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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. Employees seeking legal recourse for employment discrimination have increasingly sought protection from employers attempting to retaliate against their anti-discrimination efforts. The primary source of this protection has been § 704(a) of Title VII of the Civil Rights Act of 1964. 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. § 12123(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. Mideffort 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 Act).
Title VII protects employees both from discriminatory treatment in employment and from retaliation by employers for asserting their rights against alleged discrimination. In a discrimination claim, an employee alleges that an employer treated the employee differently because of a statutorily protected characteristic. In a retaliation claim, an employee alleges that an employer treated the employee adversely because the employee protested alleged discrimination. 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").

Temporal proximity is crucial in many retaliation claims because retaliatory employers rarely memorialize their retaliatory motives. In
the absence of such "smoking gun" evidence, many retaliation claims are mostly, if not entirely, built on circumstantial evidence including temporal proximity. Furthermore, temporal proximity has been recognized as particularly powerful circumstantial evidence of retaliation. Short intervals of time between an employee's anti-discrimination efforts and an employer's allegedly retaliatory action can create powerful inferences of retaliation. Yet courts have not adopted consistent standards for weighing temporal proximity evidence. As a result, temporal proximity is not given the same weight among courts, nor even, on occasion, in different cases within the same jurisdiction. 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.

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. 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"). Part III analyzes the components of these rules and establishes from them the basic principles determining the appropriate weight for temporal proximity. 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.A.-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 Holavabrown 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 21-29 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.\textsuperscript{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.\textsuperscript{21} Title VII prohibits discrimination by employers based on race, color, religion, sex, or national origin.\textsuperscript{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.\textsuperscript{23} Title VII, therefore, not only prohibits employment discrimination, but also enables employees to seek recourse for discrimination.\textsuperscript{24}

In addition to prohibiting discrimination, Title VII protects employees from retaliation in response to their anti-discrimination activity.\textsuperscript{25} A retaliation claim begins with alleged employment discrimination.\textsuperscript{26} The employee responds to the alleged discrimination by protesting the discrimination in some way.\textsuperscript{27} This may be as informal as discussing it with the employer or as formal as filing an official complaint with the EEOC.\textsuperscript{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.\textsuperscript{29} Specifically, Title VII prohibits an employer

\textsuperscript{20} See infra notes 239–392 and accompanying text.
\textsuperscript{21} See 42 U.S.C. § 2000e (1994); Kahan & Deem, supra note 1, at 484.
\textsuperscript{22} 42 U.S.C. § 2000e-2(a).
\textsuperscript{23} Id. § 2000e-5(a)–(f).
\textsuperscript{24} See id.
\textsuperscript{25} Id. § 2000e-8(a); see Essay & Friedman, supra note 8, at 116.
\textsuperscript{26} See, e.g., Passantino v. Johnson & Johnson Consumer Prods., Inc., 212 F.3d 493, 500 (9th Cir. 2000).
\textsuperscript{27} See id. at 500–01.
\textsuperscript{28} See id. at 500–01, 506.
\textsuperscript{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 Dowc 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.  

The rationale for these provisions is to ensure employees full access to Title VII's anti-discrimination protections.  Protecting employees from employment discrimination, after all, would be meaningless if an employer could simply fire an employee who sought to protest discriminatory behavior.  

Title VII also establishes the basic requirements for proving retaliation.  In defining these requirements, the statute attempts a careful balance between employee rights and employer interests that courts struggle to maintain.  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").  Retaliation claims proceed in one of two ways, depending on the nature of the evidence available.  Plaintiffs with direct evidence of retaliation present such evidence without the benefit of a shifting burden of production ("burden
shift").\textsuperscript{57} Plaintiffs with only circumstantial evidence, however, experience this benefit.\textsuperscript{58} In 1973, in \textit{McDonnell Douglas Corp. v. Green}, the Supreme Court of the United States adopted a burden shift for Title VII discrimination cases.\textsuperscript{59} Since \textit{McDonnell Douglas}, all United States Courts of Appeals have adopted the burden shift for retaliation claims under Title VII as well.\textsuperscript{40} The burden shift involves three steps.\textsuperscript{41} First, the plaintiff must make a showing of a prima facie case of retaliation.\textsuperscript{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.\textsuperscript{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.\textsuperscript{44} Under the burden shift, therefore, proving pretext satisfies the plaintiff's ultimate burden of proof in a retaliation claim.\textsuperscript{45} Since \textit{McDonnell Douglas}, the burden shift has provided the framework for presenting and evaluating the circumstantial evidence so common to Title VII claims.\textsuperscript{46} The Supreme Court introduced the burden shift as the best means to fulfill Title VII's purpose of protect-

\textsuperscript{57} See Brodin, \textit{supra} note 5, at 188-89; Smith, \textit{supra} note 8, at 382.

\textsuperscript{58} See Brodin, \textit{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 \textit{infra} notes 39-45 and accompanying text; see also, \textit{e.g.}, O'Neal v. Ferguson Constr. Co., 237 F.3d 1248, 1252 (10th Cir. 2001) (beginning analysis with prima facie case requirements).

\textsuperscript{59} See 411 U.S. 792, 802-04 (1973).

\textsuperscript{40} See Kahan & Deem, \textit{supra} note 1, at 435-36.

\textsuperscript{41} Burdine, 450 U.S. at 252-53; see Essary & Friedman, \textit{supra} note 8, at 120-21.

\textsuperscript{42} Burdine, 450 U.S. at 252-53; see \textit{infra} notes 50-52 and accompanying text.

\textsuperscript{43} Burdine, 450 U.S. at 252-53; see Essary & Friedman, \textit{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 \textit{Hicks}).

\textsuperscript{44} Burdine, 450 U.S. at 252-53; see Essary & Friedman, \textit{supra} note 8, at 121.

\textsuperscript{45} See Brodin, \textit{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 \textit{id}.

\textsuperscript{46} See Brodin, \textit{supra} note 5, at 190-91 (citing Burdine, 450 U.S. at. 255 n.8); Smith, \textit{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 \textit{Hicks}, 509 U.S. at 525 (Souter, J., dissenting).
ing equality in the workplace.\textsuperscript{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.\textsuperscript{48} In doing so, the burden shift facilitates access to Title VII protection for plaintiffs with no direct evidence of retaliation.\textsuperscript{49}

\textbf{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.\textsuperscript{50} Because of the burden shift, however, the plaintiff's entire burden of proof need not be satisfied at the prima facie stage.\textsuperscript{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."\textsuperscript{52} The plaintiff may then fulfill the burden by proving pretext.\textsuperscript{53}

Determining the point at which a plaintiff has established a prima facie case, therefore, is essential for two reasons.\textsuperscript{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.\textsuperscript{55} Second, establishing a prima facie case shifts not only the burden but the entire battle.\textsuperscript{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

\textsuperscript{47} See McDonnell Douglas, 411 U.S. at 800.
\textsuperscript{48} See Burdine, 450 U.S. at 253–55.
\textsuperscript{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.
\textsuperscript{51} See Burdine, 450 U.S. at 253–54.
\textsuperscript{52} See id. at 253.
\textsuperscript{53} See Brodin, supra note 5, at 189–92; Kahan & Deem, supra note 1, at 447–48.
\textsuperscript{54} See Essary & Friedman, supra note 8, at 120–21.
\textsuperscript{55} See Brodin, supra note 5, at 187–89; Essary & Friedman, supra note 8, at 120–21.
\textsuperscript{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.


\(^{67}\) 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.\textsuperscript{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.\textsuperscript{71}

But perhaps the most important and most common circumstantial evidence of a causal connection is temporal proximity.\textsuperscript{72} The reasons are straightforward.\textsuperscript{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.\textsuperscript{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.\textsuperscript{75}

Courts have spent considerable time and energy evaluating temporal proximity evidence in retaliation claims.\textsuperscript{76} In the process, they have found several areas of agreement regarding its treatment.\textsuperscript{77} For example, courts typically agree that temporal proximity is significant circumstantial evidence of retaliation.\textsuperscript{78} Moreover, courts generally agree that temporal proximity alone \textit{can} be sufficient to establish a prima facie case, even though some do not consider it sufficient per se.\textsuperscript{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.\textsuperscript{80} Conversely, courts also agree that extended intervals may disprove a causal connection.\textsuperscript{81}

\textsuperscript{70} See Snell & Eskow, \textit{supra} note 10, at 385, 396–405.

\textsuperscript{71} See Ray, \textit{supra} note 29, at 425–29; Snell & Eskow, \textit{supra} note 10, at 396–405.

\textsuperscript{72} See Ellis & Rudder, \textit{supra} note 8, at 257; Essary & Friedman, \textit{supra} note 8, at 143; Sandler & Brewer, \textit{supra} note 8, at 119.

\textsuperscript{73} See Ellis & Rudder, \textit{supra} note 8, at 257; Essary & Friedman, \textit{supra} note 8, at 143; Sandler & Brewer, \textit{supra} note 8, at 119.

\textsuperscript{74} See Ellis & Rudder, \textit{supra} note 8, at 257; Sandler & Brewer, \textit{supra} note 8, at 119.

\textsuperscript{75} See Ellis & Rudder, \textit{supra} note 8, at 257; Sandler & Brewer, \textit{supra} note 8, at 119.

\textsuperscript{76} See infra notes 123–238 and accompanying text.

\textsuperscript{77} See Ellis & Rudder, \textit{supra} note 8, at 257; Sandler & Brewer, \textit{supra} note 8, at 119.

\textsuperscript{78} See Ellis & Rudder, \textit{supra} note 8, at 257; Sandler & Brewer, \textit{supra} note 8, at 119.

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

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

\textsuperscript{81} See Kahan & Deem, \textit{supra} note 1, at 445; Snell & Eskow, \textit{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. The Court held that very close temporal proximity alone could be sufficient evidence for a prima facie causal connection. 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. 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").

The Supreme Court, however, left unresolved a number of issues regarding the appropriate weight for temporal proximity in retaliation claims. 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*. 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. Finally, the Court did not determine what weight temporal proximity should be given beyond the prima facie case stage.

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*. A number of factors contribute to the relative weight that courts considering retaliation claims give to temporal proximity evidence. In general, however, the ways in which courts weigh temporal proximity can be

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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.
94 See Slattery v. Swiss Reinsurance Am. Corp., 248 F.3d 87, 95 (2d Cir. 2001); Yartzoff v. Thomas, 809 F.2d 1871, 1876 (9th Cir. 1987); Mitchell, 759 F.2d at 86.
95 See Slattery, 248 F.3d at 95; Yartzoff, 809 F.2d at 1376; Mitchell, 759 F.2d at 86.
96 See Slattery, 248 F.3d at 95; Yartzoff, 809 F.2d at 1376; Mitchell, 759 F.2d at 86.
97 See Slattery, 248 F.3d at 95; Yartzoff, 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, 97 (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))).
100 252 F.3d at 217.
basis of gender. Her termination occurred twenty days after her employer learned that she had retained an attorney to pursue a discrimination claim against the employer. 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.

B. Weak Proximity Rules

A number of jurisdictions have adopted rules giving temporal proximity evidence significantly less weight in retaliation claims ("weak proximity rules"). Courts with weak proximity rules harbor significant concern for the limited purposes of Title VII's anti-retaliation provisions. These courts give less weight to temporal proximity evidence to prevent plaintiffs from pursuing retaliation claims based on insufficient evidence. Jurisdictions with weak proximity rules are similar to those with strong proximity rules in several important ways. 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. Moreover, courts with weak proximity rules, like those with strong proximity rules, still vary among themselves in their treatment of temporal proximity. Yet plaintiffs who rely substantially on temporal proximity evidence may face appreciably greater challenges in pursuing their claims under weak proximity rules.
For example, in 1999, 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. 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. 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.

C. Case by Case Rules

Some courts have declined to adopt definitive rules regarding temporal proximity. Instead, these courts have held that the appropriate treatment of temporal proximity depends on the context of each case ("case by case rule"). 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. 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. Case by case rules, as a result, generally do not produce clear standards of proof for retaliation claims.

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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.
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. "We 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. In *Hudson*, the plaintiff alleged that his employer retaliated against him because he had testified in a co-worker’s lawsuit against the employer. Within four months of his testimony, the plaintiff was subjected to multiple adverse actions, including two internal affairs investigations and denial of a promotion. 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*.

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. Individually, these issues define the way in which temporal proximity is evaluated at a particular point in the litigation of a retaliation claim. Collectively, they indicate a court’s attitude towards temporal proximity and determine the category into which a court’s rule fits.

A. Defining Temporal Proximity

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

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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.
125 See supra notes 90–122 and accompanying text.
appropriate treatment in retaliation claims.\textsuperscript{127} But courts have not adopted bright line standards for defining temporal proximity.\textsuperscript{128} For example, in \textit{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.\textsuperscript{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.\textsuperscript{130}

Courts with strong proximity rules, however, can be distinguished somewhat from those with weak proximity rules by their definitions of temporal proximity.\textsuperscript{131} Courts with strong proximity rules define temporal proximity as a short time interval between protected activity and adverse action.\textsuperscript{132} This standard is commonly stated as adverse action "close in time" to protected activity or "within a reasonable period of time."\textsuperscript{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.\textsuperscript{134} Courts with strong proximity rules consider a range of intervals from as short as a few minutes

\begin{footnotesize}
\begin{enumerate}
\item 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).
\item 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.").
\item 532 U.S. 268, 273 (2001). The Court, however, did not expressly adopt the Tenth Circuit's definition. See id.
\item 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); Brodeski v. Duffey, 199 F.R.D. 14, 20 (D.D.C. 2001) (noting that courts have not adopted bright line standard for temporal proximity).
\item 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").
\item 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).
\item 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").
\item See Passantino, 212 F.3d at 507; Wyatt, 35 F.3d at 16.
\end{enumerate}
\end{footnotesize}
to as long as a few months sufficiently close to constitute temporal proximity.\textsuperscript{135}

Courts adopting weak proximity rules are more restrictive in defining temporal proximity.\textsuperscript{136} For example, in 2001, in \textit{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.\textsuperscript{137} The court cited precedent in which an interval as short as two months was insufficient alone to establish a prima facie causal connection.\textsuperscript{138} Similarly, in 2001, in \textit{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."\textsuperscript{139} The court noted that it had previously held three months alone insufficient evidence of temporal proximity.\textsuperscript{140}

Courts with case by case rules display the most range in defining temporal proximity.\textsuperscript{141} In some cases, these courts evaluate the timing of protected activity on a sliding scale, allowing for varying degrees of temporal proximity.\textsuperscript{142} For example, in 2001, in \textit{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.\textsuperscript{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.\textsuperscript{144} Other courts with case by case rules, in contrast, severely restrict the definition of temporal proximity.\textsuperscript{145} For example, in 2000, in \textit{Farrell v. Planters Lifesavers Co.}, the United States Court of Appeals for the Third Circuit held that


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

\textsuperscript{137} 2001 WL 1216979, at *4 (emphasis added).

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

\textsuperscript{139} 237 F.3d at 1253 (emphasis added).

\textsuperscript{140} Id. (citing \textit{Anderson v. Coors Brewing Co.}, 181 F.3d 1171, 1179 (10th Cir. 1999)).

\textsuperscript{141} The court also declined to rule whether the time frame of approximately two-and-one-half months in \textit{O'Neal} constituted evidence of temporal proximity. See id.

\textsuperscript{142} See \textit{Oest}, 240 F.3d at 616; \textit{Hudson}, 227 F.3d at 1051; \textit{Farrell}, 206 F.3d at 279.

\textsuperscript{143} See \textit{Oest}, 240 F.3d at 616.

\textsuperscript{144} See \textit{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.'" \textit{Id.} (quoting \textit{Davidson v. Midelfort Clinic, Ltd.}, 135 F.3d 193, 211 (7th Cir. 1998)).

\textsuperscript{145} See \textit{id.}

\textsuperscript{146} See \textit{Farrell}, 206 F.3d at 280.
a time interval does not constitute temporal proximity evidence unless it is "unusually suggestive." 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.

**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. As previously noted, temporal proximity is often a plaintiff’s only evidence of a causal connection. Courts with strong proximity rules generally hold temporal proximity alone sufficient to establish a prima facie causal connection. 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. 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. 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.

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

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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. 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. 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.

Under some weak proximity rules, however, temporal proximity may not suffice to establish a prima facie case. 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. The court noted that the plaintiff had engaged in protected activities throughout his employment. The court expressed concern that allowing temporal proximity to establish a prima facie case per se would encourage employees to seek job protection by regularly engaging in unnecessary protected activities.

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. Courts with strong proximity rules recognize the prima facie burden as lower, if not significantly lower, than the ultimate burden of proof. Some courts with weak proximity rules, however, blur the distinction between these two burdens. In 1998, in Dowe v. Total Action Against Poverty in Roanoke Valley, the United States Court of Appeals for the

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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 See 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 85.
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.\footnote{145 F.3d at 656.} 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.\footnote{See id. at 657.} 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."\footnote{See id. at 656–57.}

In 2000, in \textit{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.\footnote{See id. at 656–57.} Unlike the Fourth Circuit, however, the court did not qualify its assessment of the plaintiff's prima facie burden.\footnote{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 "[i]n definition . . . cannot also be the threshold test of what a plaintiff must show to make out a prima facie case of reprisal.").} 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.\footnote{See \textit{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." \textit{Id.} at *3.}

This treatment of the prima facie burden occasionally confuses the very courts that adhere to it. See \textit{Norman v. Rubin}, No. 99-1231, 1999 WL 789433, at *2 (4th Cir. 1999). For example, in 1999, in \textit{Norman v. Rubin}, the Fourth Circuit interpreted \textit{Dowe} to support the proposition that temporal proximity alone cannot establish a prima facie case, despite an explicit statement in \textit{Dowe} to the contrary. See id. (citing \textit{Dowe}, 145 F.3d at 657). According to the \textit{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]."" \textit{Dowe}, 145 F.3d at 657 (quoting \textit{Williams v. Cerberonics, Inc.}, 871 F.2d 452, 457 (4th Cir. 1989)).

\footnote{See \textit{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." \textit{Id.} at *3.}
Moreover, the Sixth Circuit has incorporated a significant qualification into its rule that temporal proximity may be sufficient to establish a prima facie case.\textsuperscript{171} The court has held that temporal proximity alone does not suffice in the face of compelling evidence that the defendant encouraged protected activity.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{175} Courts with case by case rules provide few explicit standards for determining the appropriate weight of temporal proximity at the prima facie stage.\textsuperscript{176} Instead, such jurisdictions identify the entire prima facie causal connection as a reasonableness inquiry.\textsuperscript{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.\textsuperscript{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 228, 229 (6th Cir. 1987) ("proximity ... may give rise to an inference of a causal connection").

\textsuperscript{171} See Moon, 836 F.2d at 229.

\textsuperscript{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).

\textsuperscript{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.

\textsuperscript{174} See Soileau v. Guilford of Maine, Inc., 105 F.3d 12, 16–17 (1st Cir. 1997).

\textsuperscript{175} See Oest, 240 F.3d at 616; Hudson, 227 F.3d at 1051; Farrell, 206 F.3d at 279, 280.

\textsuperscript{176} See Oest, 240 F.3d at 616; Hudson, 227 F.3d at 1051; Farrell, 206 F.3d at 279, 280.

\textsuperscript{177} See Oest, 240 F.3d at 616; Hudson, 227 F.3d at 1051; Farrell, 206 F.3d at 279, 280.

\textsuperscript{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.\textsuperscript{179} If a plaintiff cannot establish a prima facie case, the burden will not shift to the defendant and the claim will fail.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{186}

For example, in 1996, in \textit{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.\textsuperscript{187} In \textit{Strother}, one day passed between the plaintiff’s filing of a claim of race and gender discrimination and her replacement as personal physician coordinator.\textsuperscript{188} The defendant, however, offered a variety of non-retaliatory reasons for this and other adverse actions.\textsuperscript{189} The Ninth Circuit stated that a prima facie case is, in itself, in-

\textsuperscript{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).

\textsuperscript{180} See Kahan & Deem, \textit{supra} note 1, at 435.

\textsuperscript{181} See id.

\textsuperscript{182} See Passantino, 212 F.3d at 507.

\textsuperscript{183} See id.

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

\textsuperscript{185} See Soileau, 105 F.3d at 16–17.

\textsuperscript{186} See Passantino, 212 F.3d at 507.

\textsuperscript{187} See generally 79 F.3d 859 (9th Cir. 1996).

\textsuperscript{188} See id. at 864, 869–70.

\textsuperscript{189} See id. at 870.
sufficient to raise a genuine issue for the fact-finder. 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. 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.

Other courts with strong proximity rules, however, have not gone so far. 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. 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. 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.

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. 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. Under this standard, the court held temporal proximity evidence sufficient to prove pretext, and therefore, to find the defendant liable for retaliation. 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. In Slattery, the plaintiff alleged that he had been put on probation and later

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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 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. In considering the defendant’s motion for summary judgment, the court evaluated evidence that the adverse action was part of an extended disciplinary process. Considering this other evidence, the Second Circuit held that temporal proximity was not sufficient for a rational jury to find for the plaintiff.

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. 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. 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.

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.

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. For example, in 2000, in Buettner v. Arch Coal Sales Co., the Eighth Circuit held that temporal proximity generally is insufficient to create an
issue for the jury.\textsuperscript{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.\textsuperscript{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.\textsuperscript{211}

A defendant's motion for summary judgment puts a court's attitude towards temporal proximity evidence in sharp focus.\textsuperscript{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.\textsuperscript{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.\textsuperscript{214}

\textbf{D. One More Hurdle: The Knowledge Requirement}

The Supreme Court's adoption of a knowledge requirement in \textit{Breeden} potentially added another hurdle to the sufficiency of temporal proximity, for both establishing a prima facie case and surviving summary judgment.\textsuperscript{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.\textsuperscript{216} Proving retaliation, therefore, requires proof of the employer's knowledge.\textsuperscript{217} Most courts, however, regardless of the type of proximity rule they

\begin{footnotesize}
\textsuperscript{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).

\textsuperscript{210} See 206 F.3d at 279 n.5.

\textsuperscript{211} Id.

\textsuperscript{212} Compare Harris, 2000 WL 853676, at *3 (weak proximity rule), with Strother, 79 F.3d at 870 (strong proximity rule).

\textsuperscript{213} See, e.g., Bermudez, 138 F.3d at 1179.

\textsuperscript{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.").

\textsuperscript{215} See 532 U.S. at 273.

\textsuperscript{216} See id.

\textsuperscript{217} See id.
\end{footnotesize}
have adopted, had previously adopted the knowledge requirement in some form and, practically, treat it in a common manner.\textsuperscript{218}

Some courts with strong proximity rules require a showing of knowledge as part of the proof of a causal connection.\textsuperscript{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.\textsuperscript{220} In 1998, in \textit{Hazward v. Runyon}, the United States District Court for the District of Columbia utilized such a standard.\textsuperscript{221} In \textit{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.\textsuperscript{222} The plaintiff produced no evidence, however, that his employer knew of the original request.\textsuperscript{223} The plaintiff, therefore, was unable to prove that the employer knew about the protected activity when the adverse action occurred.\textsuperscript{224} The court held that temporal proximity, without evidence of knowledge, was insufficient to establish a prima facie causal connection.\textsuperscript{225} Similarly, the United States Court of Appeals for the First Circuit expressly requires a separate showing of knowledge in its strong proximity rule.\textsuperscript{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."\textsuperscript{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.\textsuperscript{228} The Sixth Circuit has adopted the knowledge requirement as a fourth element of the prima facie case, separate from the

\textsuperscript{220} See \textit{Wyatt}, 35 F.3d at 16; \textit{Hazward}, 14 F. Supp. 2d at 124–25.
\textsuperscript{221} See \textit{Hazward}, 14 F. Supp. 2d at 124–25.
\textsuperscript{222} See \textit{id.} at 123–25.
\textsuperscript{223} \textit{id.} at 124–25.
\textsuperscript{224} \textit{Id.}
\textsuperscript{225} \textit{Id.}; see also \textit{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.").
\textsuperscript{226} See \textit{Wyatt}, 35 F.3d at 16.
\textsuperscript{227} \textit{Id.} (emphasis added).
causal connection.\textsuperscript{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.\textsuperscript{230} The Fourth Circuit, in contrast, has incorporated knowledge into the causal connection requirement, but still requires a separate showing of knowledge.\textsuperscript{231} In practice, there is no difference between the two approaches—both require a separate showing of knowledge.\textsuperscript{232}

Not every jurisdiction, however, requires a separate showing of knowledge per se.\textsuperscript{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.\textsuperscript{234} The Eleventh Circuit has reasoned that proving knowledge is part of proving a causal connection.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{238}

IV. SHAPING A SINGLE RULE FOR TEMPORAL PROXIMITY

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

\textsuperscript{229} See Jeffries, 2001 WL 845486, at *4.
\textsuperscript{230} See id.
\textsuperscript{231} See Dowd, 145 F.3d at 656–57. In Dowd, the court described this showing as "absolutely necessary" to establish a prima facie case. Id.
\textsuperscript{232} See Jeffries, 2001 WL 845486, at *4; Dowd, 145 F.3d at 656–57.
\textsuperscript{233} See Bass, 242 F.3d at 1015.
\textsuperscript{234} See id.
\textsuperscript{235} See id.
\textsuperscript{236} See id.
\textsuperscript{237} See id.
\textsuperscript{238} See Bass, 242 F.3d at 1015.
\textsuperscript{239} See, e.g., Ellis & Rudder, supra note 8, at 257.
\textsuperscript{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 Hazwood, 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

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241 See supra notes 123–238 and accompanying text.
242 See infra notes 248–392 and accompanying text.
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.
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. 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.

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. Moreover, each requires that the time interval indicate, by itself, some degree of causal connection to be considered probative of retaliation. 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. Most significantly, no court has adopted a bright line standard for defining temporal proximity.

A bright line standard is ill-suited to temporal proximity evidence. 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. 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. Moreover, a bright line rule could defeat the purpose of anti-retaliation protection. For example, it might encourage employers harboring

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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.


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.").
retaliatory motives merely to delay adverse action until the length of time defined by the standard had passed. The employer could thus deny an employee use of temporal proximity evidence in establishing a prima facie case of retaliation. 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. Therefore, any adverse action would occur within the period of time defined as probative of retaliation.

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

The next step, then, is defining the terms of an appropriate reasonableness standard for temporal proximity. 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. For example, courts

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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)); Dow, 145 F.3d at 657.

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

262 Id.

263 See Oest, 240 F.3d at 616; Dow, 145 F.3d at 657.

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

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

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

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

268 See Oest, 240 F.3d at 616; Dow, 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." Alternatively, courts with weak proximity rules generally require that the two be "very close." 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."

The difference among these definitions might be largely semantic. 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. 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. 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. Courts that give more weight to temporal proximity evidence—those with strong proximity rules—define temporal proximity more expansively. Courts that give less weight to temporal proxim-

(footnotes)

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 568-94; see also Timing of Adverse Actions, in EMPLOYMENT DISCRIMINATION COORDINATOR § 20,947 (2001).
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 ap-
propriate definition for temporal proximity requires a determination
of the optimal weight that courts should give temporal proximity evi-
dence.\(^{282}\) 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 dif-
ferent 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 po-
tential 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
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 accompany-
ing 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.\textsuperscript{289}

A strong proximity rule best serves the purpose of the burden shift.\textsuperscript{290} The burden shift "is intended progressively to sharpen the inquiry into the elusive factual question" of retaliation.\textsuperscript{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.\textsuperscript{292} In the absence of any other evidence, temporal proximity creates such an inference.\textsuperscript{293} Adverse action taken soon after protected activity creates an inference of a causal connection between the two events.\textsuperscript{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.\textsuperscript{295} Although temporal proximity is itself not conclusive proof of a causal connection, such proof is not required to establish a prima facie case.\textsuperscript{296}

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

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

\textsuperscript{290} See Cifra, 252 F.3d at 218; Slattery, 248 F.3d at 95.

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{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.").

\textsuperscript{294} See id.

\textsuperscript{295} 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).

\textsuperscript{296} See Burdine, 450 U.S. at 253-54.

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

\textsuperscript{298} See Bermudez, 138 F.3d at 1179; Dow, 145 F.3d at 657; Swanson, 110 F.3d at 1188 n.3.

\textsuperscript{299} See Bermudez, 138 F.3d at 1179; Dow, 145 F.3d at 657; Swanson, 110 F.3d at 1188 n.3.
in a protected activity, regardless of its validity. 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.

The argument falters, however, for two reasons. First, the intermediate burden of the prima facie case is intentionally more easily met than the ultimate burden. An employee who cannot prove retaliation often may be able to establish a prima facie case. Therefore, the burden shift may encourage employees to file retaliation claims that cannot be proven. 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.

The second reason the weak proximity rule argument should ultimately fail is an extension of the first. 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. 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. Once the burden shifts, however, the legitimacy of the adverse action comes into focus. If the employer cannot state a legitimate, non-retaliatory reason for the adverse action, the employee will win. But, if the employer can state such a reason, the burden shifts back to the employee to prove that reason pretextual. If the employee cannot, then the employee's retaliation claim fails. A frivolous retaliation claim, therefore, will likely fail

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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; Dow, 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.\textsuperscript{314}

A strong proximity rule for the prima facie case is also preferable because it maintains the distinction between the plaintiff’s two burdens.\textsuperscript{315} Courts with strong proximity rules generally define the prima facie burden as easily met, as the Supreme Court of the United States has.\textsuperscript{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.\textsuperscript{317} In contrast, courts with weak proximity rules generally blur the distinction between the two burdens.\textsuperscript{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.\textsuperscript{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.\textsuperscript{320}

A case by case alternative is no more appealing.\textsuperscript{321} Courts with case by case rules make the sufficiency of temporal proximity purely contextual.\textsuperscript{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.\textsuperscript{323} Moreover, a case by case approach to the prima facie case is unnecessary.\textsuperscript{324} In \textit{Farrell v. Planters Lifesavers Co.}, the Third Circuit supported its case by case rule by emphasizing the im-

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

\textsuperscript{315} See \textit{Burdine}, 450 U.S. at 253-54.

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

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

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

\textsuperscript{319} E.g. \textit{Harris}, 2000 WL 353676, at *2-3.

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

\textsuperscript{321} See \textit{Oest}, 240 F.3d at 616; \textit{Hudson}, 227 F.3d at 1051; \textit{Farrell}, 206 F.3d at 279.

\textsuperscript{322} See \textit{Oest}, 240 F.3d at 616; \textit{Hudson}, 227 F.3d at 1051; \textit{Farrell}, 206 F.3d at 279.

\textsuperscript{323} See \textit{Oest}, 240 F.3d at 616; \textit{Hudson}, 227 F.3d at 1051; \textit{Farrell}, 206 F.3d at 279.

\textsuperscript{324} See \textit{Oest}, 240 F.3d at 616; \textit{Hudson}, 227 F.3d at 1051; \textit{Farrell}, 206 F.3d at 279.
portance of the "specific facts and circumstances" of each case. But the purpose of the prima facie case requirement is not to weigh and evaluate all of the evidence in a retaliation claim. That is the purpose of the three stages of the burden shift collectively. 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.

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. Courts with strong proximity rules hold temporal proximity sufficient to create a genuine material issue for the jury, at least in some cases. In contrast, courts with weak proximity rules generally require a plaintiff to produce additional evidence of a causal connection. Similarly, courts with case by case rules generally require additional proof of pretext. Unlike in the prima facie case analysis, this difference does not hinge on different understandings of the burden for summary judgment resolution. It depends instead on different evaluations of the probative value of temporal proximity evidence. 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.

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

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525 206 F.3d at 279 n.5.
526 See Burdine, 450 U.S. at 253-54.
527 See id. at 256 n.8, 253-56.
528 See id. at 253-54.
529 See Cifra, 252 F.3d at 217; Passantino, 212 F.3d at 507.
530 See Cifra, 252 F.3d at 217; Passantino, 212 F.3d at 507.
532 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.
533 See supra notes 302-314 and accompanying text.
534 Compare Cifra, 252 F.3d at 217-18, with Buettner, 216 F.3d at 716.
535 See supra notes 193-203 and accompanying text.
536 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. 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.

Practically, the plaintiff's evidence for ultimately proving retaliation may be the same as the evidence used to establish a prima facie case. The plaintiff must prove the same causal connection to succeed in proving pretext as is necessary to establish a prima facie causal connection. The difference between the two stages is the burden that the plaintiff faces. 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. 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.

This determination, in turn, depends on the evidentiary record as a whole. 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. 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. For example, if the record indicates that the plaintiff had an exemplary employ-

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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; Dow, 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. On the contrary, if the defense has a strong case, temporal proximity alone will not be sufficient. 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.

Some courts with strong proximity rules incorporate this approach to summary judgment resolution. The Second Circuit provides a good example. In *Cifra v. General Electric Co.*, the court held temporal proximity sufficient to establish a prima facie causal connection. 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. In *Slattery*, however, the court produced a different result applying the same rule. In considering the defendant's motion for summary judgment, the court evaluated evidence that the adverse action was part of an extended disciplinary process. 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.

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

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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 id.
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 *9; *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 *9; *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. In doing so, courts with both types of rules raise the bar for temporal proximity evidence too high. 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. 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.

D. Circumstantial Proof of Knowledge

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

In many courts, regardless of the type of temporal proximity rule, a plaintiff must make a showing of knowledge independent of temporal proximity evidence. 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. Others treat the knowledge requirement as part of the causal connection requirement, but require a separate showing of knowledge neverthe-

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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 Gifra, 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.
less. Each of these approaches to the knowledge requirement, however, lacks the benefits of the Eleventh Circuit’s approach.

First, the Eleventh Circuit appropriately recognizes that the knowledge requirement is really part of the causal connection requirement. 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. To prove a causal connection, however, a plaintiff must prove that the defendant knew of the protected activity. The defendant could not have taken adverse action because of protected activity if the defendant did not know about the protected activity. Proving knowledge, therefore, essentially proves one aspect of a causal connection. 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.

Second, the Eleventh Circuit maintains the distinction between the prima facie case burden and the ultimate burden in a retaliation claim. 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. In doing so, they raise the prima facie burden closer to the ultimate burden and defeat the purpose of the burden shift. The Supreme Court established the burden shift as a framework for evaluating circumstantial evidence. Requiring a separate showing of knowledge, however, fails to uphold that purpose. 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. If, on the contrary, circumstantial evidence of knowledge is sufficient, then a plain-

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569 See Dove, 145 F.3d at 657; Hazward, 14 F. Supp. 2d at 124–25.
570 See Bass, 242 F.3d at 1015.
571 See id.
572 See Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 273 (2001); see also, e.g., Pas-santino, 212 F.3d at 506 (listing elements required to prove retaliation).
573 See Breeden, 532 U.S. at 273.
574 See id.
575 See Bass, 242 F.3d at 1015.
576 See Cifra, 252 F.3d at 216–18.
577 See Bass, 242 F.3d at 1015.
578 See Cifra, 252 F.3d at 216–18.
579 See Burdine, 450 U.S. at 253–56.
581 But see Dove, 145 F.3d at 657; Hazward, 14 F. Supp. 2d at 124–25.
582 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.
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