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Defining a Retaliatory Adverse Action from Wideman to Shotz: The Legitimacy of the Eleventh Circuit's Retaliation Case Law

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DEFINING A RETALIATORY ADVERSE ACTION FROM *WIDEMAN* TO *SHOTZ*: THE LEGITIMACY OF THE ELEVENTH CIRCUIT'S RETALIATION CASE LAW

INTRODUCTION

Title VII of the 1964 Civil Rights Act protects employees from workplace discrimination and retaliation.[1] Discrimination occurs when an employer treats an employee differently because of a certain statutorily protected characteristic, such as an "individual's race, color, religion, sex, or national origin."[2] Upon an employee's filing of a Title VII discrimination complaint with the Equal Employment Opportunity Commission (EEOC), the employer may retaliate by further subjecting the employee to further mistreatment.[3] Retaliation is adverse treatment by an employer arising from an employee's filing of a discrimination complaint.[4] Recognizing the ripple effects that a discrimination claim may have on the employer-employee relationship, courts have enforced anti-retaliation mechanisms under Title VII and other similar antidiscrimination statutes such as the Americans with Disabilities Act (ADA) and the Age Discrimination in Employment Act (ADEA).[5]

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1. The 1964 Civil Rights Act states in pertinent part:
> It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1) (1964); *see also id.* § 2000e-3(a).

2. *Id.* § 2000(e)-(2)(a)(1); Justin P. O'Brien, *Weighing Temporal Proximity in Title VII Retaliation Claims*, 43 B.C. L. REV. 741, 742 (2002).

3. *See* Christopher M. Courts, *An Adverse Employment Action—Not Just an Unfriendly Place to Work: Co-Worker Retaliatory Harassment Under Title VII*, 87 IOWA L. REV. 235, 237-38 (2001).

4. O'Brien, *supra* note 2, at 742.

5. *See* Age Discrimination in Employment Act, 29 U.S.C. § 623(d) (1994); Americans with Disabilities Act, 42 U.S.C. § 12203(a) (1994). Other statutes that prohibit unlawful retaliation are the National Labor Relations Act, 29 U.S.C. § 158(a)(4) (1994); Occupational Health and Safety Act of 1970, 29 U.S.C. § 660(c) (1994); Employee Income and Retirement Security Act, 29 U.S.C. § 1140 (1994); and the Family and Medical Leave Act, 29 U.S.C. § 2615 (1994). While Title VII's protections are the focus of this Note, several ADA cases herein share substantially similar retaliation considerations. Thus, while courts consider these cases under different retaliation statutes, this Note addresses them together due to the similar application in reasoning and purpose. The Eleventh Circuit's

Although Title VII clearly protects employees from retaliation, the statute has left the limits of acceptable employer behavior to the courts.[6] Courts have struggled to define what employer actions should give rise to a retaliation claim.[7] While all courts agree that employer behavior affecting "ultimate employment decisions" in response to an employee's filing of an EEOC complaint is actionable retaliation under the statute, the circuits have not reached a consensus on actions that fall short of such decisions.[8] After an employee files a discrimination complaint, does Title VII protect the employee from being excluded from overtime compensation?[9] Can an employer transfer an employee against his subjective preference?[10] Are unfavorable job evaluations and poor performance ratings actionable?[11] Is co-worker harassment retaliation?[12] Is publishing damning personal information retaliation?[13] Under the "ultimate employment decisions" interpretation of Title VII, none of these actions would give rise to a retaliation claim because they do not

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uniform analysis binds these cases together. Only when considered as a whole do the retaliation cases truly highlight the court's ability to license an employee's legitimate grievance and, at the same time, sift through insufficient claims. *See infra* Part IV.

6. *See* Courts, *supra* note 3, at 241.

7. *See id.*; *see also* O'Brien, *supra* note 2, at 742. *Compare* Mattern v. Eastman Kodak Co., 104 F.3d 702 (5th Cir. 1997), *with* Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453 (11th Cir. 1998).

8. *See* Courts, *supra* note 3, at 241. When alleging a discrimination complaint, the employee must first file with the EEOC when lodging the complaint. *Id.* at 236. "Ultimate employment decisions" are those employment actions that involve firing, failing to grant leave, refusing to promote, adjusting compensation, and adjusting benefits. *See id.* at 241. Examples of employment acts that fall short of ultimate employment decisions include the following:

> [O]ral reprimands and derogatory comments, a purely lateral transfer, a temporary transfer to a lower-grade position, negative performance evaluations, redesignation of a job title and a temporary grade reduction, informally meeting with the plaintiff in an attempt to peacefully resolve a dispute, the employer's request that the plaintiff-employee drop her EEOC charge, voluntary acceptance of an early retirement package, and troubled interactions with co-workers.

Donna Smith Cude & Brian M. Steger, *Does Justice Need Glasses? Unlawful Retaliation Under the Title VII Following* Mattern*: Will Courts Know It When They See It?*, 14 LAB. LAW. 373, 407 (1998).

9. *See* Shannon v. BellSouth Telecomm., Inc., 292 F.3d 712 (11th Cir. 2002).

10. *See* Doe v. Dekalb County Sch. Dist., 145 F.3d 1441 (11th Cir. 1998).

11. *See* Davis v. Town of Lake Park, 245 F.3d 1232 (11th Cir. 2001); *see also* Lucas v. Grainger, Inc., 257 F.3d 1249 (11th Cir. 2001).

12. *See* Knox v. Indiana, 93 F.3d 1327, 1335 (7th Cir. 1996); *see also* Courts, *supra* note 3.

13. *See* Shotz v. City of Plantation, Fla., 344 F.3d 1161, 1182-83 (11th Cir. 2003).

relate to firing, granting leave, refusing to promote, or adjusting compensation.[14]

The Eleventh Circuit considers acts that fall short of ultimate employment decisions in determining whether there has been a retaliatory adverse employment action.[15] The legitimacy of this approach, however, rests not in a broad construction alone but on the circuit's diligence to focus its inquiry into adverse employment actions.[16] While other circuits limiting adverse actions to ultimate employment decisions advocate the benefits of a bright-line rule, the Eleventh Circuit has ameliorated these concerns in two ways.[17] First, the procedural use of a burden-shifting scheme from the plaintiff to the defendant focuses the judicial inquiry and accomplishes the dual goal of limiting judicial intervention and sifting valid claims from frivolous ones.[18] Second, the willingness of the court to apply clear and understandable limits to adverse action inquiries in the wake of *Wideman v. Wal-Mart Stores, Inc.*[19] upholds the purpose of retaliation statutes.[20] These two factors justify the broad interpretation of an adverse action because they balance the risk of an interventionist judiciary with the workplace-reality that retaliatory behavior very often falls short of ultimate employment decisions.[21]

The purpose of this Note is to place the Eleventh Circuit's broad understanding of a retaliatory "adverse employment action" in the context of an unsettled legal community. This Note begins by introducing the pertinent language and text of Title VII's discrimination and retaliation provisions.[22] To utilize Title VII's mechanisms, the Supreme Court has adopted a burden-shifting scheme for employment discrimination cases.[23] Part II articulates the procedures used to invoke a retaliation claim based on *McDonnell*

14. *See* Courts, *supra* note 3, at 241.
15. *See* Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453 (11th Cir. 1998).
16. *See infra* Part V.
17. *See infra* Part V.
18. *See infra* Part V.
19. 141 F.3d 1453 (11th Cir. 1998).
20. *See infra* Part V.
21. *See infra* Part V.
22. *See infra* Part I.
23. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

Douglas Corp. v. Green.[24] In retaliation cases, the circuits define an adverse employment action in at least three ways, ranging from broad to narrow.[25] Part III discusses the policy tension underlying the various definitions of an adverse action.[26] Against this context of disagreement, Part IV catalogues Eleventh Circuit cases from the inception of its broad interpretation to its present implementation and refinement.[27] Finally, this Note posits that the Eleventh Circuit has maintained a proper role in these retaliation disputes because it has refined the scope of its broad interpretation to ameliorate the policy concerns of narrowly-construing circuits.[28]

I. PERTINENT STATUTES AND THEIR LANGUAGE

The language of Title VII's general prohibition against discrimination is narrower than the language of its retaliation provision.[29] The general prohibition against discrimination states that it is unlawful to "fail or refuse to hire or to discharge any individual, or otherwise to *discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment.*"[30] Based on the plain language of the statute, Congress tied discrimination to those employer actions that affect the terms, conditions, or privileges of employment.[31]

The retaliation provision of Title VII does not explicitly restrict adverse employment actions or discriminatory behavior to the terms, conditions, or privileges of employment.[32] Instead, the statute makes an employer's action unlawful when an employer "*discriminate[s]*

24. *Id.*; *see infra* Part II.

25. *See* O'Brien, *supra* note 2, at 742; *see also* Courts, *supra* note 3, at 241.

26. *See infra* Part III.

27. *See infra* Part IV.

28. *See infra* Part V.

29. *See generally* Matthew J. Wiles, *Defining Adverse Employment Action in Title VII Claims for Employer Retaliation: Determining the Most Appropriate Standard*, 27 U. DAYTON L. REV. 217, 232 (2001). *Compare* 42 U.S.C. § 2000e-2(a)(1) (1964), *with* 42 U.S.C. § 2000e-3(a) (1964).

30. 42 U.S.C. § 2000e-2(a)(1) (emphasis added).

31. *See id.* (defining discrimination as "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his *compensation, terms, conditions,* or *privileges* of employment" (emphasis added)); *see also* Wiles, *supra* note 29, at 230.

32. *See* 42 U.S.C. § 2000e-3(a) (1964); *see also* Wiles, *supra* note 29, at 233.

against any of his employees . . . 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."[33] While the general discrimination prohibition limits the scope of discrimination to those actions affecting compensation, terms, and privileges, the absence of this restrictive language in the retaliation provision leaves open the question of "which [employment] activities rise to the level of an adverse employment action."[34]

Because the language of the statute does not articulate which employer acts are retaliatory, the courts have been called upon to decide the proper interpretation of the text of the retaliation provision.[35] Courts have construed the provision both narrowly and broadly.[36] Broadly-construing circuits argue that had Congress sought to limit actionable retaliatory behavior, they would have articulated those limits in the statute.[37] Narrowly-construing circuits assert that had Congress sought a broad understanding of actionable behavior, they would have manifested that intent in the statute.[38] Other courts have imported the discriminatory scope from the general prohibition into the retaliation provision by holding that only those actions that materially affect the terms, conditions, or privileges of employment

33. 42 U.S.C. § 2000e-3(a) (1964) (emphasis added). The provision states in full:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, 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.

Id.

34. *See* Courts, *supra* note 3, at 240-41; *see also* Joel A. Kravetz, *Deterrence v. Material Harm: Finding the Appropriate Standard to Define an "Adverse Action" in Retaliation Claims Brought Under the Applicable Equal Employment Opportunity Statutes*, 4 U. PA. J. LAB. & EMP. L. 315, 318-19 (2002).

35. *See* Courts, *supra* note 3, at 240-41; O'Brien, *supra* note 2, at 742.

36. Courts, *supra* note 3, at 241.

37. *See* Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997); *see also* Wiles, *supra* note 29, at 233; *infra* Part III.A.

38. *See infra* Part III.C.

are actionable retaliation.[39] This textual stalemate has forced courts to substantiate their definition of an adverse action with strong public policy considerations.[40] These policy concerns include the role of courts in employment relationships and the recognition of significant retaliatory behavior that may fall short of ultimate employment decisions.[41]

II. PROCEDURAL INVOCATION OF A RETALIATION CAUSE OF ACTION

Retaliation occurs after the employee has participated in protected activity, such as filing a discrimination complaint with the EEOC.[42] Supporting this type of claim with sufficient evidence can be daunting because the claimant must prove the employer's discriminatory intent.[43] Because most cases lack direct evidence of intentional discrimination (e.g. "you are fired because you are female"), the plaintiff must rely largely on circumstantial evidence.[44] Obtaining sufficient circumstantial evidence is particularly difficult for the plaintiff because she must produce evidence of an often complex employer motive.[45] Recognizing the height of this hurdle, the Supreme Court crafted a procedural scheme "by drawing inferences and allocating shifting evidentiary burdens" in the case of *McDonnell Douglas Corp. v. Green*.[46] While *McDonnell Douglas* laid out the burden-shifting procedure for discrimination claims, "lower courts have almost universally adopted and applied its principles to retaliation cases."[47]

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39. Courts, *supra* note 3, at 253; *see infra* Part III.B.

40. *See infra* Part III.

41. *See* Wiles, *supra* note 29, at 234; *see also* Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1456 (11th Cir. 1998).

42. *See* Wiles, *supra* note 29, at 218; *see also* Courts, *supra* note 3, at 236.

43. *See* Ernest F. Lidge III, *The Meaning of Discrimination: Why Courts Have Erred in Requiring Employment Discrimination Plaintiffs to Prove that the Employer's Action Was Materially Adverse or Ultimate*, 47 U. KAN. L. REV. 333, 342 (1999).

44. *See id.* at 342.

45. *Id.*

46. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); *see* Lidge, *supra* note 43, at 342.

47. Cude & Steger, *supra* note 8, at 376.

The plaintiff-employee's initial burden is to establish a prima facie case of retaliation by showing: (1) that she participated in statutorily protected expression, (2) that she was subject to an adverse employment action, and (3) that there was a causal link between the protected expression and the adverse action.[48] The conflict over which acts are adverse employment actions is crucial:

> Determining the point at which a plaintiff has established a prima facie case, therefore, is essential for two reasons. 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. Second, establishing a prima facie case shifts not only the burden but the entire battle. 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 to prove retaliation directly. At the outset, a plaintiff needs only enough evidence of protected activity, adverse action, and a causal connection to create an inference of retaliation. The fight then moves to the issue of whether the employer's stated non-retaliatory motive is pretextual.[49]

Thus, the scope of an adverse action often determines whether the "battle" will shift to the issue of the employer's pretext.[50]

Establishing the prima facie case is significant because it "creates the presumption that the employer unlawfully discriminated."[51] While the Supreme Court has indicated that this prima facie burden is not heavy, the scheme serves to,

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48. *McDonnell Douglas Corp.*, 411 U.S. at 802; Rhea Gertken, *Causation in Retaliation Claims: Conflict Between The Prima Facie Case and the Plaintiff's Ultimate Burden of Pretext*, 81 WASH. U. L.Q. 151, 154-55 (2003); *see* Courts, *supra* note 3, at 240.

49. *See* O'Brien, *supra* note 2, at 747.

50. *See id.*

51. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981); *see also* Lidge, *supra* note 43, at 344.

> "eliminate[] the most common nondiscriminatory reasons for the plaintiff's rejection." . . . Indeed, the purpose of the whole system of the allocation of the burdens of production is to progressively "sharpen the inquiry into the elusive factual question of intentional discrimination." Thus, the court has made it easy for the plaintiff to produce evidence creating a legal presumption in order to force out the evidence most probative of the defendant's intent.[52]

Once the plaintiff establishes the prima facie case, the employer bears the burden of production to show that there was a legitimate non-discriminatory reason for the action.[53] This reason need only raise a genuine issue of material fact about the employer's intent to discriminate.[54] This is the point at which the burden shifts from plaintiff to employer.[55]

Finally, the plaintiff must show that the employer's articulated reason for the adverse action was not the actual reason, but a pretext for discrimination.[56] The burden to prove that the non-retaliatory reason was only a pretext for discrimination "merges" with the plaintiff's ultimate burden of proving the employer's intentional discrimination.[57]

While courts have not commented on the role of the burden-shift procedure in defining an adverse action, it serves as an efficient "focusing" factor for the litigation by sifting through frivolous claims and forcing necessary evidence to the surface.[58] Without the burden shift, the plaintiff's burden to produce evidence of the employer's discriminatory intent may be too high.[59] Instead, this procedure

52. Lidge, *supra* note 43, at 344 (quoting *Burdine*, 450 U.S. at 254-55).
53. *See McDonnell Douglas Corp.*, 411 U.S. at 802.
54. *Burdine*, 450 U.S. at 256.
55. *Id.*
56. *Id.* at 255-56.
57. Lidge, *supra* note 43, at 345.
58. *Cf. id.* at 344.
59. *Cf. id.* at 342-46.

efficiently brings the real issues into focus by requiring the employer to produce the legitimate reasons for the action.[60]

This focusing provides its own limitations on the broad construction of an adverse action.[61] As seen in the Eleventh Circuit's case law, courts have used this burden shifting scheme to focus the appropriate issues and evidence.[62] This scheme has enabled them to sift through frivolous claims and act on valid ones.[63] It is by this procedure, coupled with a broad understanding of an adverse employment action, that courts have begun to more efficiently and precisely assign retaliatory remedies when they are due.[64]

III. THE POLICY TENSION BETWEEN THE CIRCUITS

Flowing through each of the circuits' decisions interpreting Title VII are policy considerations about the role of courts in employer-employee relationships.[65] While there is no dispute over congressional intent to prohibit discrimination and retaliation, the courts have struggled to determine when to intervene and which employer actions the statute prohibits.[66]

A. Interpreting the Statute Narrowly—"Ultimate Employment Decisions"

Courts that narrowly construe the language of Title VII hold that only those employer actions that rise to the level of "ultimate employment decisions" are actionable under the statute.[67] In these circuits, only employer actions such as firing, failing to grant leave, refusing to promote, and changing an employee's compensation are actionable retaliation.[68]

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60. *See id.* at 345.
61. *See infra* Part V.
62. *See* Lidge, *supra* note 43, at 344; *infra* Part IV.
63. *See infra* Part V; *cf.* Lidge, *supra* note 43, at 344.
64. *See infra* Part V.
65. *See infra* Parts III.A., III.B., III.C.; *cf.* Cude & Steger, *supra* note 8.
66. *See* O'Brien, *supra* note 2, at 742.
67. *See* Kravetz, *supra* note 34, at 330.
68. *See id.*; *see also* Courts, *supra* note 3, at 242.

These circuits have invoked several policy considerations. First, they reason that the bright-line effect of requiring "ultimate employment decisions" simplifies the court's investigation because the consequences are quantifiable and easily visible.[69] While the circuits disagree about whether co-worker harassment can constitute an adverse action, all courts concede that firing an employee in response to protected activity is unlawful retaliation.[70] Additionally, requiring an act affecting an "ultimate employment decision" does not impose the same costs to employers as a broad retaliation provision.[71] These circuits reason that under the broad interpretation the employee would hail the employer into court for a judicial determination of each employee related act.[72] The benefits of this pragmatic reading are clear: simplicity, consistency, and economy.[73]

Furthermore, because of the narrow interpretation's ease of application, requiring an ultimate employment decision will curb the rising flood of retaliation litigation by facilitating early settlements and not wasting judicial effort on frivolous claims.[74] This bright-line calculation removes the judge from reconsidering the business

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69. *See* Wiles, *supra* note 29, at 232; *see also* Cude & Steger, *supra* note 8, at 406

> [T]he Fifth Circuit intended to relieve courts of the onerous task of reviewing the minutiae of events that could be misinterpreted by overly sensitive or histrionic employees as retaliation. The Fifth Circuit also desired to relieve federal judges of the burden of micro-managing each public entity and private corporation covered by Title VII.

Cude & Steger, *supra* note 8, at 406.

70. *See* Courts, *supra* note 3, at 241.

71. *Cf.* Cude & Steger, *supra* note 8, at 406.

72. *See* Wiles, *supra* note 29, at 232; *see also* Cude & Steger, *supra* note 8, at 409 ("Otherwise, minor and even trivial employment actions that 'an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit.'" (quoting Smart v. Ball State Univ., 89 F.3d 437, 441 (7th Cir. 1996))).

73. *See generally* Cude & Steger, *supra* note 8, at 409.

74. For a summary of recent statistics on the increase in discrimination and retaliation filings, see Cude & Steger, *supra* note 8, at 412.

> All told, the number of employment discrimination suits has more than doubled over the past four years. The number of charges filed with the EEOC . . . grew from 64,000 to 95,000 between 1991 and 1994. In short, the EEOC and the federal judiciary are being deluged with an endless wave of employment discrimination cases.

Id.; *see also* Wiles, *supra* note 29, at 232 ("Imposing a more restrictive standard for analyzing what constitutes an adverse employment decision will also relieve courts of the growing number of retaliation claims. With retaliation claims on a seemingly endless increase, courts must be able to restrict their focus to the claims that have merit.").

judgment of the employer—a role that these circuits argue is beyond both the expertise and the duty of judges.[75]

Finally, narrowly-construing circuits reason that that the language of Title VII supports restricting retaliation to ultimate employment decisions.[76] While Congress could have articulated a broader scope of protection against retaliation, it chose not to do so.[77] These courts assert that this omission by Congress imports the scope of the general discrimination provision to retaliation cases.[78] This limitation confines adverse actions to those affecting the terms, conditions, and privileges of employment.[79]

In *Mattern v. Eastman Kodak Co.*,[80] the Fifth Circuit overturned a retaliation award for the plaintiff.[81] After filing a sexual harassment complaint, the plaintiff-employee allegedly suffered retaliation on several occasions:

> (1) [A]fter she went home sick, her supervisors went to her home to instruct her to return to work and report to the medical department if her illness was work related; (2) she was reprimanded for not being at her work station when at the time, she was reporting workplace hostilities to the employer's human resources department; (3) her supervisors and co-workers were hostile, ignored her, made verbal slights toward her, and broke into her locker and stole her tools; (4) her supervisor threatened to terminate her; (5) her work was reviewed more critically and, as a result, she was denied a pay increase; and (6) she was threatened with discipline for alleged work deficiencies when her

75. *See* Cude & Steger, *supra* note 8, at 406-07 ("The courts are not, were not intended to be, and should not become, personnel managers overseeing the day-to-day affairs of American businesses.").

76. Wiles, *supra* note 29, at 231.

77. Courts, *supra* note 3, at 242.

78. *See* Munday v. Waste Mgmt. of N. Am., Inc., 126 F.3d 239 (4th Cir. 1997).

79. *See* Wiles, *supra* note 29, at 231; *see also Munday*, 126 F.3d at 243.

80. 104 F.3d 702 (5th Cir. 1997).

81. *Id.* at 710.

> performance had previously been praised by the same individuals.[82]

The court noted that only adverse actions rising to the level of ultimate employment decisions "such as hiring, granting leave, discharging, promoting, and compensating" are actionable retaliation.[83] "Hostility from fellow employees, having tools stolen, and resulting anxiety, without more, do not constitute ultimate employment decisions, and therefore are not the required adverse employment actions." [84] The court reasoned that to render any of these acts actionable would be to unnecessarily expand the definition of adverse action.[85]

B. The Intermediate Approach

The Fourth Circuit has recognized that an adverse action need not affect an ultimate employment decision, yet it has not adopted the broad interpretation.[86] Instead, the Fourth Circuit looks to the text of Title VII to determine if there has been an adverse employment action that affects a "term, condition, or privilege of employment."[87] On its face the language appears to encompass those aspects of employment beyond termination and promotion, yet in implementation, this language often presents a hurdle that employees find hard to overcome because they must show materiality through a quantifiable adverse action.[88] "[T]he Fourth Circuit's approach is more closely aligned with the circuit courts taking a broad interpretation of section 704(a), because it recognizes that adverse

82. Kravetz, *supra* note 34, at 331.

83. *Mattern*, 104 F.3d at 707; *see also* Dollis v. Rubin, 77 F.3d 777, 782 (5th Cir. 1995).

84. *Mattern*, 104 F.3d at 707.

85. *See id.* at 708.

86. Kravetz, *supra* note 34, at 327-28.

87. *Id.* at 327.

88. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998). In *Ellerth*, the Court commented: "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 761.

employment actions can be something beyond ultimate employment decisions."[89]

In *Munday v. Waste Management of North America*,[90] the plaintiff filed a sexual harassment claim.[91] Upon returning to work after arbitration of the issue, the general manager told her coworkers to ignore her, spy on her, and report anything she did because he wanted to fire her.[92] The Fourth Circuit Court of Appeals found that this behavior "[did] not rise to the level of an adverse employment action for Title VII purposes."[93] While the Fourth Circuit recognized that decisions as to terms, conditions, and privileges can constitute adverse actions, employees face an uphill battle if the actions are not tangible or significant.[94] Particularly, the court stated: "In no case in this circuit have we found an adverse employment action to encompass a situation where the employer has instructed employees to ignore and spy on an employee who engaged in protected activity, without evidence that the terms, conditions, or benefits of her employment were adversely affected."[95]

C. Interpreting the Statute Broadly – Actions Falling Short of Ultimate Employment Decisions

Broadly-construing circuits hold that adverse employment actions can include employer actions falling short of ultimate employment decisions.[96] Courts in these circuits reason that if Congress had sought to restrict the scope of the retaliation statute, it would have done so.[97] Consequently, this congressional omission warrants a broad reading of "discrimination."[98] These circuits reject the ultimate employment decisions understanding and embrace the idea that

89. Courts, *supra* note 3, at 253.
90. 126 F.3d 239 (4th Cir. 1997).
91. *See id.* at 241.
92. *See id.* at 243; Kravetz, *supra* note 34, at 329.
93. *See Munday*, 126 F.3d at 243.
94. *Cf.* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
95. *Munday*, 126 F.3d at 243.
96. Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1456 (11th Cir. 1998).
97. *See* Courts, *supra* note 3, at 243.
98. *Id.*

"discriminate," as used in Title VII, includes all forms of retaliation.[99] Thus, retaliation encompasses behavior that creates a hostile work environment and places an undue burden on an employee's exercise of protected activity.[100]

Courts in broadly-construing circuits foster the policy of protecting employees by recognizing that retaliation can take many forms besides quantifiable actions such as adjusting compensation or benefits.[101] Advocates argue that requiring ultimate employment decisions has the effect of "immunizing employers who use hostile environment discrimination vengefully against" employees so long as the employer's actions do not rise to the level of ultimate employment decisions.[102] While recognizing that this reading of the statute will result in increased litigation, these broadly-construing circuits foster a more precise calculation of what constitutes an adverse action because they also consider actions that fall short of ultimate employment decisions.[103]

Additionally, a broad construction of the statute will have an increased deterrent effect on employers, thereby curtailing retaliatory acts in all forms.[104] After the filing of a discrimination complaint, employers will be reluctant to discriminate against employees in any way, and broad statutory construction will encourage employers to take affirmative steps to reduce workplace retaliation.[105] Thus, behavior such as telling coworkers not to speak with the employee,

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99. *Cf. Wideman*, 141 F.3d at 1456 (finding that "the term 'discriminate' is not limited to 'ultimate employment decisions'").

100. *See id.*

101. For examples of actions not cognizable under the ultimate employment decision criteria, see Cude & Steger, *supra* note 7, at 407 (1998) (listing noncognizable actions, including "oral reprimands and derogatory comments, a purely lateral transfer, a temporary transfer to a lower-grade position, negative performance evaluations, redesignation of a job title and a temporary grade reduction, informally meeting with the plaintiff in an attempt to peacefully resolve a dispute, the employer's request that the plaintiff-employee drop her EEOC charge, voluntary acceptance of an early retirement package, and troubled interactions with co-workers").

102. *See* Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1456 (11th Cir. 1998); Mattern v. Eastman Kodak Co., 104 F.3d 702, 720 (5th Cir. 1997) (Dennis, J., dissenting).

103. *See generally Wideman*, 141 F.3d at 1456.

104. *See generally id.* ("Permitting employers to discriminate against an employee who files a charge of discrimination so long as the retaliatory discrimination does not constitute an ultimate employment action, could stifle employees' willingness to file charges of discrimination.").

105. *See generally id.*

limiting overtime access to the employee, unjustifiably transferring the employee, limiting opportunities for advancement, and creating a hostile environment for the employee will be actionable and likely frustrated.[106]

These broadly-construing circuits fear that setting the bar too high for adverse actions will have a chilling effect on an employee's willingness to file a discrimination claim.[107] In response, some have adopted a case-by-case analysis to look at the details of each particular case to determine an adverse action.[108] These circuits look at not only the individual acts of the employers, but also at the collective action taken by the employer as a whole.[109]

Because the scope of actionable behavior is more extensive, broadly-construing courts seek a more precise remedy allocation than narrowly-construing circuits.[110] Thus, these circuits act to prevent retaliation at a level that would be under the radar of the narrow interpretation.[111] Broadly-construing circuits are willing to bear the costs of increased litigation, the costs to employers, and the cost of a more interventionist judiciary.[112] In exchange, these circuits address and remedy the practical reality that retaliatory behavior takes many forms beyond ultimate employment decisions.[113]

In the Second Circuit case of *Wanamaker v. Columbian Rope Co.*,[114] the court "recognized the possibility that while some

106. *See* Shannon v. BellSouth Telecomm., Inc., 292 F.3d 712, 714-16 (11th Cir. 2002); Doe v. Dekalb County Sch. Dist., 145 F.3d 1441, 1444 (11th Cir. 1998); *Wideman*, 141 F.3d at 1455-56.

107. Shotz v. City of Plantation, Fla., 344 F.3d 1161, 1182-83 (11th Cir. 2003) ("[W]hile conduct must be material to be adverse in this context, it need not be traumatic. If we set the bar too high, we run the risk of chilling legitimate opposition to unlawful and discriminatory practices, and 'could stifle [a person's] willingness to file charges of discrimination.'" (quoting *Wideman*, 141 F.3d at 1456 (citations omitted))).

108. *See* Courts, *supra* note 3, at 243; *see also* Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1456 (11th Cir. 1998).

109. *See Wideman*, 141 F.3d at 1456. In *Wideman*, the court refused to look at the "substantiality" of each of defendant's actions as adverse; instead, the court the concluded that "[it] is enough . . . that the actions about which Wideman complains considered *collectively* are sufficient to constitute prohibited discrimination." *Id.* (emphasis added).

110. *Cf. id.* at 1453.

111. *Cf. id.*

112. *Cf. id.*

113. *Cf. id.*

114. 108 F.3d 462 (2d Cir. 1997).

employment actions viewed alone would not be an adverse employment action, when viewed with others, they could become adverse employment actions."[115] Thus, these circuits embrace the view that while some employer actions might not rise to the level of an adverse action when considered independently, those actions *may* constitute an adverse action when considered collectively.[116]

IV. THE ELEVENTH CIRCUIT CASE LAW FROM *WIDEMAN* TO *SHOTZ*.

A. Wideman v. Wal-Mart Stores, Inc.[117]

In *Wideman*, the Eleventh Circuit implemented a broad construction of Title VII in the retaliation context.[118] After the plaintiff participated in a protected activity, she alleged the following:

> (1) [S]he was improperly listed as a no-show on her off day and when she brought it to her supervisor's attention, he forced her to work without a lunch break; (2) she received two written reprimands and a one-day suspension; (3) her supervisor solicited co-workers for negative statements about her; (4) after inquiring as to why she was not listed on the work schedule, a manager threatened to shoot her in the head; and (5) after suffering an allergic reaction at work, management needlessly delayed authorization for her to seek medical treatment.[119]

The court noted that it would not serve the policy interest in securing undeterred access to Title VII's protection by defining adverse actions as only those that rise to the level of ultimate employment decisions.[120] Recognizing that behavior beyond ultimate employment decisions could deter the filing of an EEOC claim, the

115. *Id.* at 466. For other cases, see *infra* Part V.

116. *See* Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1456 (11th Cir. 1998); *Wanamaker*, 108 F.3d at 466.

117. 141 F.3d at 1456

118. *See Wideman*, 141 F.3d at 1456.

119. Kravetz, *supra* note 34, at 350; *see also Wideman*, 141 F.3d at 1455.

120. *See* Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1456 (11th Cir. 1998).

court in *Wideman* broadened employee protection against retaliation.[121] The court reasoned that the acts suffered by Wideman, when considered collectively, were sufficiently adverse to require Title VII protection.[122] While the court recognized that there is "some threshold level of substantiality that must be met for unlawful discrimination to be cognizable under the anti-retaliation clause," courts would articulate the level of substantiality on a case-by-case basis.[123]

B. Doe v. Dekalb County School District[124]

In *Doe*, the plaintiff brought a retaliation claim when, in response to filing a discrimination complaint under the ADA, his employer moved him to a lateral position that did not require the same special education as his previous job.[125] The court reasoned that, in defining an adverse action, courts should not consider subjective preferences.[126] Instead, the court adopted an objective test: "An ADA plaintiff must demonstrate that a reasonable person in his position would view the employment action in question as adverse."[127]

The court's restriction of the *Wideman* holding to an objective determination was the first step toward ameliorating the concern of the narrowly-construing courts that there would be a deluge of trivial employment grievances filling the courts.[128] By adopting the reasonable person standard, the court removed subjective employee preferences from the adverse action determination, thereby tempering petty and inconsequential claims with reasonableness.[129] *Doe* signals

121. *Cf. id.*
122. *See id.*
123. *See id.*
124. 145 F.3d 1441 (11th Cir. 1998).
125. *See id.* at 1443-46.
126. *See id.* at 1448.
127. *Id.* at 1448-49.
128. *Cf.* Kravetz, *supra* note 34, at 322.
129. *See* Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996) ("Otherwise . . . every trivial personnel action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit."); *see also* Smart v. Ball State Univ., 89 F.3d 437, 441 (7th Cir. 1996) ("[N]ot everything that makes an employee unhappy is an actionable adverse action.").

the courts' ability to evaluate the total employment situation without legislating specific employment policy.[130]

C. Gupta v. Florida Board of Reagents[131]

In *Gupta,* the Eleventh Circuit used a systematic analysis of each of the alleged adverse actions to determine whether they rose to *Wideman's* "threshold level of substantiality."[132] The plaintiff claimed the following retaliatory actions:

> (1) [S]he was not given a pay raise despite an above satisfactory evaluation by her supervisor; (2) she was denied an extension on her tenure clock; (3) she was placed on the search committee for a position at the University's Boca Raton campus, which prevented her from applying for that position; (4) she was assigned to teach more credit hours than other professors and to teach classes on three different campuses in the Fall 1997 session; (5) she was not assigned to teach a desired class in the Summer 1995 second session; (6) Dean White's office intentionally delayed her visa application to the Immigration and Naturalization Service; and (7) the informal resolution process involving her sexual harassment claim was terminated without notice after she missed one deadline.[133]

After recognizing the allegations, the court began by evaluating the actions independently to determine if any constituted an adverse action.[134] The court found that the last five actions were not "objective[] and tangible enough" to sufficiently alter Gupta's employment opportunities.[135] The first two employer acts, however, constituted an adverse action for Gupta's prima facie case.[136] This

130. *See* Doe v. Dekalb County Sch. Dist., 145 F.3d 1441 (11th Cir. 1998).
131. 212 F.3d 571 (11th Cir. 2000).
132. *Id.* at 587; Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1456 (11th Cir. 1998).
133. *Gupta,* 212 F.3d at 587-88.
134. *See id.* at 588.
135. For a more thorough explanation, see *id.* at 588.
136. *See id.* at 590.

prompted the court to enter into a causation analysis, ultimately finding that the two acts were causally related to her filing a discrimination complaint.[137]

In response to Gupta's prima facie case for these two adverse actions, her employer explained that he based her merit raise on "appropriate and reasonable criteria" and that her request of a tenure clock extension was premature according to normal business practice.[138] Gupta could not prove that these two reasons for the employer's actions were a pretext for discrimination and therefore failed to maintain her retaliation claim.[139]

Gupta highlights the limiting characteristic of the *McDonnell Douglas* burden shifting procedure.[140] Here, despite establishing that an adverse action had occurred, Gupta was unable to prove the necessary pretext for retaliation.[141] Thus, the procedural effect of allowing the initial burden shift draws out the employer's legitimate reason for its action.[142] Next, the plaintiff must rebut the employer's reason by showing that the employer's articulated reasons for the action were pretextual.[143] As seen in *Gupta*, this aspect of the burden-shift procedure ameliorates the policy concerns of narrowly-construing circuits because the plaintiff does not establish the case solely upon the showing of an adverse action.[144] Instead, the plaintiff's burden of pretext presents a check on the broad interpretation of an adverse action by more squarely addressing those actions that are truly discriminatory.[145]

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137. *See* Gupta v. Fla. Bd. of Regents, 212 F.3d 571, 590-91 (11th Cir. 2000).
138. *Id.* at 592.
139. *Id.*
140. *Cf. id.* at 591.
141. *See id.*
142. *Cf. id.*
143. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 807 (1973).
144. *Cf.* Gupta v. Fla. Bd. of Regents, 212 F.3d 571, 590-92 (11th Cir. 2000).
145. *See generally id.* In narrowly-construing circuits, actions that fall short of ultimate employment decisions will not present a prima facie case because they will not satisfy the adverse action requirement. *See supra* Part III.A. Under the broad interpretation, courts consider and address retaliatory conduct, ultimately focusing on whether the conduct resulted from a retaliatory motive. *See supra* Part III.C. But for acts falling short of ultimate employment decisions under the narrow construction of Title VII, there would be no discussion of retaliatory motive, thus the court would not address the retaliatory behavior. *See supra* Part III.A. The broad construction facilitates a more thorough investigation to

D. Bass v. Board of County Commissioners[146]

In *Bass*, after dismissing two of the alleged adverse actions as "not objectively 'serious and tangible enough' to alter Bass's 'compensation, terms, conditions, or privileges of employment,'" the court moved on to consider the remaining five actions.[147] The court concluded that "depriving Bass of compensation which he otherwise would have earned" constituted an adverse action.[148] Further, "[w]hile the other actions might not have individually risen to the level of adverse employment action under Title VII, when those actions are considered collectively, the total weight of them does constitute an adverse employment action."[149]

Upon establishing causation, Bass's prima facie case was sufficient to shift the burden to the employer to produce evidence of a reasonable and non-retaliatory motive.[150] Here, Bass was able to show that the employer's reasons were sufficiently pretextual because he raised "a genuine issue of material fact concerning a causal connection between all of the adverse actions and Bass' filing of the EEOC complaint."[151]

E. Shannon v. Bellsouth Telecommunications[152]

In *Shannon*, after filing a religious discrimination complaint, the plaintiff alleged retaliation in the form of grossly decreased opportunity for overtime, reassignment to an area where it was more difficult to maintain his performance standards, instruction by his

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determine the extent of the retaliation. *Compare* Mattern v. Eastman Kodak Co., 104 F.3d 702 (5th Cir. 1997), *with* Gupta v. Fla. Bd. of Regents, 212 F.3d 571 (11th Cir. 2000).

146. 256 F.3d 1095 (11th Cir. 2001).

147. *Id.* at 1118

148. *Id.*

149. *Id.* at 1095 (citing Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1456 (11th Cir. 1998).

150. *See id.* at 1119.

> Bass filed his EEOC charge on December 19, 1995. Soon after Bass filed his EEOC complaint, he began to suffer adverse employment actions. The close temporal proximity between filing of the EEOC complaint and the adverse actions is sufficient in this case to satisfy the third prong of the prima facie case of retaliation.

Id.

151. *Bass*, 256 F.3d at 1119.

152. 292 F.3d 712 (11th Cir. 2002).

supervisor directing his coworkers to shun him, and assignment to an unairconditioned van.[153] The court recognized that unless the employer made a serious and material change in the plaintiff's duties, the court should not act as a "super-personnel department."[154] However, in light of the change in overtime hours, the court looked to a prior decision where it held that depriving the employee "of compensation which he otherwise would have earned clearly constitute[s] an adverse employment action[] for the purposes of Title VII."[155]

Here, the court utilized the broad interpretation of the Title VII to redress a grievance that would have failed if only considered in an ultimate employment decision jurisdiction because the access to overtime was not central to plaintiff's job details.[156] The court's characterizing of access to overtime as "compensation" indicates the court's willingness to consider the totality of the circumstances in allocating its remedy.[157]

F. Davis v. Town of Lake Park, Florida[158]

In *Davis*, the plaintiff received a performance memorandum of "unacceptable for any officer" and moved in and out of a position of responsibility on the police force.[159] The court found that "under Title VII's anti-discrimination clause the employer's action must impact the 'terms, conditions, or privileges' of the plaintiff's job in a real and demonstrable way."[160] In considering the plaintiff's claim, the court noted that "Congress simply did not intend for Title VII to be implicated where so comparatively little is at stake."[161]

Recognizing the danger of an interventionist judiciary, the court commented that "Title VII is not designed to make federal courts 'sit

153. *Id.* at 714-15.
154. *Id.* at 716.
155. *Id.*; Bass v. Bd. of County Comm'rs, 256 F.3d 1095, 1118 (11th Cir. 2001).
156. *See Shannon*, 292 F.3d at 716.
157. *See generally id.*
158. 245 F.3d 1232 (11th Cir. 2001).
159. *Id.* at 1236.
160. *Id.* at 1239.
161. *Id.* at 1240.

as a super-personnel department that reexamines an entity's business decisions.'"[162] Thus, the court took further steps to demarcate the outer bounds of the broad construction of Title VII, namely that there must be a "*serious and material* change in the terms, conditions, or privileges of employment."[163]

G. Lucas v. Grainger[164]

In *Lucas*, the plaintiff alleged an adverse action in poor performance ratings in his employment evaluation.[165] Here, the court re-asserted that an action is only adverse "if it results in some tangible negative, effect on the plaintiff's employment."[166] The court reasoned that because Grainger did not rely on the performance evaluations to make employment decisions regarding Lucas, the "[n]egative performance evaluations, standing alone, d[id] not constitute adverse employment action sufficient to satisfy the second element of a prima facie case of retaliation under the ADA."[167] Again, the court reasserted that while it would consider actions beyond the scope of ultimate employment decisions, those actions are not necessarily adverse.[168]

H. Shotz v. City of Plantation, Florida[169]

In *Shotz*, the defendant conducted an investigation of the plaintiff and obtained personal information consisting of "criminal, credit, and driving records, medical history, involvement in professional disciplinary and other civil proceedings, property ownership, social relationships, including an ongoing conflict with a neighbor, as well as a criminal report involving his wife."[170] While the trial court

162. *Id.* at 1244 (quoting Elrod v. Sears, Roebuck & Co., 939 F.2d 1466, 1470 (11th Cir. 1991)).
163. *Id.* at 1239.
164. 257 F.3d 1249 (11th Cir. 2001).
165. *Id.* at 1261.
166. *Id.*
167. *Id.*
168. *See id.*
169. 344 F.3d 1161 (11th Cir. 2003).
170. *Id.* at 1165.

dismissed the defendant's action as not sufficiently adverse to materially affect Shotz's terms of employment, the court of appeals found that this public disclosure by the city went far beyond the "job criticism or negative job review[s]" that *Davis* sought to protect.[171] The court found this action adverse because the "breadth of personal information [] goes beyond any legitimate bounds and thus is sufficient to establish a prima facie case of retaliation."[172] While maintaining that the first and third elements of a prima facie case were not in dispute, the court found that a reasonable person in Shotz's position would find the defendant's actions both adverse and appalling—thus sufficient to establish a prima facie case of retaliation.[173]

V. THE ELEVENTH CIRCUIT'S DEVELOPMENT AND ITS LEGITIMACY

The Eleventh Circuit sets precedents not only by its willingness to expand its understanding of Title VII, but also by demarcating the bounds of an adverse action as material, substantial, and unreasonable in order to balance the impending threat of legislating employer policy.[174] By incorporating reasonableness into its adverse action calculation, the court removes the subjective eccentricities and preferences of a negative employment relationship, thereby focusing on those acts that materially affect worker relationships in the overall environment.[175]

As in *Gupta*, when the adverse action is cognizable under the statute, the *McDonnell Douglas* burden shifting framework provides an initial limitation on retaliation claims by requiring the plaintiff to

171. *See id.* at 1182.

172. *Id.* at 1183.

173. *See id.*

174. *Cf.* Gupta v. Fla. Bd. of Regents, 212 F.3d 571, 588 (11th Cir. 2000); Doe v. Dekalb County Sch. Dist., 145 F.3d 1441, 1448-49 (11th Cir. 1998).

175. *See Doe*, 145 F.3d at 1449; *see also* Davis v. Town of Lake Park, 245 F.3d 1232, 1239 (11th Cir. 2001) ("[T]he employer's action must impact the 'terms, conditions, or privileges' of the plaintiff's job in a real and demonstrable way."); Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996) ("Otherwise . . . every trivial personnel action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit."); Smart v. Ball State Univ., 89 F.3d 437, 441 (7th Cir. 1996) ("[N]ot everything that makes an employee unhappy is an actionable adverse action.").

prove that the employer's reasons for the action were a pretext for discrimination.[176] Offering the plaintiff a burden shift upon proving a prima facie case appears to pull many employment relationships into the courtroom because of the broader construction of an adverse action.[177] At first glance, these cases appear to include illegitimate claims that do not spring from a retaliatory motive.[178] However, the pretext requirement for employer reasoning demands that adverse actions be the result of a discriminatory motive.[179] Thus, proof of an adverse action is not necessarily dispositive of retaliation because that adverse action still must flow from a discriminatory motive.[180] This procedural stop-gate, though overlooked by the narrowly-construing circuits, legitimates the Eleventh Circuit's broad interpretation of an adverse action.[181]

Furthermore, the Eleventh Circuit's implementation of its broadly-constructed adverse action has preserved the plaintiff-employee's exercise of Title VII's relief mechanisms by recognizing the deterrent effect that an ultimate employment decisions threshold can have on the employee's protected activity.[182] "If we set the bar too high, we run the risk of chilling legitimate opposition to unlawful and discriminatory practices, and 'could stifle a person's willingness to file charges of discrimination'"[183] The Eleventh Circuit's case law illustrates that the broad understanding of an adverse action does not render the court powerless to reject claims, and neither does it give rise to lawsuits for every petty or trivial slight.[184]

The court used the cases of *Doe* (reasonableness), *Davis* (unfavorable job reviews are not independently adverse), *Lucas* (poor

176. *See supra* Part II.

177. *See generally* Cude & Steger, *supra* note 8.

178. *See id.*

179. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Lidge, *supra* note 43; *supra* Part II.

180. *McDonnell Douglas Corp.*, 411 U.S. at 806.

181. *Cf. id.*

182. *See* Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1456 (11th Cir. 1998).

183. Shotz v. City of Plantation, Fla., 344 F.3d 1161, 1182-83 (11th Cir. 2003) (quoting *Wideman*, 141 F.3d at 1456).

184. *See* Gupta v. Fla. Bd. of Regents, 212 F.3d 571, 592 (11th Cir. 2000); *supra* text accompanying note 129.

performance rating is not enough) and *Gupta* (despite an adverse action, employee must prove pretext) to establish the limits of *Wideman's* broad understanding.[185] These cases gave the court the necessary tools to sift through invalid retaliation claims.[186] While the narrowly-construing circuits maintain that the "deluge" of litigation should be confined by those actions solely affecting ultimate employment decisions, the Eleventh Circuit has reconciled the policy interest of confining the retaliation inquiry with an adverse action calculation that is as broad as an employer's material retaliation.[187] It is this reconciliation of policy interests that justifies the use of the broad understanding of an adverse action.[188]

This adoption of the Eleventh Circuit view should trigger a response in employers to affirmatively curtail retaliatory actions in the workplace.[189] *Wideman* and its progeny serve to immunize employees and sanitize employer motives by eradicating retaliation in the workplace.[190] Notice of both a change in the law and of an employee's discrimination claim uniquely situates employers to ameliorate retaliatory measures.[191] The material and substantial change requirement of the Eleventh Circuit, coupled with the

185. *See Gupta*, 212 F.3d at 592; Lucas v. Grainger, Inc., 257 F.3d 1249, 1261 (11th Cir. 2001); Davis v. Town of Lake Park, 245 F.3d 1232, 1239 (11th Cir. 2001); Doe v. Dekalb County Sch. Dist., 145 F.3d 1441, 1449 (11th Cir. 1998); Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1456 (11th Cir. 1998).

186. *See Gupta*, 212 F.3d at 592; Lucas v. Grainger, Inc., 257 F.3d 1249, 1261 (11th Cir. 2001); Davis v. Town of Lake Park, 245 F.3d 1232, 1239 (11th Cir. 2001); Doe v. Dekalb County Sch. Dist., 145 F.3d 1441, 1449 (11th Cir. 1998); Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1456 (11th Cir. 1998).

187. *See Gupta*, 212 F.3d at 592; Lucas v. Grainger, Inc., 257 F.3d 1249, 1261 (11th Cir. 2001); Davis v. Town of Lake Park, 245 F.3d 1232, 1239 (11th Cir. 2001); Doe v. Dekalb County Sch. Dist., 145 F.3d 1441, 1449 (11th Cir. 1998); Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1456 (11th Cir. 1998).

188. *See Gupta*, 212 F.3d at 592; Lucas v. Grainger, Inc., 257 F.3d 1249, 1261 (11th Cir. 2001); Davis v. Town of Lake Park, 245 F.3d 1232, 1239 (11th Cir. 2001); Doe v. Dekalb County Sch. Dist., 145 F.3d 1441, 1449 (11th Cir. 1998); Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1456 (11th Cir. 1998).

189. *See Wideman*, 141 F.3d at 1456; *see also* Kravetz, *supra* note 34, at 355 (arguing that "courts should endorse the EEOC's deterrence standard, which requires a fact finder to consider whether a negative employment action would be reasonably likely to deter a charging party or others from engaging in protected activity").

190. *Cf. Wideman*, 141 F.3d at 1456.

191. *Cf. id.*

objective test for an employee in that situation, shields employers from those illegitimate suits outside their sphere of influence.[192]

While the Eleventh Circuit has taken the majority stance on this issue, the remaining circuits should follow.[193] The increasingly complex nature of the workplace, and an increasing recognition by courts that there are more ways to discriminate than hiring and firing, indicates that there is a need for more informed remedy allocation in discrimination and retaliation suits.[194] The broad construction of Title VII, together with the separating line of materiality and substantiality, are the carrot and the stick required to provide a cause of action when necessary and, at the same time, preserves an employer's decisional autonomy.[195]

CONCLUSION

While *Wideman* opened the door to a more expansive understanding of what constitutes an adverse action, subsequent case law refined, focused, and limited that determination to avoid the pitfalls that the narrowly-construing circuits sought to avoid.[196] While narrowly-construing circuits would argue that the flood of litigation resulting from second guessing employment decisions would overwhelm the courts, the Eleventh Circuit has proven both capable and competent to keep the tide at bay.[197] This is true for two main reasons. First, the procedural burden shifting effect of *McDonnell Douglas* does not end the court's determination at the definition of adverse action; instead, the Eleventh Circuit's case law has proven that the focusing effect of the procedure limits baseless claims while endorsing valid ones.[198] Second, the broad construction of Title VII's retaliation provision has not frustrated the court's ability to limit the scope of an adverse action; instead, it has empowered the court to act

192. *Cf. id.* ("Not everything that makes an employee unhappy is an actionable adverse action.").
193. *See supra* Part V.
194. *See supra* Part V.
195. *See supra* Part V.
196. *See supra* Part V.
197. *See supra* Part IV.
198. *See supra* Parts II, IV.

when necessary without undercutting its ability to reject claims that lack a retaliatory motive.[199] It is the combination of these two factors—the burden shifting scheme and the tempered broad construction of an adverse action—that most efficiently accomplish the goals of Title VII's retaliation provision.[200]

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199. *See supra* Part V.
200. *See supra* Parts II, IV, V.