Plus at Pretext: Resolving the Split Regarding the Sufficiency of Temporal Proximity Evidence in Title VII Retaliation Cases

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I. INTRODUCTION

Paulo,[1] a hard-working man originally from Portugal, had been in the United States for twenty years as a shift manager for a restaurant. However, his general

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1. The following example is based loosely upon the actual experience of someone the

manager, Donald, treated him differently from his "American-born" colleagues. For example, Paulo had trouble getting requested days off, taking vacation time, and negotiating raises, notwithstanding his seniority compared to his peers. After missing his family's Thanksgiving dinner for the fifth year in a row, while all of the other managers got the day off, Paulo filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging discrimination on the basis of national origin. In due course, the EEOC notified the restaurant about Paulo's complaint. One month later, Paulo came down with the flu and called in to work sick. When he called, however, Donald was very upset and told Paulo that if he did not show up, he need not bother showing up again. Paulo did not go to work and was terminated.

These facts raise the issue of whether Paulo's employer retaliated against him because he filed an EEOC complaint. While Paulo has the right to seek damages for retaliation, regardless of whether his underlying discrimination complaint can be proven,[2] he will have the burden of both providing evidence and persuading a jury that his termination was retaliatory.[3] Before he has that chance, however, he will almost surely be forced to defend his suit against a motion for summary judgment. During a motion for summary judgment, a court must decide whether Paulo has provided enough evidence that a reasonable jury could be persuaded to return a verdict in his favor.[4] Thus arises the issue: how much weight should the court give to the evidentiary fact that only one month separated Donald's notice of Paulo's EEOC complaint and Donald's termination of Paulo?

Unfortunately the answer is not always clear. Courts tend to agree that when adverse employment action immediately follows protected activity, this "temporal proximity" is sufficient evidence of causation to meet the burden of production. Courts also agree that when more than several months separate the protected activity from the adverse action, temporal proximity alone is not enough to meet this burden. However, the federal circuits are split regarding the weight of this evidence when the the time frame at issue falls between these two extremes.

Circuits take one of two approaches to temporal proximity evidence that falls within this gray area. Under the first approach, termed here as the "Temporal Proximity Alone" approach, courts consider temporal proximity alone to be sufficient to establish the causal connection element of a plaintiff's prima facie case of retaliation.[5] Courts adopting this approach argue that "the burden of establishing [a]

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author knows personally.

2. *See* Tuttle v. Metro. Gov't of Nashville, 474 F.3d 307, 320 (6th Cir. 2007) (providing the four elements of a *prima facie* retaliation case which do not require the complaint to be proven); *see also, e.g.,* Mickey v. Zeidler Tool & Die Co., 516 F.3d 516, 523 (6th Cir. 2008); Singfield v. Akron Metro. Hous. Auth., 389 F.3d 555, 563 (6th Cir. 2004).

3. *See* DiCarlo v. Potter, 358 F.3d 408, 420 (6th Cir. 2004).

4. *See Singfield*, 389 F.3d at 560.

5. *See, e.g., DiCarlo*, 358 F.3d at 422 (finding that twenty-one days was sufficient to create a connection between the protected activity and the retaliation); Calero-Cerezo v. U.S. Dep't of

prima facie retaliation case is easily met."[6] The First, Second, Fourth, Ninth, Tenth, Eleventh, and D.C. Circuits have adopted the Temporal Proximity Alone approach.[7]

Courts adopting the second approach, the "Temporal Proximity Plus" approach, consider temporal proximity in their analysis, but require that it be combined with other evidence before rising to the level needed to survive summary judgment.[8] These courts hold that the mere fact that an adverse employment action occurs after the employer receives notice of a protected activity is insufficient to prove the two are related unless supported by other evidence.[9] The Third, Fifth, Seventh, and Eighth Circuits have adopted the Temporal Proximity Plus approach.[10]

Justice, 355 F.3d 6, 25-26 (1st Cir. 2004) (finding one month sufficient to create a causal connection); Feingold v. New York, 366 F.3d 138, 156-57 (2d Cir. 2004) (finding two weeks sufficient); Cifra v. Gen. Elec. Co., 252 F.3d 205, 217 (2d Cir. 2001) (finding twenty days sufficient); King v. Rumsfeld, 328 F.3d 145, 151 & n.5 (4th Cir. 2003) (finding two months and two weeks sufficient)); Passantino v. Johnson & Johnson Consumer Prod., Inc., 212 F.3d 493, 507 (9th Cir. 2000); Williams v. W.D. Sports, N.M., Inc., 497 F.3d 1079, 1091 (10th Cir. 2007) (finding approximately three weeks sufficient); O'Neal v. Ferguson Constr. Co., 237 F.3d 1248, 1253 (10th Cir. 2001) (citing a number of 10th Circuit holdings related to temporal proximity); Thomas v. Cooper Lighting, Inc., 506 F.3d 1361, 1364 (11th Cir. 2007) (noting that causation can be shown by very close temporal proximity, but holding that three to four months is not close enough); Embry v. Callahan Eye Found. Hosp., 147 F. App'x 819, 830-31 (11th Cir. 2005) (finding two months sufficient); Singletary v. Dist. of Columbia, 351 F.3d 519, 525 (D.C. Cir. 2003) (finding one month sufficient).

6. *Singfield*, 389 F.3d at 563; *see also Mickey*, 516 F.3d at 523; *DiCarlo*, 358 F.3d at 420; Nguyen v. City of Cleveland, 229 F.3d 559, 563 (6th Cir. 2000); Mariani-Colón v. Dep't of Homeland Sec. *ex rel.* Chertoff, 511 F.3d 216, 224 (1st Cir. 2007) ("We conclude that the 'temporal proximity' [of two months] . . . is sufficient to meet the relatively light burden of establishing a prima facie case of retaliation."); Williams v. Cerberonics, Inc., 871 F.2d 452, 457 (4th Cir. 1989) ("While this proof far from conclusively establishes the requisite causal connection, it certainly satisfies the less onerous burden of making a prima facie case of causality.").

7. *See supra* note 5.

8. *See, e.g.*, *Tuttle*, 474 F.3d at 321; LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d 217, 232-33 (3d Cir. 2007) (noting that where temporal proximity is "unusually suggestive" it can stand alone, but requiring additional evidence in all other cases); Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 760 (3d Cir. 2004) (finding two months not "unusually suggestive"); Strong v. Univ. Healthcare Sys., L.L.C., 482 F.3d 802, 807-808 (5th Cir. 2007) ("'[w]ithout more than timing allegations . . . summary judgment in favor of [the defendant] was proper.'" (quoting Roberson v. Alltel Info. Serv., 373 F.3d 647, 656 (5th Cir. 2004))); Lang v. Ill. Dep't of Children & Family Serv., 361 F.3d 416, 419 (7th Cir. 2004) ("Close temporal proximity provides evidence of causation . . . and may permit a plaintiff to survive summary judgment provided that there is also other evidence that supports the inference of a causal link." (internal citation omitted)); Bradley v. Widnall, 232 F.3d 626, 633 (8th Cir. 2000) ("'more than a temporal connection . . . is required to present a genuine factual issue on retaliation.'" (quoting Scroggins v. Univ. of Minn., 221 F.3d 1042, 1045 (8th Cir. 2000))).

9. *See, e.g.*, *Roberson*, 373 F.3d at 655 ("'the mere fact that some adverse action is taken *after* an employee engages in some protected activity will not *always* be enough for a *prima facie* case.'" (quoting Swanson v. Gen. Serv. Admin., 110 F.3d 1180, 1188 n.3 (5th Cir. 1997))); Lewis v. City of Chicago, 496 F.3d 645, 655 (7th Cir. 2007) ("'[T]he mere fact that one event preceded

In the Sixth Circuit, there is an intra-circuit split regarding which approach should be followed, as demonstrated by *DiCarlo v. Potter*,[11] *Tuttle v. Metropolitan Government of Nashville*,[12] and *Mickey v. Zeidler Tool & Die Co.*[13] In *DiCarlo*, the court seemingly adopted the Temporal Proximity Alone approach.[14] Three years later, however, the court in *Tuttle* followed the Temporal Proximity Plus approach.[15] Less than a year after that, the *Mickey* court again asserted that the Sixth Circuit follows the Temporal Proximity Alone approach,[16] though this assertion caused Judge Batchelder to write a concurring opinion asserting the opposite.[17]

Cases from both sides of the Sixth's split mirror cases from other circuits.[18] In fact, some of those Sixth Circuit decisions cite to the other circuits' decisions for support.[19] Consequently, the Sixth Circuit's split serves as a model for examining this national issue. To date, the Supreme Court has not directly addressed the evidentiary value of temporal proximity in a Title VII retaliation case or resolved the current split of authority surrounding temporal proximity.[20]

This article argues that courts should require Temporal Proximity Alone at the prima facie case stage of the analysis, but require Temporal Proximity Plus at the

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another does nothing to prove that the first event caused the second; the plaintiff also must put forth other evidence that reasonably suggests that her protected speech activities were related to her employer's discrimination.'" (quoting Burks v. Wis. Dep't of Transp., 464 F.3d 744, 758-59 (7th Cir. 2006))).

10. *See supra* note 8.

11. 358 F.3d 408.

12. 474 F.3d 307.

13. 516 F.3d 516.

14. *See DiCarlo*, 358 F.3d at 421 ("this Circuit has embraced the premise that in certain distinct cases where the temporal proximity between the protected activity and the adverse employment action is acutely near in time, that close proximity is deemed indirect evidence such as to permit an inference of retaliation to arise.").

15. *See Tuttle*, 474 F.3d at 321 ("The law is clear that temporal proximity, standing alone, is insufficient to establish a causal connection for a retaliation claim.").

16. *See Mickey*, 516 F.3d at 525 ("Where an adverse employment action occurs very close in time after an employer learns of a protected activity, such temporal proximity between the events is significant enough to constitute evidence of a causal connection for the purposes of satisfying a prima facie case of retaliation.").

17. *See Mickey*, 516 F.3d at 528 (Batchelder, J., concurring) ("I cannot agree with the lead opinion's reading of this circuit's precedents on the question of whether 'temporal proximity' alone can satisfy the causal connection prong of the *McDonnell Douglas* framework.").

18. *See supra* notes 5-10 and accompanying text.

19. *See, e.g., DiCarlo*, 358 F.3d at 421 (citing cases from the 1st, 2nd, 9th, and 10th Circuits); Harrison v. Metro. Gov't of Nashville, 80 F.3d 1107, 1118-19 (6th Cir. 1996) *overruled in part on unrelated grounds by* Jackson v. Quanex Corp., 191 F.3d 647, 667 n.6 (6th Cir. 1999).

20. *But see* Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 273 (2001) (acknowledging that some circuits accept temporal proximity as sufficient evidence of causality to establish a prima facie case).

pretext stage, an approach this article refers to as the "Plus at Pretext" approach. This proposed approach maintains a relatively light burden upon retaliation plaintiffs at the prima facie case stage of proof, but compensates by imposing a heavier burden at the pretext stage. Consequently, the Plus at Pretext approach adequately addresses concerns of public policy while reconciling existing case law.

Part II of this article discusses Title VII and retaliation generally, the burden shifting framework used in cases, how the temporal proximity question arises, and how the split in the Sixth Circuit developed. Part III examines the split in detail by using three cases from the Sixth Circuit as examples. Part IV analyzes the arguments for both approaches and argues that the Plus at Pretext approach provides a framework reconciling both approaches. Part V concludes.

II. BACKGROUND

A. *Title VII and Protection Against Retaliation*

The "Equal Employment Opportunities" subchapter of Title 42 of the United States Code (U.S.C.) provides protection against employment discrimination.[21] Despite the fact that this statute appears in Title 42 of the U.S.C., this statute is often referred to as "Title VII" because it originated in Title VII of the Civil Rights Act of 1964.[22]

Section 2000e-2(a) of Title 42 makes it unlawful for employers to discriminate based upon an "individual's race, color, religion, sex, or national origin."[23] Section 2000e-3, on the other hand, makes it unlawful for employers to discriminate against an employee because he or she has opposed an unlawful practice or because he or she has participated in proceedings authorized by the Equal Employment Opportunities subchapter.[24] That section states:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.[25]

Therefore, discrimination claims are separate from retaliation claims, and one does not have to be proven as a condition for establishing the other.

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21. *See* 42 U.S.C. §§ 2000e to 2000e-17 (West 2003).
22. 14A C.J.S. *Civil Rights* § 224 (West 2008).
23. 42 U.S.C. § 2000e-2(a).
24. § 2000e-3(a).
25. *Id.*

B. *The McDonnell Douglas / Burdine Burden Shifting Framework*

As cases based on Title VII were litigated, the United States Supreme Court developed a framework for handling Title VII claims of discriminatory treatment.[26] An employee may use two kinds of evidence to prove discrimination: (1) direct evidence of discriminatory motive, and (2) indirect evidence of discriminatory motive.[27] Direct evidence "would take the form, for example, of an employer telling an employee, 'I fired you because you are disabled.'"[28] However, since "'rarely will there be direct evidence from the lips of the defendant proclaiming his or her . . . animus,'"[29] the Court developed a burden-shifting approach for using indirect evidence in Title VII discrimination cases.[30]

This approach has been articulated as a series of steps: First, the employee must establish, "by [a] preponderance of the evidence a prima facie case of discrimination."[31] Second, if the employee successfully proves a prima facie case, a "mandatory presumption of discrimination is created and the burden shifts to the employer to [provide] a non-discriminatory reason for discharging the employee."[32] This requires the employer to produce evidence that would allow a reasonable trier of fact to conclude that there is a legitimate, non-retaliatory explanation for the termination.[33] Finally, if the employer meets its burden, "then the mandatory presumption evaporates into a permissive inference, and the burden shifts back to the employee to show by a preponderance of the evidence that the employer's proffered reason for discharge was actually a pretext intended to hide unlawful discrimination."[34] The Sixth Circuit uses this same approach in retaliation cases.[35]

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26. *See* Tex. Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973).

27. *See* Smith v. Chrysler Corp., 155 F.3d 799, 805 (6th Cir. 1998).

28. *Id.*

29. *Id.* (internal quotations omitted).

30. *See, e.g., Burdine*, 450 U.S. at 252-53; *McDonnell Douglas*, 411 U.S. at 802-804.

31. *See Burdine*, 450 U.S. at 252-53; *see also Smith*, 155 F.3d at 805.

32. *See Smith*, 155 F.3d at 805; *see also Burdine*, 450 U.S. at 253.

33. Singfield v. Akron Metro. Hous. Auth., 389 F.3d 555, 563 (6th Cir. 2004).

34. *Smith*, 155 F.3d at 805; *see also Burdine*, 450 U.S. at 253; DiCarlo v. Potter, 358 F.3d 408, 420 (6th Cir. 2004) ("'[i]f the defendant demonstrates [a non-discriminatory reason], the plaintiff then assumes the burden of showing that the reasons given . . . were a pretext for retaliation.'") (quoting Williams v. Nashville Network, 132 F.3d 1123, 1131 (6th Cir. 1997).

35. *See, e.g.,* Mickey v. Zeidler Tool & Die Co., 516 F.3d 516, 523 (6th Cir. 2008) ("The *McDonnell Douglas* framework governs claims of retaliation based on circumstantial evidence."); *see also id.* at 521; *Singfield*, 389 F.3d at 563-65 (applying the *McDonnell Douglas* burden-shifting approach in a retaliation context while reviewing a motion for summary judgment); *DiCarlo*, 358 F.3d at 420-22 (applying the *McDonnell Douglas* approach in a retaliation context while reviewing a motion for summary judgment).

C. *The Prima Facie Case of Retaliation*

As noted above, the first step of the burden-shifting analysis requires the plaintiff to "establish a prima facie case of retaliation."[36] "To establish a *prima facie* claim of retaliation, a plaintiff must show that: (1) she engaged in a protected activity; (2) this exercise of protected rights was known to the defendant; (3) the defendant thereafter took adverse employment action against the plaintiff . . . ; and (4) there was a causal connection between the protected activity and the adverse employment action . . . ."[37] To survive the summary judgment stage, these elements do not need to be proven by a preponderance of the evidence.[38] In fact, many Sixth Circuit cases note that "the burden of establishing the prima facie retaliation case is easily met."[39]

The "temporal proximity" issue arises from an analysis of the fourth element, the "causal connection" element. In the absence of direct evidence establishing retaliation, proving the causal connection element requires the plaintiff to "produce sufficient evidence from which an inference can be drawn that the [defendant-employer] took the adverse employment action because" of the protected activity.[40] This establishes a but-for causation standard; in other words, the plaintiff must provide evidence that he or she would not have been terminated if he or she had not participated in the protected activity.[41] A plaintiff can establish causation using indirect evidence by showing that her employer treated her "differently from similarly situated employees or that the adverse action was taken shortly after the plaintiff's exercise of protected rights . . . ."[42]

D. *Separated at Birth: A History of the Sixth Circuit Split*

Because temporal proximity can be used as evidence of causal connection, the unanswered question that remains concerns the value of such evidence. As noted above, there are two approaches courts tend to follow when determining how to

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36. *Mickey*, 516 F.3d at 523; *see also Smith*, 155 F.3d at 805.

37. Tuttle v. Metro. Gov't of Nashville, 474 F.3d 307 at 320 (6th Cir. 2007); *see also Mickey*, 516 F.3d at 523.

38. *Singfield*, 389 F.3d at 563.

39. *Id. See also Mickey*, 516 F.3d at 523; Nguyen v. City of Cleveland, 229 F.3d 559, 563 (6th Cir. 2000); EEOC v. Avery Dennison Corp., 104 F.3d 858, 861 (6th Cir. 1997) ("at the *prima facie* stage the burden is minimal, requiring the plaintiff to put forth some evidence to deduce a causal connection between the retaliatory action and the protected activity and requiring the court to draw reasonable inferences from that evidence, providing it is credible.").

40. *See Singfield*, 389 F.3d at 563.

41. *See Nguyen*, 229 F.3d at 563 ("To establish the causal connection required in the fourth prong, a plaintiff must produce sufficient evidence from which an inference could be drawn that the adverse action would not have been taken had the plaintiff not filed a discrimination action.").

42. *Id.*

handle temporal proximity evidence.[43] The first is the Temporal Proximity Alone approach where courts allow temporal proximity evidence alone to establish a causal connection.[44] The second is the Temporal Proximity Plus approach, which requires temporal proximity evidence to be paired with other evidence before the causal connection can be established.[45]

A study of the Sixth Circuit's split on this issue reveals that both lines of cases—those that take the Temporal Proximity Alone approach and those that take the Temporal Proximity Plus approach—present their approach as if it were the one uniformly agreed upon by the Circuit's earlier decisions.[46] This is done in such a manner that neither side has truly attempted to give any greater rationale for its approach than to cite those cases that have come before, suggesting that the cases speak for themselves.[47] As will be discussed below, however, the reasoning for these cases is anything but clear. This subsection looks at the two seminal cases of Sixth Circuit temporal proximity jurisprudence and briefly traces their progeny to the current leading cases.[48]

1. *Brown v. ASD Computing Center* and *Nguyen v. City of Cleveland*

Although the Sixth Circuit's decisions do not generally cite to it as such, the foundational case upon which the temporal proximity jurisprudence of the Sixth Circuit is built is *Brown v. ASD Computing Center*.[49] *Brown* was a district court case from Ohio involving a pro se civilian litigant, Marvinell Brown, suing the Air Force on claims of discrimination and retaliation.[50] The district court, noting the disadvantages of being a pro se litigant, "scoured" the record for evidence supporting Brown's claims but ultimately held that Brown was neither discriminated nor retaliated against.[51] Though the court had already determined that the retaliation claim failed because there was no evidence that Brown's supervisors were aware of

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43. *See supra* notes 5-10 and accompanying text.

44. *See supra* notes 5-7.

45. *See supra* note 8-10.

46. *See, e.g.*, DiCarlo v. Potter, 358 F.3d 408, 421 (6th Cir. 2004) ("this Circuit has embraced the premise that . . . ."); Tuttle v. Metro. Gov't of Nashville, 474 F.3d 307, 321 (6th Cir. 2007) ("The law is clear that . . . .").

47. *See DiCarlo*, 358 F.3d at 421; *Tuttle*, 474 F.3d at 321.

48. This subsection does not attempt or purport to chronicle all of the Sixth Circuit cases that have dealt with the issue of temporal proximity. Instead, this section aims to discover the seminal cases upon which the most recent cases have rested their argument. There are a number of cases which are not included here because the court has tended not to cite to them as a basis of authority in the most recent temporal proximity cases.

49. *See* Brown v. ASD Computing Ctr., 519 F. Supp. 1096, 1109, 1114-17 (S.D. Ohio 1981).

50. *Id.* at 1097-98.

51. *Id.*

her protected activities at the time of her termination,[52] the court also found that there was no causal connection or "proof of a retaliatory motive" between Brown's protected activity and her termination.[53]

The court noted that "retaliation may be imputed if the timing of the retaliatory act is such as to allow an inference of retaliation to arise," but also found that where such inferences have been created, "the time period involved has been far less than that involved herein."[54] The court ultimately determined that the temporal proximity of three to four months in this case was insufficient to establish a causal connection.[55] This decision was affirmed by the Sixth Circuit in a one-word, unpublished opinion that read: "AFFIRMED[.]"[56]

Instead of *Brown*, the Sixth Circuit cites *Nguyen v. City of Cleveland*[57] as its seminal temporal proximity case.[58] The *Nguyen* case involved a city employee, Pram Nguyen, who filed a discrimination complaint with the EEOC after being unhappy with a pay increase.[59] After being denied numerous promotions over the next several years, despite having applied for various positions, Nguyen filed another EEOC complaint, this time including a claim of retaliation.[60] In reviewing the district court's grant of a motion for summary judgment against Nguyen, the Sixth Circuit was presented squarely with the temporal-proximity issue as Nguyen expressly argued that temporal proximity evidence alone was sufficient to show causal connection,

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52. *Id.* at 1115.

53. *Id.* at 1115-16.

54. *Id.* at 1116 (quoting Sutton v. Nat'l Distillers Prod. Co., 445 F. Supp. 1319, 1325-26 (S.D. Ohio 1978)); *see also* Womack v. Munson, 619 F.2d 1292, 1296-97 (8th Cir. 1980); Jefferies v. Harris County Cmty. Action Ass'n, 615 F.2d 1025, 1035-36 (5th Cir. 1980); McCarthy v. Cortland County Cmty. Action Program, 487 F. Supp. 333, 340 (N.D.N.Y. 1980)).

55. *Brown*, 519 F. Supp. at 1116-17.

56. *See* Brown v. Mark, 709 F.2d 1499 (6th Cir. 1983) (unpublished table decision).

57. 229 F.3d 559 (6th Cir. 2000).

58. *Nguyen* relied in part upon *Cooper v. City of North Olmstead*, 795 F.2d 1265 (6th Cir. 1986). *Nguyen*, 229 F.3d at 566-67. *Cooper*, in turn, relied upon *Brown*. *Cooper*, 795 F.2d at 1272. In *Cooper*, the Sixth Circuit heard a case in which Lywanna Cooper, the first African-American and first female to be hired as a bus driver for the North Olmsted Municipal Bus Line, claimed to have been retaliated against for filing discrimination claims with the Ohio Civil Rights Commission. *Id.* at 1266. Citing *Brown* as precedent, the court held that "[t]he mere fact that Cooper was discharged four months after filing a discrimination claim [was] insufficient to support an interference [sic] of retaliation." *Id.* at 1272.

59. *Nguyen*, 229 F.3d at 562.

60. *Id.* The record is unclear as to the exact amount of time between Nguyen's EEOC complaints and the City's rejection of his various promotion applications, as there was a dispute as to when the City actually received notice of the complaint and because there were multiple complaints and multiple applications. The actual number might range from only a month or two to several months. *See id.* at 565 & n.1.

thereby failing to argue other evidence in support of his claim.[61] The court rejected Nguyen's argument, saying that he misstated the law of the Circuit.[62]

The *Nguyen* court noted two kinds of earlier cases that served as precedent for its decision, cases in which temporal proximity had been coupled with other evidence in order to show a causal connection[63] and cases in which the circuit had rejected temporal proximity alone as sufficient for finding a causal connection.[64] Relying on these examples, the court made two conclusions. First, "In each of those cases, as in Nguyen's case, the fact of temporal proximity alone was not particularly compelling, because the plaintiff's retaliation case was otherwise weak, and there was substantial evidence supporting the defendant's version of the events."[65] Second, the court stated that "while there may be circumstances where evidence of temporal proximity alone would be sufficient to support that inference [of causal connection], we do not hesitate to say that they have not been presented in this case."[66]

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61. *Id.* at 565.

62. *Id.*

63. *Id.* at 566 (citing Harrison v. Metro. Gov't of Nashville, 80 F.3d 1107, 1119 (6th Cir. 1996) *overruled in part on other grounds by* Jackson v. Quanex Corp., 191 F.3d 647, 667 n.6 (6th Cir. 1999); Moore v. KUKA Welding Sys., 171 F.3d 1073, 1080 (6th Cir. 1999)). In *Harrison*, the court looked outside the Sixth Circuit to Burrus v. United Tel. Co. of Kan., Inc., 683 F.2d 339, 343 (10th Cir. 1982), in finding that temporal proximity can be used to determine whether there is a causal connection. *Harrison*, 80 F.3d at 1118-19. In reaching its decision, however, the *Harrison* court combined the temporal proximity evidence (a year and three months separated the protected activity and the adverse action) with other evidence to find that a causal connection was sufficiently established. *Id.* at 1119. The court in *Moore* relied on *Harrison* in stating that "proximity in time . . . allows an inference by the jury that the [adverse action] was in retaliation for undertaking the protected activity . . . ." *Moore*, 171 F.3d at 1080. Though the adverse action in *Moore* began in the same month that Moore filed his complaint, the court also cited other evidence that, "[w]hen viewed as a whole[,] . . . support[ed] the jury's finding that defendants retaliated against plaintiff." *Id.* at 1078, 1080. Thus, the court never addressed whether the jury's finding would have been supported absent the additional evidence. *Id.* at 1080.

64. *Nguyen*, 229 F.3d at 566 (citing Cooper v. City of North Olmstead, 795 F.2d 1265, 1272 (6th Cir. 1986) and Parnell v. West, No. 95-2131, 1997 WL 271751, at *2 (6th Cir. 1997)). For a description of the *Cooper* case, *see supra* note 58. *Parnell*, an unpublished case, relied on *Cooper* in stating that "temporal proximity alone will not support an inference of retaliatory discrimination when there is no other compelling evidence[,]" and in holding that temporal proximity of seven months is insufficient, standing alone, to show a causal connection. *Parnell*, 1997 WL 271751 at *2-3 (citing *Cooper*, 795 F.2d at 1272).

65. *Nguyen*, 229 F.3d at 567.

66. *Id.*

2. From *Nguyen v. City of Cleveland* to *Mickey v. Zeidler Tool & Die Co.*

Nguyen is an important case in Sixth Circuit temporal-proximity jurisprudence because it is cited for support by courts on both sides of the split and is the point at which the two sides of the split diverge.

DiCarlo v. Potter,[67] the foundational Temporal Proximity Alone case in the Sixth Circuit, cites to both *Nguyen* and *Brown* to support its conclusion that "this Circuit has embraced the premise that in certain distinct cases where the temporal proximity between the protected activity and the adverse employment action is acutely near in time, that close proximity is deemed indirect evidence such as to permit an inference of retaliation to arise."[68] *Asmo v. Keane, Inc.*, in turn, relies upon *DiCarlo*,[69] and the majority opinion in *Mickey v. Zeidler Tool & Die Co.*, the Sixth Circuit's most recent case addressing this issue, relies upon both cases.[70]

On the other hand, the Sixth Circuit's *Little v. BP Exploration & Oil Co.* decision cites to *Nguyen* to support its adoption of the Temporal Proximity Plus approach.[71] *Randolph v. Ohio Department of Youth Services*[72] and *Tuttle v. Metropolitan Government of Nashville*,[73] both of which continued to hold that the Sixth Circuit had

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67. 358 F.3d 408 (6th Cir. 2004); *see infra* Part III.B (discussing *DiCarlo*).

68. *DiCarlo*, 358 F.3d at 421.

69. 471 F.3d 588, 594 (6th Cir. 2006). *Asmo* was not a retaliation case, but rather a case regarding pregnancy discrimination. *Id.* at 590. The issue in the case, however, was whether there was a causal connection between Susan Asmo's supervisor, Scott Santoro, learning that Asmo was pregnant, and Asmo's subsequent termination. *Id.* at 594. In holding that Asmo did establish a causal connection, the court relied on the temporal proximity evidence that there was only two months separating these two events. *Id.*

70. 516 F.3d 516, 524 (6th Cir. 2008); *see infra* Part III.B (discussing *Mickey*).

71. 265 F.3d 357, 363-64 (6th Cir. 2001). In *Little*, a case in which Robert Little successfully showed a causal connection via a combination of temporal proximity evidence and evidence of retaliation via the testimony of a co-worker, the court stated "it is true that temporal proximity alone is insufficient to establish a causal connection for a retaliation claim . . . ." *Id.* at 363-64 (citing *Nguyen*, 229 F.3d at 566).

72. 453 F.3d 724 (6th Cir. 2006). In *Randolph*, a case in which a prison food service worker was placed on administrative leave and eventually terminated after reporting that she had been sexually assaulted by an inmate, the court held that Randolph had established a causal connection because of a combination of temporal proximity evidence plus evidence that her employer investigated her for inappropriate behavior after she made the allegations. *Id.* at 728-31, 737. Citing *Little* and *Nguyen*, the court said, "[a]lthough temporal proximity itself is insufficient to find a causal connection, a temporal connection coupled with other indicia of retaliatory conduct may be sufficient to support a find of a causal connection." *Id.* at 737.

73. 474 F.3d 307, 321 (6th Cir. 2007) ("The law is clear that temporal proximity, standing alone, is insufficient to establish a causal connection for a retaliation claim.") (citing *Little*, 265 F.3d at 363-64; *Nguyen*, 229 F.3d at 566). For a full discussion of the *Tuttle* case, *see* discussion *infra* Part III.A.

adopted the Temporal Proximity Plus approach, also relied upon *Nguyen* and *Little*.[74] Finally, in her recent concurrence in *Mickey*, Judge Alice Batchelder argued that the majority had wrongly taken an "expansive view of the precedent in" the Sixth Circuit and pointed to *Little*, *Randolph*, and *Tuttle* as precedent contradicting the majority's approach.[75]

3. Why Looking at the History of the Sixth Circuit's Split Doesn't Resolve the Issue

As noted above, the manner in which the Sixth Circuit cites precedent suggests that the precedent speaks for itself.[76] However, it does not. Despite the fact that both lines of cases claim to have the weight of precedent on its side,[77] both lines ultimately look to *Brown* and *Nguyen* for support, both of which offer little reliable guidance for the courts.[78]

Reliance on *Brown* as the precedent-setting opinion is misplaced for several reasons.[79] First, *Brown* was written by a district court and only affirmed by the Sixth Circuit in a one-word, unpublished opinion.[80] Second, *Brown* was argued by a pro se litigant against attorneys for the United States government, and the court made a number of insinuations that Brown's case was not well litigated.[81] Third, the court had already determined that Brown's retaliation case failed for other reasons prior to beginning its analysis of the causal connection element, thus decreasing the precedential weight of that analysis.[82] Finally, the opinion, at best, can only be read as serving as direct support for the Sixth Circuit's holding in *Cooper v. City of North Olmsted*.[83] While the *Brown* court acknowledged that "retaliation may be imputed if the timing of the retaliatory act is such as to allow an inference of retaliation to arise," it ultimately determined that three to four months is too long for temporal proximity

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74. *See supra* notes 72-73.

75. *Mickey*, 516 F.3d at 528-29 (Batchelder, J., concurring).

76. *See supra* notes 46-47 and accompanying text.

77. *See supra* note 46 and accompanying text.

78. *See Tuttle*, 474 F.3d at 321 (citing *Nguyen*, 229 F.3d at 566); DiCarlo v. Potter, 358 F.3d 408, 421 (6th Cir. 2004) (citing Brown v. ASD Computing Ctr., 519 F. Supp. 1096, 1116 (S.D. Ohio 1981) *aff'd sub nom.* Brown v. Mark, 709 F.2d 1499 (6th Cir.) (unpublished table decision); and *Nguyen*, 229 F.3d at 567); *Nguyen*, 229 F.3d at 566 (citing Cooper v. City of North Olmsted, 795 F.2d 1265, 1272 (6th Cir. 1986)); *Cooper*, 795 F.2d at 1272 (citing *Brown*, 519 F. Supp. at 1116-17).

79. *See* Asmo v. Keane, Inc., 471 F.3d 588, 599 (6th Cir. 2006) (Griffin, J., dissenting).

80. *See* Brown v. ASD Computing Ctr., 519 F. Supp. 1096 (S.D. Ohio 1981) *aff'd sub nom.* Brown v. Mark, 709 F.2d 1499 (6th Cir. 1983) (unpublished table decision); *see also Asmo*, 471 F.3d at 599 (Griffin, J. dissenting).

81. *See Brown*, 519 F. Supp. at 1097-98 (the court noted that it was forced to "scour[]" the record for evidence in Brown's favor and that Brown failed to dispute evidence which did not meet procedural requirements).

82. *See id.* at 1115.

83. *See* 795 F.2d at 1272 (citing Brown, 519 F. Supp. at 1116-17).

evidence presented by itself to be sufficient in meeting the causal connection requirement.[84] This supports the Sixth Circuit's later holding in *Cooper* that four months is too long for temporal proximity evidence alone to establish a causal connection,[85] but it fails to provide any guidance for those cases in which the temporal proximity is significantly shorter.

In addition to the shortcomings of the *Brown*'s decision, *Nguyen* also fails to offer much guidance for future courts. A cursory reading of *Nguyen* may suggest that, by ultimately deciding in favor of the defendant employer, the court explicitly rejected temporal proximity as sufficient to show causal connection entirely. The *Nguyen* court was presented squarely with the temporal-proximity alone issue and with a factual situation in which it was possible that only a month separated the adverse action and the EEOC claim.[86] However, the court's own statements make such a reading questionable. First, the court noted that it rejected, in part, Nguyen's claim based on the strong evidence presented by the defendant.[87] This suggests that the court was actually viewing the retaliation issue as a whole and was therefore conflating the prima facie case part of the burden-shifting analysis with the pretext part, as a court does not look at the defendant's case until the second part of the burden-shifting framework (i.e. the employer's legitimate, non-discriminatory reason for the adverse action).[88] As a result, the holding in *Nguyen* does not directly address the issue of how much value should be given to temporal proximity evidence at the prima facie case stage of an analysis.

Second, the court's comment that there may be other cases in which temporal proximity alone *is* enough further implies that its holding should be read in a limited fashion.[89] At most, it could be argued that *Nguyen* should stand for the proposition that an even shorter time frame than that which appeared in *Nguyen* is needed before temporal proximity alone is sufficient. However, the fact that the court failed to clearly identify the determinative time frame in the *Nguyen* case diminishes the probability that it intended to set this kind of new precedent.[90] As a result, *Nguyen* also fails to offer more than scant guidance for subsequent courts.[91]

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84. *See Brown*, 519 F. Supp. at 1116.

85. *See Cooper*, 795 F.2d at 1272.

86. *See* Nguyen v. City of Cleveland, 229 F.3d 559, 565 & n.1 (6th Cir. 2000).

87. *Id.* at 567.

88. *See* Smith v. Chrysler Corp., 155 F.3d 799, 805 (6th Cir. 1998).

89. *See Nguyen*, 229 F.3d at 567.

90. *See id.* at 565 & n.1.

91. The cases, other than *Brown*, upon which *Nguyen* relied are equally uninstructive. While *Cooper* established an upper limit of the value of temporal proximity evidence, when presented alone, at something less than four months, it failed to state any rule which addresses how to handle such evidence when the temporal proximity is something less. *See* Cooper v. City of North Olmsted, 795 F.2d 1265, 1272 (6th Cir. 1986). In *Parnell*, the temporal proximity was six months; this case did little more than apply the upper limit from *Cooper*. *See Parnell v. West*, No. 95-2131,

E. *The Common Ground*

While the precedential cases in the Sixth Circuit do not fully resolve the temporal proximity issue, there are two rules upon which the judges of the Sixth Circuit, and other courts, appear to agree. These two rules can be described as an upper and lower limit of temporal proximity evidence. The lower-limit rule establishes a time period whereby temporal proximity alone is sufficient to demonstrate a prima facie case of retaliation. The upper-limit rule, on the other hand, sets a period of time, above which it is agreed that temporal proximity alone is not sufficient.

With regard to the first rule, if the adverse employment action occurs immediately after the employer learns of the protected activity, the temporal proximity is enough to meet the causal connection element of the prima facie case.[92] While the judges in *Mickey* did not agree on the exact role temporal proximity plays in establishing a causal connection, all three agreed that, where an employee was fired immediately after arriving for work on the morning that his boss learned of his EEOC complaint, the temporal proximity was sufficient to establish a causal connection because "the protected activity [was] so closely followed by the employer's taking of an adverse action that the two [were] virtually contemporaneous . . . ."[93] The *Mickey* court also argued that the Supreme Court implied that temporal proximity alone can be sufficient if the employer's discovery of the protected activity and adverse employment action are "very close."[94]

1977 WL 271751, at *2-3 & n.1 (6th Cir. 1997). *Harrison*, which invoked the *Burrus* case from the Tenth Circuit, Burrus v. United Tel. Co. of Kan., Inc., 683 F.2d 339, 343 (10th Cir. 1982), also provides nothing new since the temporal proximity therein, which was over a year, would have failed under *Cooper* if not combined with something else. *See* Harrison v. Metro. Gov't of Nashville, 80 F.3d 1107, 1118-19 (6th Cir. 1996) *overruled in part on unrelated grounds by* Jackson v. Quanex Corp., 191 F.3d 647, 667 n.6 (6th Cir. 1999). It is worth noting that the *Burrus* line of cases in the Tenth Circuit has developed into a Temporal Proximity Alone approach as well as inspired other circuits to do the same. *See, e.g.*, Williams v. W.D. Sports, N.M., Inc., 497 F.3d 1079, 1091 (10th Cir. 2007); O'Neal v. Ferguson Constr. Co., 237 F.3d 1248, 1253 (10th Cir. 2001). The rule stated by the *Moore* court, based on *Harrison*, could be read as permitting temporal proximity alone to establish a causal connection. *See* Moore v. KUKA Welding Sys., 171 F.3d 1073, 1080 (6th Cir. 1999). However, since the court went on to also discuss the other available evidence, it is unclear whether the court discussed that evidence because it was necessary before a causal connection could be found, or because it was available as further support. *See id.*

92. *See* Mickey v. Zeidler Tool & Die Co., 516 F.3d 516, 528 (6th Cir. 2008) (Batchelder, J., concurring); *see also* Smith v. Allen Health Sys., Inc., 302 F.3d 827, 832-33 (8th Cir. 2002) (generally holding that temporal proximity cannot establish a causal connection, but in this case specifically holding that temporal proximity of 14 days was sufficient, "but barely so," to establish causation).

93. *Mickey*, 516 F.3d at 528-29 (Batchelder, J. concurring).

94. *Id.* at 524-25 ("Furthermore, one could read the Supreme Court as having accepted that temporal proximity may be sufficient in a narrow set of cases." (citing Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 273 (2001)); *see also Breeden*, 532 U.S. at 273 ("The cases that accept mere

The second generally accepted rule, the upper-limit rule, is that the value of temporal proximity evidence diminishes as the period of time between the employer's discovery of the protected activity and the adverse action increases.[95] In *Clark County School District v. Breeden*,[96] the Supreme Court reviewed a case from the Ninth Circuit in which Shirley Breeden, a female school district employee, claimed her supervisor retaliated against her for filing charges against the school district with the Nevada Equal Rights Commission and the Equal Employment Opportunity Commission (EEOC).[97] Breeden filed her EEOC complaint on August 23, 1995,[98] and her supervisor discussed contemplating a transfer of Breeden on April 10, 1997 (the transfer was "carried through" in May).[99] The Supreme Court held that Breeden, who relied only on temporal proximity evidence, failed to establish a causal connection between her protected activity (the EEOC complaint) and the adverse employment action (the transfer) because twenty months separated the two events.[100] This decision established an upper limit for temporal proximity of twenty months.[101]

However, the Sixth Circuit has established precedent that creates an upper limit for temporal proximity evidence at an even lower amount of time. In *Cooper v. City of North Olmsted*,[102] the Sixth Circuit heard a case in which Lywanna Cooper, the first African-American and first female hired to be a bus driver for the North Olmsted Municipal Bus Line,[103] claimed that her employer retaliated against her for filing discrimination claims with the Ohio Civil Rights Commission.[104] Cooper filed her claim on February 15, 1980, and the city received a copy on February 25, 1980.[105] She was discharged on June 19, 1980.[106] The court held that "[t]he mere fact that Cooper was discharged four months after filing a discrimination claim [was] insufficient to support an interference [sic] of retaliation."[107]

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temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be 'very close'").

95. *See, e.g., Breeden*, 532 U.S. at 273-74.
96. 532 U.S. 268 (2001).
97. *Id.* at 271.
98. *Id.* at 273.
99. *Id.* at 271-72.
100. *Id.* at 272-74.
101. *Id.* ("Action taken (as here) 20 months later suggests, by itself, no causality at all.").
102. 795 F.2d 1265 (6th Cir. 1986).
103. *Id.* at 1266.
104. *Id.* at 1272.
105. *Id.*
106. *Id.* at 1267.
107. *Id.* at 1272.

Other circuits that follow the Temporal Proximity Alone approach have also acknowledged the existence of an upper limit and have set precedents that limit the use of temporal proximity evidence.[108]

III. THE SPLIT

Despite the general agreement that there is both an upper and lower limit to the value of temporal proximity evidence in establishing a causal connection, there remains disagreement as to how much weight to give such evidence when it is within the grey area between that floor and ceiling.[109] The Sixth Circuit's internal split serves as a model for examining this nationwide issue.[110]

This section will examine the current split from both perspectives. First, it will discuss *Tuttle v. Metro. Gov't of Nashville*[111] as an example of the Temporal Proximity Plus approach. Second, this section will analyze *Mickey v. Zeidler Tool & Die Co.*[112] and *DiCarlo v. Potter*[113] as examples of the "Temporal Proximity Alone" approach.

A. *The Temporal Proximity Plus Approach:* Tuttle v. Metro Gov't of Nashville[114]

In *Tuttle v. Metropolitan Government of Nashville*, after seven years of employment, 63 year-old Patricia Tuttle was terminated by the Metropolitan

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108. *See, e.g.*, Dowe v. Total Action Against Poverty in Roanoke Valley, 145 F.3d 653, 657 (4th Cir. 1998) ("A lengthy time lapse between the employer becoming aware of the protected activity and the alleged adverse employment action . . . negates any inference that a causal connection exists between the two."); Pascual v. Lowe's Home Centers, Inc., 193 F. App'x 229, 233 (4th Cir. 2006) ("In this case, at least three to four months separated the termination . . . and the claimed protected activities. We find that this time period is too long to establish a causal connection by temporal proximity alone."); Manatt v. Bank of America, 339 F.3d 792, 802 (9th Cir. 2003) (holding nine months to be too long); Anderson v. Coors Brewing Co., 181 F.3d 1171, 1179 (10th Cir. 1999) ("The date of Plaintiff's termination is key to [the causation inquiry] because the closer it occurred to the protected activity, the more likely it will support a showing of causation."); Mayers v. Laborers' Health & Safety Fund of North America, 478 F.3d 364 (D.C. Cir. 2007) (eight to nine month gap "is far too long").

109. *See supra* notes 5, 8.

110. *See supra* notes 11-20 and accompanying text.

111. 474 F.3d 307 (6th Cir. 2007).

112. 516 F.3d 516 (6th Cir. 2008).

113. 358 F.3d 408 (6th Cir. 2004).

114. Judge Martin, who joined the *Tuttle* opinion in 2006, previously joined the *DiCarlo* opinion and authored the opinion in Singfield v. Akron Metro. Hous. Auth., 389 F.3d 555, 564 (6th Cir. 2004), both of which applied the Temporal Proximity Alone approach. *Tuttle*, 474 F.3d at 310; *see also DiCarlo*, 358 F.3d at 421. It is therefore curious that Judge Martin joined the *Tuttle* opinion, which adopted the Temporal Proximity Plus approach, without comment on its divergence from *DiCarlo* and *Singfield*. *See Tuttle*, 474 F.3d at 321.

Government of Nashville ("Metro") on March 4, 2002.[115] Tuttle's problems began in 2000 when she reported to John Walker, the human resources manager for Metro, that she observed her supervisor, George Sullivan, and another co-worker destroying documents.[116] Although Metro was unable to corroborate these claims, Tuttle's relationship with Sullivan subsequently deteriorated.[117] From that point until Sullivan's retirement on February 28, 2001, Sullivan gave Tuttle poor evaluations.[118]

Tuttle's situation did not improve when Chase Anderson replaced Sullivan as Tuttle's supervisor. Anderson recorded a number of complaints against Tuttle and gave her another poor evaluation.[119] In October 2001, Anderson transferred Tuttle from her clerical office position to a "scale house booth," where she weighed Metro's garbage trucks.[120] Although Anderson had told Tuttle that this would be a temporary transfer lasting thirty days, Tuttle remained there until her termination five months later.[121]

On December 6, 2001, Tuttle filed a charge against Metro with the EEOC, alleging age discrimination.[122] Metro received notice on December 10.[123] On December 19, Walker met with Tuttle at the scale house booth and told her that she either needed to transfer or she would be demoted or terminated.[124] When Tuttle was unable to transfer, Anderson submitted another poor performance evaluation of Tuttle on January 15, 2002, which eventually resulted in her termination on March 4, 2002.[125] Tuttle claimed that her termination was in retaliation for her EEOC complaint.[126]

At trial, the jury found in favor of Tuttle and awarded damages accordingly.[127] The district court, however, granted Metro's motion for judgment as a matter of law and overturned the jury's verdict regarding the age discrimination and retaliation claims.[128] Regarding the retaliation claim, the district court determined that Tuttle failed to establish a causal connection between her filing of the EEOC complaint and her termination.[129] The Sixth Circuit reversed this decision by holding that Tuttle

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115. *Tuttle*, 474 F.3d at 310.
116. *Id.* at 311.
117. *Id.*
118. *See id.*
119. *Id.* at 311 & nn.1-2.
120. *Id.* at 311-12.
121. *Id.*
122. *Id.* at 312.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 310.
128. *Id.*
129. *Id.* at 320-21.

established the required causal connection.[130] The court stated that while "[t]he law is clear that temporal proximity, standing alone, is insufficient to establish a causal connection for a retaliation claim[,] . . . . [t]here are . . . circumstances where temporal proximity, considered with other evidence of retaliatory conduct would be sufficient to establish a causal connection."[131] The court determined that combining temporal proximity evidence with evidence that the plaintiff was treated differently from other employees could show a causal connection.[132] In the present case, Tuttle's termination occurred less than three months after she filed her EEOC complaint.[133] When combined with the evidence that Walker, on behalf of Metro, went to Tuttle and "threatened her that he was going either to demote her or to cut her wages if she did not transfer voluntarily . . . " the court concluded that sufficient evidence existed to support a jury's finding of causation.[134]

B. *The Temporal Proximity Alone Approach:* Mickey v. Zeidler Tool & Die Co.[135] and DiCarlo v. Potter[136]

At the time this article was written, the most recent decision from the Sixth Circuit regarding this issue appeared in the case of *Mickey v. Zeidler Tool & Die Co.*[137] Charles Mickey, a sixty-seven year old man, had been employed at Zeidler Tool & Die Co. ("Zeidler") for thirty-three years until he was terminated on October 19, 2004.[138] During his time with the company, Mickey had been promoted to various supervisory positions and eventually, in 1992, became General Manager.[139]

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130. *Id.* at 321.

131. *Id.* (internal citations omitted).

132. *Id.* (citing Moore v. KUKA Welding Sys., 171 F.3d 1073, 1080 (6th Cir. 1999)).

133. *Id.* at 321.

134. *Id.*

135. 516 F.3d 516 (6th Cir. 2008). Judge Moore, who joined the *Mickey* opinion, *Id.* at 519, and Judge Batchelder, who took issue with the *Mickey* opinion's argument for a more expansive use of temporal proximity evidence, *Id.*, were the only two Sixth Circuit judges on the panel who reviewed *Nguyen v. City of Cleveland*, 229 F.3d 559 (6th Cir. 2000). In fact, Judge Batchelder authored the *Nguyen* opinion. *Id.* As is seen below, one of the chief issues of contention in the *Mickey* court is how to properly interpret *Nguyen*.

136. 358 F.3d 408 (6th Cir. 2004). Judge Moore, the same who joined the *Nguyen* opinion in 2000, *Nguyen*, 229 F.3d at 561, went on to author the *DiCarlo* opinion in 2004. *DiCarlo*, 358 F.3d at 410, one of the major cases arguing for the "Temporal Proximity Alone" approach in the Sixth Circuit. Judge Moore went on to join the opinion in *Asmo v. Keane*, 471 F.3d 588 (6th Cir. 2006), another "Temporal Proximity Alone" case, before eventually joining the *Mickey* opinion in 2008, *Mickey*, 516 F.3d at 519. The main opinion in *Mickey* cites to both *DiCarlo* and *Asmo* in arguing for a more expansive use of temporal proximity evidence. *Id.* at 524.

137. 516 F.3d at 519.

138. *Id.* at 519.

139. *Id.* at 519-20.

After Mickey became General Manager, Patrick Rhein, a co-worker twenty years Mickey's junior, was promoted to Mickey's former position.[140] In 1995, Mickey was earning $20,000 more, annually, than Rhein.[141] By 1997, however, Rhein was making $25,000 more per year than Mickey, despite the fact that Mickey was Rhein's supervisor.[142] Rhein's salary continued to be higher than Mickey's for the remainder of Mickey's employment.[143]

In 2002, Harold DeForge, the owner of Zeidler, lowered both Mickey's and Rhein's salary, citing Zeidler's financial condition.[144] At the same time, DeForge began to inquire into Mickey's plans for retirement.[145] In late 2003, when Mickey informed DeForge that he would not be retiring yet, DeForge changed the terms of Mickey's employment including a loss of benefits and a decrease in annual compensation.[146]

DeForge again claimed this change was due to financial difficulties, but during the same time DeForge increased Rhein's compensation to more than double Mickey's.[147] On October 7, 2004, Mickey filed an age discrimination charge against Zeidler with the EEOC.[148] Notice of the charge was sent to DeForge on October 14, 2004.[149] DeForge, however, was out of town at the time and did not see the notice until the morning of October 19, 2004.[150] He terminated Mickey within minutes of Mickey's arrival to work that morning.[151] Mickey filed a charge of retaliation with the EEOC in December of the same year and initiated suit on January 31, 2005.[152]

In reviewing the retaliation portion of this case, the Sixth Circuit reversed the district court's grant of summary judgment against Mickey, holding that Mickey provided both sufficient evidence of a prima facie case and sufficient evidence to show that Zeidler's proffered legitimate business reasons for Mickey's termination were, in fact, a pretext for retaliation.[153] Specifically, the court determined that the district court had erred in holding "'that temporal proximity, standing alone, is not enough to allow a reasonable juror to conclude that [Zeidler] would not have laid off

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140. *Id.*
141. *Id.* at 520.
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.* at 527-28.

[Mickey] 'but for' his filing the EEOC charge . . . .'"[154] Looking to the precedent established by *DiCarlo v. Potter*,[155] and dismissing the precedent established by *Tuttle*,[156] the *Mickey* court concluded that temporal proximity evidence alone can be sufficient when "an adverse employment action occurs very close in time after an employer learns of a protected activity . . . ."[157] It reasoned that such a rule is necessary because there is no time for evidence of retaliation, other than temporal proximity, to be created when an employer fires an employee immediately after learning of the protected activity.[158]

While all three judges who reviewed *Mickey* agreed on its outcome, one of the three disagreed with the majority opinion's "expansive view of the precedent in [the Sixth C]ircuit."[159] Judge Alice Batchelder, who authored *Nguyen*, argued that *Nguyen* only stated in dicta that there *might* be cases where evidence of temporal proximity alone would be sufficient to establish a causal connection.[160] Further, Batchelder argued that the other judges' reliance on *DiCarlo* was questionable because *DiCarlo* relied only on this dictum in *Nguyen* and on unpublished, and therefore non-precedential, cases.[161] Ultimately, however, Judge Batchelder acknowledged that the *Mickey* case was distinguishable from *DiCarlo* due to the immediacy of Mickey's termination and determined that this was a limited scenario in which temporal proximity alone *could* satisfy the causal connection requirement.[162]

Although the main opinion in *Mickey* makes an argument for an expanded use of temporal proximity evidence, as noted by Judge Batchelder's concurrence,[163] the ultimate agreement between the three judges shows that *Mickey* is limited by its facts. Since Mickey's discharge occurred immediately after DeForge learned of Mickey's complaint,[164] *Mickey* likely stands for the proposition that only an immediate adverse employment action produces temporal proximity evidence that can be used to satisfy the causal connection requirement of a prima facie retaliation case. Any argument for

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154. *Id.* at 523.

155. *Id.* at 524 ("this Circuit has embraced the premise that in certain distinct cases where the temporal proximity between the protected activity and the adverse employment action is acutely near in time, that close proximity is deemed indirect evidence such as to permit an inference of retaliation to arise.") (quoting *DiCarlo v. Potter*, 358 F.3d 408, 421 (6th Cir. 2004)).

156. *Id.* at 523-24 (dismissing the *Tuttle* rule [discussed later in this article] because it was based on *Nguyen* and arguing that *Nguyen* does not support the *Tuttle* rule).

157. *Id.* at 525.

158. *Id.*

159. *Id.* at 528 (Batchelder, J., concurring).

160. *Id.*

161. *Id.*

162. *Id.* at 529 (Batchelder, J., concurring).

163. *Id.*

164. *Id.* at 525.

a more expansive use of temporal proximity should be read as dicta. Therefore, one must look elsewhere to find a case demonstrating the Sixth Circuit's use of the Temporal Proximity Alone approach.

A prime example of the Temporal Proximity Alone approach in the Sixth Circuit occurred in *DiCarlo v. Potter*.[165] Henry DiCarlo was a U.S. post office employee who was terminated at the end of his ninety-day probationary period.[166] He started working on January 15, 2000, and was terminated effective April 1, 2000.[167] During this time, DiCarlo was evaluated three times by his supervisor, Timothy Bailey.[168]

In all of Bailey's evaluations of DiCarlo, Bailey noted unsatisfactory work performance.[169] On March 9, 2000, DiCarlo filed a complaint against Bailey with an EEO counselor alleging discrimination on the basis of national origin, age, and disability.[170] Bailey learned of this complaint by March 11, and on March 22 recommended that DiCarlo be terminated.[171] DiCarlo argued that his termination was retaliation for filing the EEOC complaint against Bailey.[172]

In reviewing the district court's summary judgment against DiCarlo on his retaliation claim, the Sixth Circuit reversed the decision and remanded the case for determination on the second and third parts of the *McDonnell Douglas* burden-shifting analysis (i.e., whether the post office had a legitimate non-discriminatory reason and whether DiCarlo has evidence that the reason is pretextual, respectively).[173] The court determined that DiCarlo had met his burden for the prima facie case, particularly the causal connection element, because only twenty-one days separated DiCarlo's termination and his protected activity.[174] Looking to *Nguyen*,[175] *Brown*,[176] and other circuits[177] for persuasive support, the *DiCarlo* court reasoned that "this Circuit has embraced the premise that in certain distinct cases where the

165. 358 F.3d 408 (6th Cir. 2004).

166. *Id.* at 410-11.

167. *Id.* at 411, 413.

168. *Id.* at 411-12.

169. *Id.*

170. *Id.* at 412-13.

171. *Id.* at 421.

172. *Id.* at 420.

173. *Id.* at 422.

174. *Id.*

175. Nguyen v. City of Cleveland, 229 F.3d 559, 567 (6th Cir. 2000) (noting that there are instances in which "evidence of temporal proximity alone would be sufficient to support" may provide an inference creating a causal link).

176. Brown v. ASD Computing Ctr., 519 F. Supp. 1096, 1116 (S.D. Ohio 1981) ("where there is no direct proof of a retaliatory motive, retaliation may be imputed if the timing of the retaliatory act is such as to allow an inference of retaliation to arise.").

177. *See, e.g.*, Oliver v. Digital Equip. Corp., 846 F.2d 103, 110-11 (1st Cir. 1988); Miller v. Fairchild Indus., Inc., 797 F.2d 727, 731 (9th Cir. 1986); Burrus v. United Tel. Co. of Kan., 683 F.2d 339, 343 (10th Cir. 1982); Grant v. Bethlehem Steel Corp., 622 F.2d 43, 46 (2d Cir. 1980).

temporal proximity between the protected activity and the adverse employment action is acutely near in time, that close proximity is deemed indirect evidence such as to permit an inference of retaliation to arise."[178]

DiCarlo is distinct from *Mickey* in that over two weeks separated the time between DiCarlo's EEOC complaint and his termination.[179] In *Mickey*, however, termination occurred only hours after the employer learned of Mickey's complaint.[180]

It is this distinction that caused Judge Batchelder, a proponent of the Temporal Proximity Plus approach, to concur, rather than dissent, with the pro-Temporal-Proximity-Alone majority's judgment.[181] Thus, where *Mickey* merely establishes the common ground that a truly immediate termination will result in an inference of causal connection, *DiCarlo* stands for the divisive proposition that something longer than immediacy but less than four months can also result in that same inference of a causal connection.

IV. ANALYSIS: RESOLVING THE SPLIT USING THE PLUS AT PRETEXT APPROACH

Because its seminal cases fail to address the issue of how to value temporal proximity evidence when it is shorter than four months, the Sixth Circuit lacks a clear rationale for its current temporal proximity jurisprudence. Consequently, judges seem unable to agree on the circuit's approach. Given the lack of foundation, a new approach is required that reconciles all of the Sixth Circuit's cases and provides a reasoned framework for its application. That approach is the Plus at Pretext approach.

The Plus at Pretext approach combines the current two approaches—Temporal Proximity Alone and Temporal Proximity Plus—and applies them to different parts of the *McDonnell Douglas* burden-shifting analysis. At the prima facie case stage of the analysis, the court should accept temporal proximity evidence alone to be sufficient to establish a causal connection, so long as the period of time is less than the upper limit established by *Cooper*. On the other hand, more than temporal proximity evidence should be required at the third stage of the analysis, when the plaintiff must rebut the defendant's proffered legitimate, non-discriminatory reason by showing that the reason is actually a pretext for retaliation (i.e. the "plus" of the Plus at Pretext approach).

There are two reasons why the Plus at Pretext approach should be adopted by all of the circuits, including the Sixth Circuit. First and foremost, the Plus at Pretext approach resolves the limited arguments proffered by proponents and opponents of the two current approaches.

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178. *DiCarlo*, 358 F.3d at 421.

179. *Id.* at 422.

180. Mickey v. Zeidler Tool & Die Co., 516 F.3d 516, 520 (6th Cir. 2008).

181. *Id.* at 528 (Batchelder, J., concurring).

Most Temporal Proximity Alone courts have noted, prior to beginning their analysis, that "the burden of establishing a prima facie retaliation case is easily met" or have otherwise expressed the low threshold required at that stage.[182] In contrast, many of the Temporal Proximity Plus courts have expressed concern that dropping the plus requirement at the prima facie case stage will permit employees to cry foul any time an adverse employment action takes place subsequent to a protected activity.[183] The Plus at Pretext approach addresses both of these concerns.

The Plus at Pretext approach addresses the concern of Temporal Proximity Alone courts by acknowledging that the prima facie case stage of the *McDonnell Douglas* analysis is not meant to operate as a significant barrier for the plaintiff. Considering that the burden-shifting framework was designed for indirect evidence cases, smoking-gun evidence linking protected activity to adverse actions against an employee is neither expected nor required. It is also significant that the prima facie case stage does not end the analysis; it is only the first step. Therefore, nothing is lost by allowing temporal proximity alone, so long as it is below the upper-limit threshold, to satisfy the causal connection requirement.

On the other hand, courts concerned about rampant and unchecked employee claims of retaliation can be comforted by knowing that the burden will be much greater at the pretext stage of the analysis. Once the employer meets the minimal burden of producing a legitimate and non-retaliatory reason for the employee's discharge, the burden of production and persuasion shifts back to the employee to prove that the employer is lying.[184]

By requiring Temporal Proximity Plus at this stage of analysis, any claims that might have been weeded out by requiring more at the prima facie case stage will still be eliminated before the summary judgment analysis is over. Once again, nothing is

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182. Singfield v. Akron Metro. Hous. Auth., 389 F.3d 555, 563 (6th Cir. 2004); *see also Mickey*, 516 F.3d at 523 (6th Cir. 2008); *DiCarlo*, 358 F.3d at 420; Nguyen v. City of Cleveland, 229 F.3d 559, 563 (6th Cir. 2000); Mariani-Colón v. Dep't of Homeland Sec. *ex rel.* Chertoff, 511 F.3d 216, 224 (1st Cir. 2007) ("We conclude that the 'temporal proximity' [of two months] . . . is sufficient to meet the relatively light burden of establishing a prima facie case of retaliation); Williams v. Cerberonics, Inc., 871 F.2d 452, 457 (4th Cir. 1989) ("While this proof far from conclusively establishes the requisite causal connection, it certainly satisfies the less onerous burden of making a prima facie case of causality.").

183. *See, e.g.*, Roberson v. Alltel Info. Serv., 373 F.3d 647, 655 (5th Cir. 2004) ("the mere fact that some adverse action is taken *after* an employee engages in some protected activity will not *always* be enough for a *prima facie* case.") (quoting Swanson v. Gen. Serv. Admin., 110 F.3d 1180, 1188 n.3 (5th Cir. 1997) (emphasis included)); Lewis v. City of Chicago, 496 F.3d 645, 655 (7th Cir. 2007) ("[T]he mere fact that one event preceded another does nothing to prove that the first event caused the second; the plaintiff also must put forth other evidence that reasonably suggests that her protected speech activities were related to her employer's discrimination.") (quoting Burks v. Wis. Dep't of Transp., 464 F.3d 744, 758-59 (7th Cir. 2006).

184. *See* Smith v. Chrysler Corp., 155 F.3d 799, 805 (6th Cir. 1998).

lost by allowing temporal proximity alone at the prima facie case stage but uniformity and a clear standard of law are gained.

The second reason why the circuits should adopt the Plus at Pretext approach is that nearly all of the Temporal Proximity Alone circuits, plus the cases in the Sixth Circuit which have adopted the Temporal Proximity Alone approach, are already applying the Plus at Pretext approach, even if not expressly. For example, all of the Sixth Circuit's cases require something more than temporal proximity (i.e. a "plus") at some point in the *McDonnell Douglas* burden-shifting analysis. The only difference between the decisions is *when* that "plus" is required. In *Tuttle* and *Nguyen*, and in the other Temporal Proximity Plus cases, the court utilizes the "plus" during the prima facie case stage.[185] In *Tuttle*, the court ultimately reversed the district court's judgment as a matter of law decision because there was additional evidence supporting Tuttle's causal connection claim.[186] However, the *Nguyen* court ultimately affirmed the district court's summary judgment against Nguyen because there was no additional evidence to support his claim.[187]

Similarly, in the Temporal Proximity Alone cases, the Sixth Circuit required the "plus" at the pretext stage of the analysis.[188] In *Mickey*, the court reversed the district court's grant of summary judgment on Mickey's retaliation claim after finding additional evidence that supported a finding that Zeidler's proffered reasons for Mickey's termination were pretextual.[189]

Additionally, the court in *Asmo* reversed in favor of Asmo after examining various pieces of evidence, including temporal proximity, to determine that a fact finder could find her employer's proffered reasoning to be pretextual.[190] In contrast, the court in *Skrjanc v. Great Lakes Power Serv. Co.* affirmed a district court's grant of summary judgment because "temporal proximity is insufficient in and of itself to establish that the employer's nondiscriminatory reason for discharging an employee was in fact pretextual."[191] As noted earlier, nearly all of the other Temporal Proximity Alone circuits have expressly indicated that more is required at the pretext

185. *See, e.g.*, Tuttle v. Metro. Gov't of Nashville, 474 F.3d 307, 321 (6th Cir. 2007); Nguyen v. City of Cleveland, 229 F.3d 559, 566-67 (6th Cir. 2000).

186. *See Tuttle*, 474 F.3d at 321.

187. *See Nguyen*, 229 F.3d at 566-67.

188. *See, e.g.*, Mickey v. Zeidler Tool & Die Co., 516 F.3d 516, 526-28; Asmo v. Keane, Inc., 471 F.3d 588, 595-96 (6th Cir. 2006); Skrjanc v. Great Lakes Power Serv. Co., 272 F.3d 309, 317 (6th Cir. 2001); DiCarlo v. Potter, 358 F.3d 408, 422 (6th Cir. 2004) (remanding the case for findings on the second and third step of the burden-shifting analysis); Singfield v. Akron Metro. Hous. Auth., 389 F.3d 555, 564-65 (6th Cir. 2004) (reversing the district court's summary judgment after noting evidence in addition to temporal proximity which supported a finding that the proffered reason was pretextual).

189. *Mickey*, 516 F.3d at 526-28.

190. *Asmo*, 471 F.3d at 595-98.

191. *Skrjanc*, 272 F.3d at 317.

stage of the analysis than mere temporal proximity.[192] As a result, the Plus at Pretext approach has the potential of reconciling existing jurisprudence while achieving both of the goals that have motivated the opposing sides of this issue.

Consider the plight of Paulo from this article's introduction. If Paulo were to bring his case in a Plus at Pretext jurisdiction, Paulo could meet his burden of providing evidence of causation merely by demonstrating that his termination occurred one month after his employer received notice of his EEOC complaint. Under the Plus at Pretext approach, temporal proximity evidence alone is enough to meet the burden of production at the prima facie case stage. The employer would then meet its burden of providing a legitimate, non-discriminatory reason for the termination by pointing to Paulo's failure to report to work after being told that he was expected to do so. This would shift the burden back to Paulo to prove that the employer's reason is pretextual.

Under the Plus at Pretext approach, Paulo would need to pair his temporal proximity evidence with other evidence to show that the employer's reason is a pretext for retaliation. If Paulo has evidence that Donald, his boss, made comments to someone that Paulo was not being given sick time because he was a "trouble-maker," this could be the additional evidence needed. If Paulo can show he was treated differently from other similarly situated employees with regard to taking sick leave, this could also be the additional evidence needed. However, if Paulo fails to provide any additional evidence that a reasonable jury could use to conclude that the employer acted for retaliatory reasons, then under the Plus at Pretext approach, the court should grant the employer's motion for summary judgment against Paulo. In the end, Paulo's case, as with all cases under the Plus at Pretext approach, will stand or fall depending upon whether there is additional evidence linking the protected activity to the termination.

V. CONCLUSION

Although courts tend to agree that temporal proximity evidence can be sufficient to show a causal connection when the time between a protected activity and an adverse employment action is "very close" and that such evidence, standing alone, is not sufficient when temporal proximity is longer than four months, the circuits are split as to the evidentiary value of temporal proximity when the time frame is within the gray area between these two limits. Most of the circuits have adopted the Temporal Proximity Alone approach. A minority of the circuits has adopted the Temporal Proximity Plus approach. The Sixth Circuit's decisions are split on this

192. *See, e.g.*, Mariani-Colón v. Dep't of Homeland Sec. *ex rel.* Chertoff, 511 F.3d 216, 224 (1st Cir. 2007); Simpson v. N.Y. State Dep't of Civil Serv., 166 F. App'x 499, 502 (2d Cir. 2006); King v. Rumsfeld, 328 F.3d 145, 154 (4th Cir. 2003); Conner v. Schnuck Mkt., Inc., 121 F.3d 1390, 1395 (10th Cir. 1997); Robinson v. LaFarge N. Am., Inc., 240 F. App'x 824, 829 (11th Cir. 2007); Embry v. Callahan Eye Found. Hosp., 147 F. App'x 819, 831-32 (11th Cir. 2005).

issue. This article argues that the circuits should adopt the Plus at Pretext Approach, a hybrid of the two existing approaches, because it addresses the concerns that have motivated this split and it reconciles the existing jurisprudence.