge soon after the employee engages in an activity specifically protected . . . is indirect proof of a causal connection between the firing and the activity because it is strongly suggestive of retaliation.").

²⁹⁴ See *id.*

²⁹⁵ See, e.g., *Cifra*, 252 F.3d at 217-18 (strong proximity rule); *Evans*, 246 F.3d at 354 (weak proximity rule); *Fairrell*, 206 F.3d at 279 (case by case rule).

²⁹⁶ See *Burdine*, 450 U.S. at 253-54.

²⁹⁷ See *Bermudez v. TRC Holdings, Inc.*, 138 F.3d 1176, 1179 (7th Cir. 1998); *Dowe*, 145 F.3d at 657; *Swanson*, 110 F.3d at 1188 n.3.

²⁹⁸ See *Bermudez*, 138 F.3d at 1179; *Dowe*, 145 F.3d at 657; *Swanson*, 110 F.3d at 1188 n.3.

²⁹⁹ See *Bermudez*, 138 F.3d at 1179; *Dowe*, 145 F.3d at 657; *Swanson*, 110 F.3d at 1188 n.3.

in a protected activity, regardless of its validity.³⁰⁰ Indeed, this argument has been persuasive to courts adopting a weak proximity rule or case by case rule analysis of the prima facie case requirement.³⁰¹

The argument falters, however, for two reasons.³⁰² First, the intermediate burden of the prima facie case is intentionally more easily met than the ultimate burden.³⁰³ An employee who cannot prove retaliation often may be able to establish a prima facie case.³⁰⁴ Therefore, the burden shift may encourage employees to file retaliation claims that cannot be proven.³⁰⁵ The establishment of a burden that is "not onerous" for raising an inference of retaliation, however, is simply a necessary cost of the expanded access to Title VII protection that the burden shift is intended to provide.³⁰⁶

The second reason the weak proximity rule argument should ultimately fail is an extension of the first.³⁰⁷ Because the ultimate burden is higher than the prima facie burden, proving retaliation under the burden shift requires more than establishing a prima facie case.³⁰⁸ For example, under a strong proximity rule, an employee with a frivolous retaliation claim could establish a prima facie case based solely on temporal proximity.³⁰⁹ Once the burden shifts, however, the legitimacy of the adverse action comes into focus.³¹⁰ If the employer cannot state a legitimate, non-retaliatory reason for the adverse action, the employee will win.³¹¹ But, if the employer can state such a reason, the burden shifts back to the employee to prove that reason pretextual.³¹² If the employee cannot, then the employee's retaliation claim fails.³¹³ A frivolous retaliation claim, therefore, will likely fail

³⁰⁰ See *Swanson*, 110 F.3d at 1188 n.3; see also *Smith*, *supra* note 8, at 391-92 (asserting need for sufficient proof of claim under burden shift to prevent Title VII being transformed "into a statute requiring just cause for employment decisions.").

³⁰¹ See *Bermudez*, 138 F.3d at 1179; *Doue*, 145 F.3d at 657; *Swanson*, 110 F.3d at 1188 n.3.

³⁰² See *Burdine*, 450 U.S. at 253-54.

³⁰³ See *id.*

³⁰⁴ See, e.g., *Slattery*, 248 F.3d at 95 (finding claim failed despite timing sufficient to establish prima facie causal connection).

³⁰⁵ See *Smith*, *supra* note 8, at 377-78.

³⁰⁶ See *Burdine*, 450 U.S. at 253-54.

³⁰⁷ See *id.*

³⁰⁸ See *id.*

³⁰⁹ See *Swanson*, 110 F.3d at 1188 n.3 (noting concern for frivolous cases); *Smith*, *supra* note 8, at 377-78.

³¹⁰ See *Burdine*, 450 U.S. at 254-55.

³¹¹ See *Hicks*, 509 U.S. at 509, 510 n.3; *Burdine*, 450 U.S. at 254.

³¹² See *Hicks*, 509 U.S. at 510-11; *Burdine*, 450 U.S. at 256.

³¹³ See *Hicks*, 509 U.S. at 510-11; *Burdine*, 450 U.S. at 256.

despite the sufficiency of temporal proximity alone to establish a prima facie case.³¹⁴

A strong proximity rule for the prima facie case is also preferable because it maintains the distinction between the plaintiff's two burdens.³¹⁵ Courts with strong proximity rules generally define the prima facie burden as easily met, as the Supreme Court of the United States has.³¹⁶ Furthermore, some courts with strong proximity rules declare explicitly that the burden to establish a prima facie case is not the same as the ultimate burden of proof.³¹⁷ In contrast, courts with weak proximity rules generally blur the distinction between the two burdens.³¹⁸ Some explicitly require a plaintiff to prove a prima facie case by a preponderance of the evidence, the same standard by which a plaintiff must ultimately prove pretext.³¹⁹ In trying to correct what they perceive as the excessively low burden of establishing a prima facie case, therefore, these courts essentially defeat the purpose of the burden shift.³²⁰

A case by case alternative is no more appealing.³²¹ Courts with case by case rules make the sufficiency of temporal proximity purely contextual.³²² Although every court agrees that evaluating temporal proximity depends on its factual context, at least to some extent, a case by case rule provides no clear standards regarding the prima facie case burden.³²³ Moreover, a case by case approach to the prima facie case is unnecessary.³²⁴ In *Farrell v. Planters Lifesavers Co.*, the Third Circuit supported its case by case rule by emphasizing the im-

³¹⁴ See *Hicks*, 509 U.S. at 510-11; *Burdine*, 450 U.S. at 256; see also, e.g., *Slattery*, 248 F.3d at 95 (finding claim fails despite timing sufficient to establish prima facie causal connection).

³¹⁵ See *Burdine*, 450 U.S. at 253-54.

³¹⁶ See *id.* at 253 ("not onerous"); *Slattery*, 248 F.3d at 94 ("de minimis" (quoting *Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 37 (2d Cir. 1994))); *Mitchell*, 759 F.2d at 86 ("not great" (quoting *McKenna v. Weinberger*, 729 F.2d 783, 790 (D.C. Cir. 1984))).

³¹⁷ See *Yartzoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir. 1987) ("At the summary judgment stage, the prima facie case need *not* be proved by a preponderance of the evidence.") (emphasis added).

³¹⁸ See *Harris v. King*, No. 98-5826, 2000 WL 353676, at *2-3 (6th Cir. 2000); *Dowe*, 145 F.3d at 656-57.

³¹⁹ E.g. *Harris*, 2000 WL 353676, at *2-3.

³²⁰ See *Burdine*, 450 U.S. at 253-54; see also *Smith*, *supra* note 8, at 377 (critiquing the burden shift, in part, precisely because the prima facie burden is easily met).

³²¹ See *Oest*, 240 F.3d at 616; *Hudson*, 227 F.3d at 1051; *Farrell*, 206 F.3d at 279.

³²² See *Oest*, 240 F.3d at 616; *Hudson*, 227 F.3d at 1051; *Farrell*, 206 F.3d at 279.

³²³ See *Oest*, 240 F.3d at 616; *Hudson*, 227 F.3d at 1051; *Farrell*, 206 F.3d at 279.

³²⁴ See *Oest*, 240 F.3d at 616; *Hudson*, 227 F.3d at 1051; *Farrell*, 206 F.3d at 279.

portance of the "specific facts and circumstances" of each case.³²⁵ But the purpose of the prima facie case requirement is not to weigh and evaluate all of the evidence in a retaliation claim.³²⁶ That is the purpose of the three stages of the burden shift collectively.³²⁷ Instead, the purpose of the prima facie case is simply to determine if the plaintiff has raised an inference of retaliation—a burden for which temporal proximity alone should suffice.³²⁸

C. A Discretionary Standard for Summary Judgment

As with the prima facie case analysis, a strong proximity rule approach to summary judgment is likely the most appropriate.³²⁹ Courts with strong proximity rules hold temporal proximity sufficient to create a genuine material issue for the jury, at least in some cases.³³⁰ In contrast, courts with weak proximity rules generally require a plaintiff to produce additional evidence of a causal connection.³³¹ Similarly, courts with case by case rules generally require additional proof of pretext.³³² Unlike in the prima facie case analysis, this difference does not hinge on different understandings of the burden for summary judgment resolution.³³³ It depends instead on different evaluations of the probative value of temporal proximity evidence.³³⁴ A strong proximity rule for summary judgment resolution incorporates both an appropriate recognition of the probative value of temporal proximity and sufficient discretion for a court to grant summary judgment in cases in which it is appropriate.³³⁵

In a retaliation claim, evaluating summary judgment disposition requires an understanding of the plaintiff's ultimate burden of proof.³³⁶ To prove retaliation under the burden shift, a plaintiff must first establish a prima facie case and then, if the defendant produces

³²⁵ 206 F.3d at 279 n.5.

³²⁶ See *Burdine*, 450 U.S. at 253–54.

³²⁷ See *id.* at 256 n.8, 253–56.

³²⁸ See *id.* at 253–54.

³²⁹ See *Cifra*, 252 F.3d at 217; *Passantino*, 212 F.3d at 507.

³³⁰ See *Cifra*, 252 F.3d at 217; *Passantino*, 212 F.3d at 507.

³³¹ See *Harris*, 2000 WL 353676, at *3; *Ward v. Wal-Mart Stores, Inc.*, 140 F. Supp. 2d 1220, 1230 (D.N.M. 2001) (citing Tenth Circuit precedent).

³³² See *Buettner v. Arch Coal Sales Co.*, 216 F.3d 707, 716 (8th Cir. 2000); *Farrell*, 206 F.3d at 279 n.5; *Bermudez*, 138 F.3d at 1179.

³³³ See *supra* notes 302–314 and accompanying text.

³³⁴ Compare *Cifra*, 252 F.3d at 217–18, with *Buettner*, 216 F.3d at 716.

³³⁵ See *supra* notes 193–203 and accompanying text.

³³⁶ See *Hicks*, 509 U.S. at 509–10, 510 n.3.

evidence of legitimate, non-retaliatory reasons for the adverse action, prove those reasons to be, in fact, pretext for retaliation.³³⁷ The issue for summary judgment resolution of a retaliation claim, then, is whether a reasonable jury could find that a retaliatory motive caused the adverse action, based on the evidence in the record viewed most favorably to the plaintiff.³³⁸

Practically, the plaintiff's evidence for ultimately proving retaliation may be the same as the evidence used to establish a *prima facie* case.³³⁹ The plaintiff must prove the same causal connection to succeed in proving pretext as is necessary to establish a *prima facie* causal connection.³⁴⁰ The difference between the two stages is the burden that the plaintiff faces.³⁴¹ Although the evidentiary burden at the *prima facie* case stage may be "de minimis," the ultimate burden—the burden at the pretext stage—requires a preponderance of the evidence.³⁴² The sufficiency of temporal proximity evidence alone to defeat a motion for summary judgment, therefore, depends on the sufficiency of temporal proximity to prove a causal connection by a preponderance of the evidence.³⁴³

This determination, in turn, depends on the evidentiary record as a whole.³⁴⁴ In ruling on a defendant's motion for summary judgment, a court credits the inference of a causal connection that a *prima facie* case establishes.³⁴⁵ If the record indicates no valid, credible reason for the adverse action, then a reasonable jury could find a causal connection based solely on temporal proximity.³⁴⁶ For example, if the record indicates that the plaintiff had an exemplary employ-

³³⁷ See *supra* notes 7, 39–45 and accompanying text.

³³⁸ See *Hicks*, 509 U.S. at 509–10, 510 n.3.

³³⁹ See *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000); *Burdine*, 450 U.S. at 256 n.10. The Supreme Court has recognized this fact in holding that the factfinder may consider the same evidence at the pretext stage as at the *prima facie* stage, despite the difference in burdens that the plaintiff faces at each. See *Reeves*, 530 U.S. at 143; *Burdine*, 450 U.S. at 256 n.10.

³⁴⁰ See *Burdine*, 450 U.S. at 253–54, 256.

³⁴¹ See *supra* notes 182–186 and accompanying text.

³⁴² See *Hicks*, 502 U.S. at 509–10, 510 n.3.

³⁴³ See *id.*; see also *Cifra*, 252 F.3d at 217–18 (stating standard for summary judgment).

³⁴⁴ See *Warren*, 2001 WL 1216979, at *2; *Cifra*, 252 F.3d at 216; *Hudson*, 227 F.3d at 1050; *Dowe*, 145 F.3d at 656; *Oliver*, 846 F.2d at 105. Summary judgment depends "on a number of factors. Those include the strength of the plaintiff's *prima facie* case, the probative value of the proof that the employer's explanation is false, and any other evidence . . . that may be considered." *Reeves*, 530 U.S. at 148–49; see also *id.* at 150 (equating the summary judgment and judgment as a matter of law standards).

³⁴⁵ See, e.g., *Oliver*, 846 F.2d at 105.

³⁴⁶ See *Cifra*, 252 F.3d at 217–18.

ment record with an economically vibrant employer, but became the object of adverse action soon after engaging in protected activity, a reasonable jury probably could find the employer liable for retaliation by a preponderance of the evidence.³⁴⁷ On the contrary, if the defense has a strong case, temporal proximity alone will not be sufficient.³⁴⁸ For example, if the defendant has produced a legitimate, non-retaliatory reason for its adverse action and the plaintiff's only evidence of a causal connection is temporal proximity, summary judgment in favor of the defendant is appropriate.³⁴⁹

Some courts with strong proximity rules incorporate this approach to summary judgment resolution.³⁵⁰ The Second Circuit provides a good example.³⁵¹ In *Cifra v. General Electric Co.*, the court held temporal proximity sufficient to establish a prima facie causal connection.³⁵² Although the record contained no other evidence of a causal connection, the court held that a rational fact-finder could find a causal connection based solely on the temporal proximity evidence, and therefore, could find the defendant liable for retaliation.³⁵³ In *Slattery*, however, the court produced a different result applying the same rule.³⁵⁴ In considering the defendant's motion for summary judgment, the court evaluated evidence that the adverse action was part of an extended disciplinary process.³⁵⁵ Under the circumstances, temporal proximity was insufficient to prove a causal connection between the adverse action and the protected activity by a preponderance of the evidence.³⁵⁶

In contrast, courts with weak proximity rules generally hold temporal proximity alone insufficient to create a genuine material issue.³⁵⁷ They require additional evidence of a causal connection, regardless of the facts in a case.³⁵⁸ Similarly, jurisdictions with case by

³⁴⁷ See *id.*

³⁴⁸ See *Slattery*, 248 F.3d at 95; *Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12, 16-17 (1st Cir. 1997).

³⁴⁹ See *Slattery*, 248 F.3d at 95; *Soileau*, 105 F.3d at 16-17.

³⁵⁰ See *Cifra*, 252 F.3d at 217-18; *Slattery*, 248 F.3d at 95; *Soileau*, 105 F.3d at 16-17.

³⁵¹ See *Cifra*, 252 F.3d at 217-18; *Slattery*, 248 F.3d at 95.

³⁵² See 252 F.3d at 217.

³⁵³ See *id.* at 218.

³⁵⁴ See 248 F.3d at 95.

³⁵⁵ See *id.*

³⁵⁶ See *id.*

³⁵⁷ See *Harris*, 2000 WL 353676, at *3; *Dowe*, 145 F.3d at 656-57; *Swanson*, 110 F.3d at 1188; *Ward*, 140 F. Supp. 2d at 1230.

³⁵⁸ See *Harris*, 2000 WL 353676, at *3; *Dowe*, 145 F.3d at 656-57; *Swanson*, 110 F.3d at 1188; *Ward*, 140 F. Supp. 2d at 1230.

case rules require more than temporal proximity to create a genuine material issue, even though, by definition, they weigh the sufficiency of temporal proximity evidence according to the context of each case.³⁵⁹ In doing so, courts with both types of rules raise the bar for temporal proximity evidence too high.³⁶⁰ As a general proposition, they may grant defendants' motions for summary judgment even in cases in which a reasonable jury could find a causal connection based on temporal proximity.³⁶¹ Courts with strong proximity rules for summary judgment resolution are more effective in distinguishing cases in which summary judgment is appropriate from those in which it is not.³⁶²

D. *Circumstantial Proof of Knowledge*

Finally, courts should adopt the Eleventh Circuit's approach to the knowledge requirement.³⁶³ The Eleventh Circuit expressly allows a plaintiff to meet the knowledge requirement with the same evidence used to meet the causal connection requirement.³⁶⁴ In doing so, the court has held temporal proximity sufficient circumstantial proof of knowledge.³⁶⁵ Although unique, this approach best serves the purpose of the burden shift while upholding the appropriate standards of proof for a retaliation claim.³⁶⁶

In many courts, regardless of the type of temporal proximity rule, a plaintiff must make a showing of knowledge independent of temporal proximity evidence.³⁶⁷ Some courts identify the knowledge requirement as a fourth element of a *prima facie* case, comparable to protected activity, adverse action, and a causal connection.³⁶⁸ Others treat the knowledge requirement as part of the causal connection requirement, but require a separate showing of knowledge neverthe-

³⁵⁹ See *Buettner*, 216 F.3d at 716; *Farrell*, 206 F.3d at 279 n.5; *Bermudez*, 138 F.3d at 1179.

³⁶⁰ See, e.g., *Harris*, 2000 WL 353676, at *3 (weak proximity rule); *Buettner*, 216 F.3d at 716 (case by case rule).

³⁶¹ See *Harris*, 2000 WL 353676, at *3; *Buettner*, 216 F.3d at 716.

³⁶² See *Cifra*, 252 F.3d at 217-18; *Slattery*, 248 F.3d at 95.

³⁶³ See *Bass*, 242 F.3d at 1015.

³⁶⁴ See *id.*

³⁶⁵ See *id.*

³⁶⁶ See *id.*

³⁶⁷ See, e.g., *Jeffries*, 2001 WL 845486, at *4; *Hawward*, 14 F. Supp. 2d at 124-25.

³⁶⁸ See *Jeffries*, 2001 WL 845486, at *4.

less.³⁶⁹ Each of these approaches to the knowledge requirement, however, lacks the benefits of the Eleventh Circuit's approach.³⁷⁰

First, the Eleventh Circuit appropriately recognizes that the knowledge requirement is really part of the causal connection requirement.³⁷¹ Both requirements derive from the same chain of logic. To prove retaliation, a plaintiff must prove that a causal connection exists between protected activity and adverse action.³⁷² To prove a causal connection, however, a plaintiff must prove that the defendant knew of the protected activity.³⁷³ The defendant could not have taken adverse action *because of* protected activity if the defendant did not *know* about the protected activity.³⁷⁴ Proving knowledge, therefore, essentially proves one aspect of a causal connection.³⁷⁵ Courts that require a showing of knowledge separate from the showing of a causal connection implicitly, illogically, and unnecessarily add another hurdle to a plaintiff's case.³⁷⁶

Second, the Eleventh Circuit maintains the distinction between the prima facie case burden and the ultimate burden in a retaliation claim.³⁷⁷ By requiring a separate showing of knowledge at the prima facie case stage, other courts require more evidence than is otherwise necessary to establish a prima facie case.³⁷⁸ In doing so, they raise the prima facie burden closer to the ultimate burden and defeat the purpose of the burden shift.³⁷⁹ The Supreme Court established the burden shift as a framework for evaluating circumstantial evidence.³⁸⁰ Requiring a separate showing of knowledge, however, fails to uphold that purpose.³⁸¹ If the separate showing is intended to require direct evidence of knowledge, then it requires at least some direct evidence of a causal connection and, therefore, of retaliation.³⁸² If, on the contrary, circumstantial evidence of knowledge is sufficient, then a plain-

³⁶⁹ See *Dowe*, 145 F.3d at 657; *Hazward*, 14 F. Supp. 2d at 124-25.

³⁷⁰ See *Bass*, 242 F.3d at 1015.

³⁷¹ See *id.*

³⁷² See *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001); see also, e.g., *Pasantino*, 212 F.3d at 506 (listing elements required to prove retaliation).

³⁷³ See *Breeden*, 532 U.S. at 273.

³⁷⁴ See *id.*

³⁷⁵ See *Bass*, 242 F.3d at 1015.

³⁷⁶ See *Cifra*, 252 F.3d at 216-18.

³⁷⁷ See *Bass*, 242 F.3d at 1015.

³⁷⁸ See *Cifra*, 252 F.3d at 216-18.

³⁷⁹ See *Burdine*, 450 U.S. at 253-56.

³⁸⁰ See *McDonnell Douglas*, 411 U.S. at 802-04.

³⁸¹ But see *Dowe*, 145 F.3d at 657; *Hazward*, 14 F. Supp. 2d at 124-25.

³⁸² See *Bass*, 242 F.3d at 1015.

tiff should be able to prove knowledge with temporal proximity evidence, in the same way that the plaintiff is able to prove a causal connection with temporal proximity evidence.³⁸³

In some cases, proving retaliation ultimately may require more evidence of knowledge than establishing a prima facie case.³⁸⁴ Likewise, in many cases, proving a causal connection requires additional evidence.³⁸⁵ In both situations, however, the sufficiency of temporal proximity to create a genuine issue of material fact should depend on the circumstances of a particular case.³⁸⁶ Requiring additional evidence of knowledge per se unduly supports defendants' motions for summary judgment in cases in which a reasonable jury could find a causal connection based on temporal proximity alone.³⁸⁷

This understanding of the knowledge requirement is fully compatible with the Supreme Court's decision in *Clark County School District v. Breeden*.³⁸⁸ In that case, the Supreme Court held simply that proof of retaliation requires proof of knowledge.³⁸⁹ The Court neither defined any standard for the knowledge requirement nor required direct evidence of knowledge.³⁹⁰ Presumably, proof of knowledge may be circumstantial.³⁹¹ If so, temporal proximity should be sufficient to prove knowledge, in addition to proving the causal connection as a whole.³⁹²

³⁸³ See *id.*

³⁸⁴ See *id.* at 1016 (holding sufficient evidence for establishment of prima facie case and reversal of summary judgment in favor of defendant and remanding for further proceedings).

³⁸⁵ See *Slattery*, 248 F.3d at 95 (finding implicitly that plaintiff produced sufficient evidence to establish a prima facie case, but insufficient evidence for ultimate proof of retaliation to survive summary judgment).

³⁸⁶ See *Soileau*, 105 F.3d at 16-17 (weighing sufficiency of evidence at summary judgment in light of the record as a whole).

³⁸⁷ See, e.g., *Gribcheck v. Runyon*, 245 F.3d 547, 551 (6th Cir. 2001). In *Gribcheck*, the court held that the plaintiff had shown sufficient temporal proximity to establish a prima facie case based on evidence of a lawsuit against his employer that was ongoing when his employer took adverse action. See *id.* The court also found that the plaintiff sufficiently established that the employer knew about the lawsuit because the plaintiff had allegedly deposed his supervisors. See *id.* Without evidence of the deposition or other evidence of knowledge, however, the plaintiff's case may have failed despite the strong circumstantial evidence of an ongoing lawsuit against the employer. See *id.*

³⁸⁸ See 532 U.S. at 273 (2001).

³⁸⁹ See *id.*

³⁹⁰ See *id.*

³⁹¹ See *id.*

³⁹² See *id.*; *Bass*, 242 F.3d at 1015.

CONCLUSION

Despite the conflicting treatment of temporal proximity evidence by different federal jurisdictions, a single, optimal rule for such evidence can be identified. According to this rule, courts should adopt a broad definition of temporal proximity—specifically, adverse action close in time to protected activity. In turn, courts should determine the length of time necessary to meet this standard depending, to some extent, on the circumstances of each case. Courts should also, however, recognize the fundamental sufficiency of temporal proximity for establishing a *prima facie* case. Moreover, at least in cases in which the factual context makes it appropriate, temporal proximity alone should be sufficient to create a genuine material issue for the jury, and therefore, to defeat a defendant's motion for summary judgment. Finally, temporal proximity alone should be sufficient to meet the knowledge requirement in a retaliation claim.

Such a rule for temporal proximity upholds both the purpose of the burden shift and the Title VII protection against retaliation that the burden shift serves. Courts adopting such a rule would sustain the burden shift as the framework for evaluating circumstantial evidence. They would recognize the value of circumstantial evidence in retaliation claims and maintain the distinction between the plaintiff's *prima facie* and ultimate burdens. In preserving the burden shift, these courts would preserve access to Title VII and maintain the statute's balance between employee rights and employer interests. Moreover, in adopting a uniform standard, they would bring consistency to an otherwise conflicting but increasingly significant focus of federal employment law.

JUSTIN P. O'BRIEN