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ADOPTING THE EEOC DETERRENCE APPROACH TO THE ADVERSE EMPLOYMENT ACTION PRONG IN A PRIMA FACIE CASE FOR TITLE VII RETALIATION

Abstract: Section 704(a) of Title VII of the Civil Rights Act of 1964 protects employees who oppose what they consider to be workplace discrimination from subsequent employer retaliation. The retaliation provision, however, does not delineate the types of discriminatory acts that an employer is prohibited from taking. Thus, the federal circuit courts of appeals are divided on what types of acts rise to the level of adverse action such that an employee plaintiff may establish a prima facie case of retaliation. The U.S. Supreme Court has stated that the purpose of the retaliation provision is to maintain unfettered access to Title VII's remedial mechanisms. This Note argues that the most appropriate way to do this is to ensure that all retaliatory acts that would likely deter an employee from filing a discrimination charge or otherwise opposing discriminatory activity should be prohibited.

INTRODUCTION

Title VII of the Civil Rights Act of 1964's prohibition on retaliation is essential in ensuring that employees do not suffer quietly through workplace discrimination without voicing their complaints.¹ When employees oppose what they consider to be discriminatory acts or behavior, an employer may not then discriminate against those employees for doing so.²

Recently, retaliation claims have received a great deal of attention from courts as well as legal commentators.³ In part, this is due to the

¹ See Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a)(1)-(2), -3(a) (2000).

² See *id.* § 2000e-3(a).

³ See *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000); Donna Smith Cude & Brian M. Steger, *Does Justice Need Glasses? Unlawful Retaliation Under Title VII Following Matern: Will Courts Know It When They See It?*, 14 LAB. LAW. 373, 373-75 (1998); 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, 316-18 (2002); Matthew J. Wiles, Note, *Defining Adverse*

proliferation of retaliation claims.⁴ Plaintiffs find that they can recover on a retaliation claim even when the court dismisses their underlying claim.⁵ Retaliation claims have been successful with juries, and in 2003, they accounted for 27.9% of all claims filed with the Equal Employment Opportunity Commission (the "EEOC").⁶

Aside from the statistical increase in retaliation claims, legal commentators and courts have been interested in these claims because the federal circuit courts of appeals are divided on what types of retaliatory actions an employer can be liable for taking, that is, what constitutes an adverse employment action.⁷ This disagreement is rooted in the ambiguity of the language in section 704(a) of Title VII, the retaliation provision, as well as the lack of legislative history associated with it.⁸ At one end of the debate, the U.S. Courts of Appeals for the Fifth and Eighth Circuits hold that an employer can be liable only for retaliation when it makes an ultimate employment decision, such as hiring, discharging, failing to promote, demoting, or changing compensation.⁹ A second group of circuits adopts an intermediate threshold, holding that decisions materially affecting the terms and conditions of employment may be actionable.¹⁰ At the other end of the spectrum, a number of circuits, including the U.S. Courts of Appeals for the First, Seventh, Tenth, Eleventh, and District of Columbia Circuits employ a broad, case-by-case approach, which focuses on the retaliatory motive rather than solely on the severity of the action.¹¹ The EEOC endorses a deterrence

Employment Action in Title VII Claims for Employer Retaliation: Determining the Most Appropriate Standard, 27 U. DAYTON L. REV. 217, 218–20 (2001).

⁴ See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, CHARGE STATISTICS, FY 1992 THROUGH FY 2003, <http://www.eeoc.gov/stats/charges.html> (last modified Mar. 8, 2004).

⁵ *Pryor v. Seyfarth, Shaw, Fairweather & Geraldson*, 212 F.3d 976, 980 (7th Cir. 2000); see *Passatino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 506 (9th Cir. 2000); *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1140 (5th Cir. 1981).

⁶ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *supra* note 4.

⁷ See *Shannon v. Bellsouth Telecomms., Inc.*, 292 F.3d 712, 716 (11th Cir. 2002); *Von Gunten v. Maryland*, 243 F.3d 858, 866 (4th Cir. 2001); *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997); *Cude & Steger*, *supra* note 3, at 373–75; *Kravetz*, *supra* note 3, at 316–18; *Wiles*, *supra* note 3, at 218–20.

⁸ See 42 U.S.C. § 2000e-3(a) (2000); Eric M.D. Zion, Note, *Overcoming Adversity: Distinguishing Retaliation from General Prohibitions Under Federal Employment Discrimination Law*, 76 IND. L.J. 191, 196 (2001).

⁹ *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997); *Mattern*, 104 F.3d at 707.

¹⁰ See *Akers v. Alvey*, 338 F.3d 491, 497–98 (6th Cir. 2003); *Von Gunten*, 243 F.3d at 866; *Torres v. Pisano*, 116 F.3d 625, 640 (2d Cir. 1997).

¹¹ See *Ray*, 217 F.3d at 1240; *Gunnell v. Utah Valley State Coll.*, 152 F.3d 1253, 1264 (10th Cir. 1998); *Corneveaux v. CUNA Mut. Ins. Group*, 76 F.3d 1498, 1507 (10th Cir. 1996); *Passer v. Am. Chem. Soc'y*, 935 F.2d 322, 331 (D.C. Cir. 1991).

approach, whereby any act reasonably likely to deter the plaintiff or others from exercising their statutory rights amounts to an adverse employment action.¹² The U.S. Court of Appeals for the Ninth Circuit is the only one to adopt the EEOC's approach explicitly.¹³

The use of these different standards produces inconsistent results depending on which jurisdiction the claim is brought in.¹⁴ Employers and employees are left without a clear understanding of what facts are sufficient to establish a prima facie case of retaliation.¹⁵ The U.S. Supreme Court should grant certiorari and end the disagreement among the federal circuit courts of appeals as to which standard to employ.¹⁶ The most appropriate standard is the EEOC's deterrence approach, primarily because it is the most consistent with the purpose of Title VII generally and the retaliation provision specifically, as well as U.S. Supreme Court precedent.¹⁷

Part I.A of this Note provides an outline of the text of Title VII's discrimination and retaliation provisions, along with a discussion of their purpose.¹⁸ Part I.B explains what a plaintiff must demonstrate to establish a prima facie case of retaliation.¹⁹ Part I.C explores the differences in Title VII's general discrimination and retaliation provisions and relevant U.S. Supreme Court precedent addressing Title VII.²⁰

Next, Part II provides an overview of the current divide among federal circuit courts of appeals by exploring the different approaches that they employ.²¹ Part III.A provides an example of the varying results produced by the different approaches to defining an adverse employment action.²² Part III.B argues that the deterrence approach is most consistent with the language and purpose of Title VII, as articulated by the U.S. Supreme Court.²³ Part III.C argues that courts should defer to the reasoned judgment of the EEOC in adopting the deterrence approach.²⁴ Next, Part III.D contends that in light of an affirmative de-

¹² U.S. EQUAL OPPORTUNITY COMM'N, COMPLIANCE MANUAL, § 8, at 8-13 (May 20, 1998); available at <http://www.eeoc.gov/policy/docs/retal.pdf>.

¹³ *Ray*, 217 F.3d at 1243.

¹⁴ See *infra* notes 234-244 and accompanying text.

¹⁵ See *infra* notes 234-244 and accompanying text.

¹⁶ See *infra* notes 234-244 and accompanying text.

¹⁷ See *infra* notes 245-279 and accompanying text.

¹⁸ See *infra* notes 27-47 and accompanying text.

¹⁹ See *infra* notes 48-105 and accompanying text.

²⁰ See *infra* notes 106-134 and accompanying text.

²¹ See *infra* notes 135-208 and accompanying text.

²² See *infra* notes 209-244 and accompanying text.

²³ See *infra* notes 245-279 and accompanying text.

²⁴ See *infra* notes 280-288 and accompanying text.

fense to supervisory harassment established by the U.S. Supreme Court, the deterrence approach is most logical to ensure that employees can adequately exercise their rights.²⁵ Finally, Part III.E contends that employers have ways within Title VII to manage their workplaces effectively; the adverse employment action requirement is not, however, the appropriate vehicle to take this concern into account.²⁶

I. TITLE VII AND THE RETALIATION PROVISION

A. *Title VII's Language, Purpose, and Use*

The goal of Title VII of the Civil Rights Act of 1964 is to eliminate discrimination in employment, public accommodations, and public education.²⁷ In terms of employment, this goal has been explained as "achiev[ing] equality of employment opportunities and remov[ing] barriers that have operated in the past to favor an identifiable group of white employees over other employees."²⁸ The U.S. Supreme Court has stated that Title VII protects employees against a workplace full of "discriminatory intimidation, ridicule, and insult."²⁹

Title VII prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin.³⁰ Specifically, the general discrimination provision of Title VII, section 703(a), makes it unlawful for an employer

- (1) 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; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.³¹

²⁵ See *infra* notes 289-299 and accompanying text.

²⁶ See *infra* notes 300-331 and accompanying text.

²⁷ See 42 U.S.C. § 2000e-2(a)(1)-(2) (2000).

²⁸ *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971).

²⁹ *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986).

³⁰ 42 U.S.C. § 2000e-2(a)(1).

³¹ *Id.* § 2000e-2(a)(1)-(2).

To give effect to section 703(a), section 704(a) prohibits employers from retaliating against employees who have filed a discrimination charge or otherwise opposed a discriminatory employment practice.³² A section 704(a) retaliation claim arises when an employee files a complaint accusing an employer of discriminating against him or her, and the employer retaliates against the employee for filing the initial claim.³³

Section 704(a) of Title VII prohibits retaliation by employers, employment agencies, and labor organizations against employees, applicants, union members, and other individuals who either (1) opposed an unlawful employment practice or (2) made a charge or testified, assisted, or participated in an investigation, proceeding, or hearing under the statute.³⁴ These two different types of protection are referred to as the "opposition" and "participation" clauses.³⁵

Retaliation charges serve as independent legal claims, which do not depend on the validity of the underlying claim.³⁶ In some cases, courts have found that there was no discrimination based on the employee's protected class status, but nevertheless have allowed recovery for an employer's adverse action taken in retaliation for the employee's filing of a claim of discrimination.³⁷ Given retaliation claims' proven success with juries, it is becoming common for plaintiffs to add them to their discrimination claims.³⁸ In fact, retaliation claims

³² *Id.* § 2000e-3(a).

³³ *See id.*

³⁴ *See id.* The retaliation provision reads as follows:

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.

³⁵ *See* 42 U.S.C. § 2000e-3(a).

³⁶ *Pryor v. Seyfarth, Shaw, Fairweather & Geraldson*, 212 F.3d 976, 980 (7th Cir. 2000); *see Passatino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 506 (9th Cir. 2000); *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1140 (5th Cir. 1981).

³⁷ *Pryor*, 212 F.3d at 980; *see Passatino*, 212 F.3d at 506; *Payne*, 654 F.2d at 1140.

³⁸ *See* WAYNE N. OUTTEN ET AL., PRACTICING LAW INST., WHEN YOUR EMPLOYER THINKS YOU ACTED DISLOYALLY: THE GUARANTEES AND UNCERTAINTIES OF RETALIATION LAW 151, 153 (2003); U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *supra* note 4.

increased by over 10% in the 1990s,³⁹ and in 2003, 27.9% of all claims filed with the EEOC were for retaliation.⁴⁰

For example, in 2000, in *Fine v. Ryan International Airports*, the Seventh Circuit Court of Appeals upheld the plaintiff's jury verdict on her retaliation claim, even though the underlying sexual harassment and sex discrimination charges were dismissed because they were time-barred and the employer offered a legitimate business reason that was non-pretextual.⁴¹ The jury awarded the plaintiff a mere \$6000 in compensatory damages, but \$3.5 million in punitive damages.⁴² The court later reduced this to the statutory maximum of \$300,000.⁴³

Although it has been utilized heavily by plaintiffs, Congress spent little time debating section 704(a), leaving courts with negligible legislative history to elucidate interpretation of the section.⁴⁴ In fact, the House Judiciary Committee's report to Congress, which accompanied the Civil Rights Act of 1964, contained commentary on section 704(a) that was almost the precise wording of the section itself.⁴⁵ Thus, Congress provided little guidance on how courts and employers should interpret this provision.⁴⁶ Because of this, differing standards have emerged, making it difficult for employers and employees to understand their rights and responsibilities with respect to retaliation.⁴⁷

B. Establishing a *Prima Facie* Case of Retaliation

1. Burden-Shifting Framework

In 1973, the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green* held that a plaintiff in a discrimination case may demonstrate discrimination, in the absence of direct evidence, by establishing a *prima facie* case.⁴⁸ Once the *prima facie* case is established, the burden shifts to the defendant to articulate some legitimate, non-discriminatory rea-

³⁹ See Wiles, *supra* note 3, at 218.

⁴⁰ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *supra* note 4.

⁴¹ 305 F.3d 746, 751, 754, 757 (7th Cir. 2002).

⁴² *Id.* at 751.

⁴³ *Id.*

⁴⁴ See Zion, *supra* note 8, at 196–97.

⁴⁵ See *id.*

⁴⁶ See *id.*

⁴⁷ See *infra* notes 135–208 and accompanying text.

⁴⁸ See 411 U.S. 792, 802 (1973).

son for the employment action.⁴⁹ Courts analyze Title VII retaliation claims similarly to the way they analyze Title VII discrimination claims.⁵⁰

In order to establish a prima facie case for retaliation, the plaintiff must show the following: (1) that he or she engaged in a statutorily protected activity, (2) that he or she suffered some adverse action by his or her employer, and (3) that there exists a causal link between the protected expression and the adverse action.⁵¹ If the plaintiff establishes a prima facie case using this three-prong test, then the burden shifts to the employer to produce a valid, non-retaliatory reason for the action.⁵² In order to prevail, the plaintiff must then rebut the employer's proffered reason by proving that it is a mere pretext for discrimination.⁵³

Taking this a step further, in 2000, in *Reeves v. Sanderson Plumbing Products, Inc.*, the U.S. Supreme Court held that when a plaintiff can establish a prima facie case of discrimination and there is sufficient evidence for a reasonable factfinder to discredit the defendant's proffered nondiscriminatory explanation for the action, this may be enough to sustain a finding of discrimination.⁵⁴ In *Reeves*, the plaintiff established a prima facie case, and the employer contended that the plaintiff was fired for shoddy recordkeeping.⁵⁵ Although the plaintiff could not show that he was fired because of his age, he was able to show that he had properly maintained the attendance records.⁵⁶ After the plaintiff demonstrated that the employer's proffered reason was not supported by the evidence, the jury was free to conclude that the actual reason for the plaintiff's discharge was discriminatory.⁵⁷ This same principle applies in retaliation cases—a plaintiff can prevail by demonstrating that the employer's proffered legitimate business reason is false.⁵⁸

2. First Prong: Protected Activities

In order to satisfy the first prong of a prima facie case, plaintiffs must show that they either opposed an employer practice that is pro-

⁴⁹ See *id.*

⁵⁰ See *Montemayor v. City of San Antonio*, 276 F.3d 687, 692 (5th Cir. 2001).

⁵¹ *Id.*

⁵² See *id.*

⁵³ *Id.* at 693.

⁵⁴ 530 U.S. 133, 147 (2000).

⁵⁵ *Id.* at 143.

⁵⁶ *Id.* at 144–45.

⁵⁷ *Id.* at 147–48.

⁵⁸ See *Montemayor*, 276 F.3d at 693.

hibited by Title VII, or participated in either filing a charge, testifying, or assisting in any manner in an investigation, proceeding, or hearing under Title VII.⁵⁹

The opposition clause covers a broader range of activities than the participation clause, including public protests and letters to officials; the protection against retaliation, however, is narrow.⁶⁰ The basic limitation is that the employee's activities must be reasonable and the employee must have a good faith belief that the opposed employer conduct was discriminatory.⁶¹

Conversely, the participation clause covers fewer activities, but offers a greater degree of protection against retaliation.⁶² The most typical type of participation involves the plaintiff filing a discrimination charge against his or her employer, but also includes other activities, such as providing testimony or assisting in an investigation.⁶³ The underlying charge of discrimination does not have to be valid, and unlike the opposition clause, there is not a reasonableness standard.⁶⁴

In 1976, the First Circuit Court of Appeals in *Hochstadt v. Worcester Foundation for Experimental Biology* established the extent to which an employer can discipline or terminate an employee who opposed and participated in filing a claim against allegedly discriminatory conduct.⁶⁵ In that case, the court held that the plaintiff's actions went beyond the scope of protected opposition that section 704(a) is meant to encompass because the plaintiff's complaints were exceedingly hostile, disruptive, and excessive in the context of that particular workplace.⁶⁶ The court reasoned that in cases in which plaintiffs constantly complain in a hostile and disruptive way, the court must balance the setting in which the activity arises and the interests and motivations of both the employer and employee.⁶⁷ In *Hochstadt*, the employment setting was a laboratory, and the employer had a strong interest in maintaining a cooperative working environment, which would allow for the exchange

⁵⁹ See U.S. EQUAL OPPORTUNITY COMM'N, *supra* note 12, at 8-3.

⁶⁰ See *id.* at 8-3 to -11.

⁶¹ See *id.* at 8-7 to -8.

⁶² See *id.* at 8-10.

⁶³ See *id.* at 8-9 to -10.

⁶⁴ See U.S. EQUAL OPPORTUNITY COMM'N, *supra* note 12, at 8-10.

⁶⁵ See 545 F.2d 222, 227-29, 233 (1st Cir. 1976).

⁶⁶ See *id.* at 233.

⁶⁷ See *id.*

of research and ideas.⁶⁸ Therefore, by complaining in such a manner, the plaintiff's actions were beyond the scope of protected opposition.⁶⁹

Courts have declined to extend the holding of *Hochstadt* to acts of mere disloyalty because nearly every form of opposition could be considered disloyal.⁷⁰ Courts that have followed *Hochstadt* evaluate the level of interference with the plaintiff's job performance in determining whether the opposition falls outside the protection of Title VII and serves as a legitimate reason for the employer's action.⁷¹

Some courts hold that there is no protected activity involved when a plaintiff complains in a disruptive or insubordinate manner; however, other courts hold that this disruptive behavior provides the employer with a legitimate business reason for the adverse action.⁷² In 2000, in *Matima v. Celli*, the Second Circuit Court of Appeals held that the employer had offered a legitimate reason for terminating the plaintiff's employment when the plaintiff pressed his complaints in a disruptive and insubordinate manner.⁷³ The court noted that other circuits have held similarly, although the courts disagree where to locate this principle within the prima facie case.⁷⁴ Some courts find that the plaintiff did not engage in protected oppositional activity, whereas others find that the employer's proffered reason for the conduct was legitimate.⁷⁵

In *Matima*, however, because the plaintiff actually filed a formal complaint, which is unquestionably a protected activity, the burden shifted to the employer, who articulated the employee's disruptive and

⁶⁸ *Id.*

⁶⁹ *Id.* at 230.

⁷⁰ See *Grant v. Hazelett Strip-Casting Corp.*, 880 F.2d 1564, 1570 (2d Cir. 1989) (agreeing with the Ninth Circuit Court of Appeals that *Hochstadt* must be read narrowly to ensure that valid opposition by employees asserting civil rights is not chilled); *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1014 (9th Cir. 1983) (stating that if discipline may be imposed because of mere disloyal conduct, protected activities under section 704(a) would essentially be eliminated because all opposition is in some way disloyal to the employer).

⁷¹ See *Crown Zellerbach*, 720 F.2d at 1015.

⁷² See *Matima v. Celli*, 228 F.3d 68, 79, 80 (2d Cir. 2000); see also *Robbins v. Jefferson County Sch. Dist.*, 186 F.3d 1253, 1260 (10th Cir. 1999) (holding that the employee's activities were not reasonable and did not constitute protected opposition), *abrogated on other grounds by Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *Laughlin v. Metro. Wash. Airports Auth.*, 149 F.3d 253, 259 (4th Cir. 1998) (holding as a matter of law that the plaintiff did not engage in protected activities); *Rosser v. Laborers' Int'l Union, Local 438*, 616 F.2d 221, 224 (5th Cir. 1980) (stating that although the plaintiff established a prima facie case for retaliation, the employer offered a legitimate business reason for the adverse action it took because the employee's political opposition put her loyalty and cooperation in dispute).

⁷³ See *Matima*, 228 F.3d at 80-81.

⁷⁴ See *id.* at 79-80.

⁷⁵ See *id.*; *Robbins*, 186 F.3d at 1260; *Laughlin*, 149 F.3d at 259; *Rosser*, 616 F.2d at 224.

inappropriate behavior as a legitimate, nondiscriminatory ground for the action.⁷⁶ The question then became whether the employee had demonstrated that the stated reason was a pretext for illegal retaliation.⁷⁷ Because there was substantial evidence that the plaintiff's behavior was significantly disruptive, the court upheld the jury's finding that the employer would have fired the plaintiff even in the absence of retaliation.⁷⁸

Additionally, for an oppositional activity to be considered protected, plaintiffs must have a good faith belief that the conduct of which they complain was discriminatory.⁷⁹ In 2001, the U.S. Supreme Court in *Clark County School District v. Breeden* addressed the limit of this good faith standard necessary to satisfy the first prong of the prima facie case.⁸⁰ The Court held that no one could reasonably and in good faith believe that the recitation of an inappropriate comment made by an applicant, stated in the context of screening that applicant, violated Title VII.⁸¹ Therefore, the plaintiff did not engage in a protected activity.⁸²

Once plaintiffs establish that they have engaged in a protected activity, they next must establish that the employer took some sort of adverse action against them.⁸³ This next prong is the most contentious and is discussed at length in this Note.⁸⁴

3. Second Prong: Adverse Employment Action

Much of the debate surrounding retaliation claims involves the second prong of the plaintiff's prima facie case, specifically, what constitutes an adverse employment action.⁸⁵ The federal circuit courts of appeals are divided as to what standard courts should use in determining whether employer conduct amounts to an adverse action in a re-

⁷⁶ See *Matima*, 228 F.3d at 80.

⁷⁷ See *id.*

⁷⁸ See *id.* at 80–81.

⁷⁹ *Wyatt v. City of Boston*, 35 F.3d 13, 15 (1st Cir. 1994).

⁸⁰ See 532 U.S. 268, 270 (2001). In *Clark County*, the plaintiff alleged that she was sexually harassed when a manager, in discussing whether to hire a prospective employee, merely repeated an inappropriate comment that the prospective employee made, in the presence of the plaintiff. See *id.* at 269.

⁸¹ See *id.* at 269–70.

⁸² See *id.* at 270.

⁸³ See, e.g., *Montemayor*, 276 F.3d at 692.

⁸⁴ See *infra* notes 135–331 and accompanying text.

⁸⁵ See *Shannon v. BellSouth Telecomms., Inc.*, 292 F.3d 712, 716 (11th Cir. 2002); *Von Gunten v. Maryland*, 243 F.3d 858, 866 (4th Cir. 2001); *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997).

taliation claim.⁸⁶ This disagreement stems from the ambiguity of the language in section 704(a) of Title VII, the retaliation provision, as well as the lack of legislative history associated with it.⁸⁷ The U.S. Courts of Appeals for the Fifth and Eighth Circuits take a restrictive approach and hold that an employer can only be liable for retaliation when it makes an ultimate employment decision, such as hiring, discharging, failing to promote, demoting, or changing compensation.⁸⁸ The U.S. Courts of Appeals for the Second, Third, Fourth, and Sixth Circuits use an intermediate threshold and hold that decisions materially affecting the terms and conditions of employment may be actionable.⁸⁹ A third group, including the U.S. Courts of Appeals for the First, Seventh, Tenth, Eleventh, and District of Columbia Circuits, employs a broad, case-by-case approach, which focuses on the retaliatory motive rather than solely on the severity of the action.⁹⁰ The EEOC endorses a broad but slightly different approach, whereby any act reasonably likely to deter the plaintiff or others from exercising their statutory rights amounts to an adverse employment action.⁹¹ The Ninth Circuit has embraced the EEOC's approach.⁹² At issue in the adverse employment action debate is whether retaliatory harassment should constitute an adverse employment action.⁹³

4. Third Prong: Causal Connection

Finally, a Title VII retaliation plaintiff must prove that the adverse employment action was causally related to the protected activity.⁹⁴ Title VII requires the plaintiff to show that the employer was aware of

⁸⁶ See *Shannon*, 292 F.3d at 716; *Von Gunten*, 243 F.3d at 866; *Mattern*, 104 F.3d at 707.

⁸⁷ See 42 U.S.C. § 2000e-3(a) (2000); *Zion*, *supra* note 8, at 196-97.

⁸⁸ See *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997); *Mattern*, 104 F.3d at 707. Although the Eighth Circuit has not explicitly moved away from the restrictive approach, the court in 2004 found that an employer's practice of limiting the plaintiff's bathroom and other breaks, refusing to provide her with job assistance, yelling at her for making mistakes, withholding privileges allowed to other employees, and attempting to dissuade her from making further complaints constituted sufficient and material disadvantages to support a retaliation claim. *Baker v. Morrell & Co.*, 382 F.3d 816, 830 (8th Cir. 2004).

⁸⁹ See *Akers v. Alvey*, 338 F.3d 491, 497-98 (6th Cir. 2003); *Von Gunten*, 243 F.3d at 866; *Torres v. Pisano*, 116 F.3d 625, 640 (2d Cir. 1997).

⁹⁰ See *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000); *Gunnell v. Utah Valley State Coll.*, 152 F.3d 1253, 1264 (10th Cir. 1998); *Corneveaux v. CUNA Mut. Ins. Group*, 76 F.3d 1498, 1507 (10th Cir. 1996).

⁹¹ See U.S. EQUAL OPPORTUNITY COMM'N, *supra* note 12, at 8-13.

⁹² *Ray*, 217 F.3d at 1243.

⁹³ See *Kravetz*, *supra* note 3, at 368; *infra* notes 214-244 and accompanying text.

⁹⁴ U.S. EQUAL OPPORTUNITY COMM'N, *supra* note 12, at 8-15.

the plaintiff's protected activity and that a retaliatory motive played a part in the employment action.⁹⁵ Circumstantial evidence is typically enough to show that the employer both knew about the protected activity and that a retaliatory motive played a role.⁹⁶

In establishing this causal connection, most plaintiffs rely on the timing of the adverse action and a demonstration that the person taking the adverse action knew about the protected activity.⁹⁷ In cases in which the alleged retaliatory action is not immediate, there is no precise test for how long is too long to establish temporal proximity.⁹⁸ In 2001, in *Clark County*, the U.S. Supreme Court held that, without other evidence of causality, an action taken twenty months after the plaintiff complained of discrimination was not enough to establish that it was retaliatory.⁹⁹ The Court stated that where timing has been enough for the plaintiff to establish the third prong of the prima facie case, the temporal proximity must be "very close."¹⁰⁰

Although temporal proximity is often the basis for establishing a causal connection, a plaintiff cannot rely on proximity alone to establish this prong of the prima facie case.¹⁰¹ In addition to the time-frame, a plaintiff may also provide evidence that similarly situated employees who did not engage in the protected activity were treated differently by the employer.¹⁰² When the employer can show that similarly situated employees were treated in the same manner, the plaintiff's claim will be unsuccessful absent direct evidence of a retaliatory motive.¹⁰³

Although courts may differ in how they interpret all prongs of the prima facie case, the most pronounced debate involves what constitutes an adverse employment action.¹⁰⁴ A look at the text of Title VII elucidates the disagreement.¹⁰⁵

⁹⁵ See *id.*

⁹⁶ See *id.*

⁹⁷ See *id.* at 8-18.

⁹⁸ See Lisa Cooney, *Understanding and Preventing Workplace Retaliation*, 88 MASS. L. REV. 3, 14 (2003).

⁹⁹ 532 U.S. at 274.

¹⁰⁰ *Id.* at 273.

¹⁰¹ See Cooney, *supra* note 98, at 14.

¹⁰² See *id.* at 15.

¹⁰³ See *id.*

¹⁰⁴ See *Shannon*, 292 F.3d at 716; *Von Gunten*, 243 F.3d at 866; *Mattern*, 104 F.3d at 707; *OUTTEN ET AL.*, *supra* note 38, at 171-83.

¹⁰⁵ See *infra* notes 106-113 and accompanying text.

C. Language of Title VII and Relevant Precedent: Adverse Employment Action

1. Comparing the Language of Sections 703(a) and 704(a)

The most contentious aspect of retaliation charges is the second prong of the *prima facie* case—what constitutes an adverse employment action.¹⁰⁶ The lack of consensus as to what types of employment actions are adverse stems from the ambiguity of the term “discrimination” as used in section 704(a).¹⁰⁷ In the general discrimination provision, section 703(a), employers are prohibited from discriminating “against any individual with respect to his compensation, terms, conditions, or privileges of employment.”¹⁰⁸ By delineating the ways an employer cannot discriminate against an employee, section 703(a) sets the limits for an actionable discrimination claim.¹⁰⁹

Section 704(a), conversely, does not limit the term discrimination by listing certain actions.¹¹⁰ Instead, it states that “it shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment” because that person has engaged in protected activities.¹¹¹ The U.S. Supreme Court has not ruled on how the term “to discriminate” should be defined for the purposes of the retaliation provision.¹¹² Some general guidance on how to interpret Title VII, however, can be found in the Court’s section 703(a) precedent and its holding as to how the term “employee” in section 704(a) should be interpreted.¹¹³

¹⁰⁶ See *Shannon*, 292 F.3d at 716; *Von Gunten*, 243 F.3d at 866; *Mattern*, 104 F.3d at 707.

¹⁰⁷ See 42 U.S.C. § 2000e-3(a) (2000). See generally Linda M. Glover, Note, *Title VII Section 704(a) Retaliation Claims: Turning a Blind Eye Toward Justice*, 38 Hous. L. Rev. 577, 585 (2001) (arguing that courts imposing higher thresholds for adverse employment actions, attempting to mirror the general discrimination provision threshold, overlook the independent interest protected by section 704(a)); Zion, *supra* note 8, at 215–16 (contending that there is little support in the history, language, or purpose of section 704(a) that requires an adverse action to be an ultimate employment decision).

¹⁰⁸ 42 U.S.C. § 2000e-2(a)(1).

¹⁰⁹ See *id.*

¹¹⁰ See *id.* § 2000e-3(a).

¹¹¹ *Id.* (emphasis added).

¹¹² See *id.*

¹¹³ See *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997); *Meritor*, 477 U.S. at 73.

2. General Guidance from the U.S. Supreme Court on Section 703(a)

a. *Hostile Work Environment Liability Under Section 703(a)*

The U.S. Supreme Court's broad interpretation of section 703(a), whereby the Court recognized claims based on a hostile work environment, a cause of action not explicitly found in the text, provides some context for interpreting the retaliation provision.¹¹⁴ Reinforcing the broad construction of Title VII, in 1986, in *Meritor Savings Bank, FSB v. Vinson*, the U.S. Supreme Court concluded that the language of section 703(a) is not limited to economic or tangible discrimination.¹¹⁵ Rather, the Court reasoned that the phrase "terms, conditions or privileges of employment" demonstrates that the legislature intended to encompass the entire spectrum of disparate treatment between men and women in employment.¹¹⁶ The Court held that section 703(a) of Title VII encompasses claims of a hostile work environment when discrimination is severe or pervasive enough to alter the conditions of the plaintiff's employment and create an abusive working environment.¹¹⁷

Although the Court adopted a broad construction of discrimination in section 703(a), the Court also stated that Title VII is not a general civility code.¹¹⁸ In order for a hostile work environment claim to be actionable, the environment must be sufficiently hostile or abusive.¹¹⁹ To determine whether such an environment exists, courts consider the totality of the circumstances, including (1) the frequency of the discriminatory conduct, (2) the severity of the conduct, (3) whether the conduct was physically threatening or humiliating, and (4) whether the conduct unreasonably interfered with the employee's work.¹²⁰

After defining a cause of action for hostile work environments, the Court addressed the extent to which liability would flow to the employer for supervisory harassment outside the scope of employment.¹²¹ In 1998, in *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*, two decisions handed down the same day, the Court held that employers may be held liable for unlawful harassment

¹¹⁴ See *infra* notes 115–129 and accompanying text.

¹¹⁵ 477 U.S. at 64.

¹¹⁶ *Id.* (quoting 42 U.S.C. § 2000e-2(a)(1) (2000)).

¹¹⁷ See *id.* at 67.

¹¹⁸ *Faragher*, 524 U.S. at 788.

¹¹⁹ See *id.* at 787–88.

¹²⁰ *Id.*

¹²¹ See *Faragher*, 524 U.S. at 807–08; *Ellerth*, 524 U.S. at 765.

committed by their employees placed in supervisory roles.¹²² In *Ellerth* and *Faragher*, the Court declared that employers may not avoid liability by claiming that a supervisor acted outside the scope of employment.¹²³ Previous decisions of the federal circuit courts of appeals had distinguished between quid pro quo harassment, for which the employer could be held vicariously liable, and a hostile work environment, for which it would not.¹²⁴ The Court eliminated this distinction and held that employers could be held vicariously liable for either cause of action.¹²⁵

Additionally, the Court established what is now referred to as the *Ellerth/Faragher* affirmative defense to supervisory harassment.¹²⁶ In cases in which the plaintiff suffers no tangible employment action, yet is subjected to a hostile work environment, the employer may establish an affirmative defense to charges that a supervisor harassed a subordinate employee.¹²⁷ An employer can avoid liability in cases where no tangible employment action was taken by showing (1) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or otherwise failed to avoid harm.¹²⁸ This defense has implications for the interpretation of an adverse employment action in a claim of retaliation.¹²⁹

b. Retaliation Provision Construed Broadly

In addition to interpreting section 703(a) broadly to incorporate causes of action that are not explicit in the text, the U.S. Supreme Court has likewise interpreted section 704(a) liberally, outside the context of adverse employment actions, in order to effectuate its purpose.¹³⁰ In 1997, in *Robinson v. Shell Oil Co.*, the Court determined whether former employees were covered under section 704(a).¹³¹ The language of the

¹²² See *Faragher*, 524 U.S. at 807–08; *Ellerth*, 524 U.S. at 765.

¹²³ See *Faragher*, 524 U.S. at 807–08; *Ellerth*, 524 U.S. at 765.

¹²⁴ See *Ellerth*, 524 U.S. at 765–66; Edward A. Marshall, Note, *Excluding Participation in Internal Complaint Mechanisms from Absolute Retaliation Protection: Why Everyone, Including the Employer, Loses*, 5 EMPLOYEE RTS. & EMP. POL'Y J. 549, 571–72 (2001).

¹²⁵ See *Ellerth*, 524 U.S. at 765–66.

¹²⁶ See Marshall, *supra* note 124, at 571.

¹²⁷ *Faragher*, 524 U.S. at 807–08; *Ellerth*, 524 U.S. at 765.

¹²⁸ *Ellerth*, 524 U.S. at 765.

¹²⁹ See *infra* notes 289–299 and accompanying text.

¹³⁰ See *Robinson*, 519 U.S. at 345–46.

¹³¹ See *id.* at 339.

section makes it unlawful "for an employer to discriminate against any of his employees or applicants for employment."¹³² The Court held that the term "employees" included former employees, because read with the rest of the provision, it would be illogical to prohibit retaliatory discharge, but not allow discharged employees to bring a charge of retaliation.¹³³ This broad interpretation of "employees" is consistent with the primary purpose of section 704(a), which the Court held is to "[m]aintain[] unfettered access to statutory remedial mechanisms."¹³⁴

II. THE CIRCUIT SPLIT ON ADVERSE EMPLOYMENT ACTIONS

Notwithstanding the guidance provided by Title VII's language and U.S. Supreme Court precedent, there has been no uniform standard established for defining adverse employment action in retaliation claims.¹³⁵ Thus, federal circuit courts of appeals differ in their interpretations.¹³⁶ The U.S. Courts of Appeals for the Fifth and Eighth Circuits employ the narrowest view and hold that an adverse employment action occurs only when the employer makes an ultimate employment decision.¹³⁷ A number of other circuits, including the U.S. Courts of Appeals for the Second, Third, Fourth, and Sixth Circuits, utilize an intermediate standard, holding that a plaintiff establishes an adverse employment action when the employer's act materially affects the terms and conditions of the plaintiff's employment.¹³⁸ The U.S. Courts of Appeals for the First, Seventh, Tenth, Eleventh, and District of Columbia Circuits apply a broad, case-by-case approach, focusing more on the defendant's retaliatory motive than on the severity of the act.¹³⁹ Finally, the Equal Employment Opportunity Commission and the U.S. Court of Appeals for the Ninth Circuit employ a deterrence

¹³² 42 U.S.C. § 2000e-3(a) (2000).

¹³³ See *Robinson*, 519 U.S. at 345.

¹³⁴ *Id.* at 346.

¹³⁵ See *Von Gunten v. Maryland*, 243 F.3d 858, 866 (4th Cir. 2001); *Gunnell v. Utah Valley State Coll.*, 152 F.3d 1253, 1264 (10th Cir. 1998); *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir. 1997); *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997).

¹³⁶ See *Von Gunten*, 234 F.3d at 866; *Gunnell*, 152 F.3d at 1264; *City of Pittsburgh*, 120 F.3d at 1300; *Mattern*, 104 F.3d at 707.

¹³⁷ See *Banks v. E. Baton Rouge Parish Sch. Bd.*, 320 F.3d 570, 575 (5th Cir. 2003); *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997); *Mattern*, 104 F.3d at 709.

¹³⁸ See *Akers v. Alvey*, 338 F.3d 491, 497-98 (6th Cir. 2003); *Von Gunten*, 243 F.3d at 866; *Torres v. Pisano*, 116 F.3d 625, 640 (2d Cir. 1997).

¹³⁹ See *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000); *Gunnell*, 152 F.3d at 1264; *Corneveaux v. CUNA Mut. Ins. Group*, 76 F.3d 1498, 1507 (10th Cir. 1996); *Wyatt v. City of Boston*, 35 F.3d 13, 15-16 (1st Cir. 1994); *Passer v. Am. Chem. Soc'y*, 935 F.2d 322, 331 (D.C. Cir. 1991).

approach, holding that the adverse employment action requirement is satisfied when the employer's act is reasonably likely to deter the plaintiff or others from engaging in the protected activity.¹⁴⁰

A. Restrictive Standard: Ultimate Employment Decisions

A minority of jurisdictions, namely the U.S. Courts of Appeals for the Fifth and Eighth Circuits, take the restrictive position that plaintiffs may only claim retaliation in ultimate employment decisions, such as hiring, granting leave, discharging, promoting, or compensating an employee.¹⁴¹

In 1997, in *Mattern v. Eastman Kodak Company*, the Fifth Circuit Court of Appeals held against a plaintiff who alleged that her employer retaliated against her after she filed a Title VII sexual harassment, hostile work environment claim with the EEOC.¹⁴² The plaintiff offered a number of incidents that she considered retaliatory, including a visit from a supervisor in her home, in violation of company policy, after she took a day of vacation for a work-related illness, a reprimand for not being at her work station, coworker and supervisor hostility, lack of response from the employer to a call of concern from her doctor, negative performance reviews, and a missed pay increase.¹⁴³ The Fifth Circuit reaffirmed its 1995 holding in *Dollis v. Rubin*, where it stated that Title VII was intended to address ultimate employment decisions, as opposed to every employment decision that potentially has a peripheral effect on those ultimate decisions.¹⁴⁴ The court in *Mattern* reasoned that because section 704(a) does not mention the "vague harms" contained in section 703(a), "discrimination" as used in section 704(a) includes only ultimate employment decisions.¹⁴⁵ In fact, the court as-

¹⁴⁰ See *Ray*, 217 F.3d at 1243; U.S. EQUAL OPPORTUNITY COMM'N, *supra* note 12, at 8-13.

¹⁴¹ See *Mattern*, 104 F.3d at 707 (seminal case articulating the ultimate employment standard); see also *Banks*, 320 F.3d at 575 (adopting *Mattern's* rationale and holding that employer's implementation of a new position with reading requirement and new salary structure was not an ultimate employment decision); *Ledgergerber*, 122 F.3d at 1144 (holding that reassigning an employee to a more stressful position where she had more difficult employees to supervise was not an ultimate employment decision actionable under section 704(a)). But see *Baker v. Morrell & Co.*, 382 F.3d 816, 830 (8th Cir. 2004) (holding that employer's practice of limiting the plaintiff's bathroom and other breaks, refusing to provide her with job assistance, yelling at her for making mistakes, withholding privileges allowed to other employees, and attempting to dissuade her from making further complaints constituted sufficient and material disadvantages to support a retaliation claim).

¹⁴² 104 F.3d at 706, 707, 708.

¹⁴³ *Id.* at 705-06.

¹⁴⁴ *Id.* at 707 (citing *Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir. 1995)).

¹⁴⁵ See *id.* at 708-09.

sumed it was established that only such decisions would be covered under section 704(a).¹⁴⁶ Without deciding whether the missed pay increase was an ultimate employment decision, the court held that the plaintiff's retaliation claim was not actionable because there was no evidence that the action was retaliatory, and the other incidents did not rise to the level of an adverse employment action.¹⁴⁷

The Eighth Circuit has also adopted a restrictive standard.¹⁴⁸ In 1997, in *Ledergerber v. Stangler*, it held that a lateral transfer involving only minor changes in working conditions, including a change in staff, and no reduction in pay or benefits, is not an adverse employment action.¹⁴⁹ The court stated that a lateral transfer does not constitute an adverse employment action, reasoning that if it did, every minute decision that an irritable employee did not like would amount to a discrimination claim.¹⁵⁰ The court concluded that although the action at issue may have had some peripheral effect on the plaintiff's employment, it did not rise to the level of an ultimate employment decision, and thus it was not a violation of Title VII's prohibition on retaliation.¹⁵¹

A number of Eighth Circuit judges, however, have reluctantly applied the restrictive standard, making it clear that they would decide the case differently absent contrary precedent.¹⁵² A significant issue that arises with the strict interpretation in the Fifth and Eighth Circuits is whether retaliatory harassment can ever be covered under section 704(a).¹⁵³

B. *Intermediate Standard: Materially Adverse*

A majority of federal circuit courts of appeals do not follow the Fifth and Eighth Circuits' restrictive interpretation of what constitutes an adverse action.¹⁵⁴ The U.S. Courts of Appeals for the Second,

¹⁴⁶ See *id.* at 708.

¹⁴⁷ See *Mattern*, 104 F.3d at 709–10. In 2004, in *Davis v. Dallas Area Rapid Transit*, the Fifth Circuit reaffirmed its reliance on the ultimate employment decision standard and held that the denial of a promotion because of a rigged reading test was an ultimate employment decision and hence an adverse employment action. 383 F.3d 309, 320 (5th Cir. 2004).

¹⁴⁸ See *Ledergerber*, 122 F.3d at 1144.

¹⁴⁹ *Id.* at 1144–45.

¹⁵⁰ *Id.* at 1145.

¹⁵¹ *Id.*

¹⁵² See, e.g., *LePique v. Hove*, 217 F.3d 1012, 1014 (8th Cir. 2000) (stating that the court is bound by precedent invoking the restrictive requirement); *id.* (Heaney, J., concurring) (reluctantly concurring based on precedent).

¹⁵³ See Kravetz, *supra* note 3, at 368.

¹⁵⁴ See *Ray*, 217 F.3d at 1240.

Third, Fourth, and Sixth Circuits have held that a plaintiff need not show an ultimate employment decision, but instead must make the same showing of a "material adverse action" that applies to any Title VII claim.¹⁵⁵ This approach to adverse employment action has been classified as the intermediate view.¹⁵⁶ Nonetheless, this view requires relatively significant consequences to the employee before the employer is held liable.¹⁵⁷

In 1997, the Third Circuit Court of Appeals in *Robinson v. City of Pittsburgh* held that the following acts of reprisal did not constitute adverse employment actions: restricted job duties, reassignment and failure to transfer the plaintiff out of an assignment in which she was under the direct command of the alleged harasser, unsubstantiated oral reprimands, and several derogatory comments.¹⁵⁸ The court concluded that, aside from firing or refusing to rehire an employee, retaliation is actionable only when it changes the employee's compensation, terms, conditions, or privileges of employment; deprives him or her of employment opportunities; or negatively affects his or her status as an employee.¹⁵⁹

Similarly, in the same year in *Torres v. Pisano*, the Second Circuit held that a request by the plaintiff's supervisor that she drop her EEOC charge did not constitute an adverse employment action.¹⁶⁰ Although the plaintiff stated that the demands made her feel frightened and intimidated, the court concluded that the plaintiff had not shown that she suffered a materially adverse change in the terms and conditions of employment.¹⁶¹ The court stated that it may be possible for a demand for withdrawal of an EEOC charge to amount to retaliation when the demand alters the conditions of the plaintiff's employment in a material way, such as impliedly threatening to discharge the plaintiff.¹⁶² The court concluded, however, that employers may take reasonable protective measures in defending themselves without

¹⁵⁵ See *infra* notes 158–170 and accompanying text.

¹⁵⁶ See Michael Rusie, Note, *The Meaning of Adverse Employment Action in the Context of Title VII Retaliation Claims*, 9 WASH. U. J.L. & POL'Y 379, 389 (2002); see also *Ray*, 217 F.3d at 1240 (discussing the circuit split and stating that the Second and Third Circuits hold an intermediate position).

¹⁵⁷ See *Akers*, 338 F.3d at 497–98; *Von Gunten*, 243 F.3d at 866; *City of Pittsburgh*, 120 F.3d at 1300; *Torres*, 116 F.3d at 640.

¹⁵⁸ 120 F.3d at 1300.

¹⁵⁹ *Id.*

¹⁶⁰ 116 F.3d at 639.

¹⁶¹ *Id.* at 640.

¹⁶² *Id.*

violating section 704(a) of Title VII.¹⁶³ Two years later, however, in *Richardson v. New York State Department of Correctional Services*, the Second Circuit held that unchecked coworker harassment could be an adverse employment action if it is sufficiently severe.¹⁶⁴

Employing a similar middle-of-the-road standard, the Fourth Circuit Court of Appeals expressly disagreed with the Fifth Circuit's restrictive standard and held that any employer actions that materially affect the terms and conditions of employment are actionable under Title VII's retaliation provision.¹⁶⁵ In 2001, in *Von Gunten v. Maryland*, the Fourth Circuit held that employer action must at least meet some threshold level of substantiality for unlawful discrimination to be cognizable under section 704(a) by adversely affecting the terms and conditions of the plaintiff's employment.¹⁶⁶

Likewise, the Sixth Circuit Court of Appeals upheld the intermediate view that an adverse employment action must materially affect the terms of employment.¹⁶⁷ In 2000, the Sixth Circuit in *Morris v. Oldham County Fiscal Court*, employing an intermediate standard, held that severe or pervasive supervisory harassment can amount to an adverse employment action.¹⁶⁸ Conversely, in 2003, the Sixth Circuit in *Akers v. Alvey* held that the plaintiff failed to demonstrate that she had suffered an adverse employment action because she had not established a significant change in her employment status, such as being hired, fired, not receiving a promotion, being reassigned with significantly different responsibilities, suffering a significant change in benefits, or other factors unique to her particular situation.¹⁶⁹ Although the court examined the claim on the facts specific to the case, the court's focus on "significant" changes to the plaintiff's employment is consistent with the materially adverse standard.¹⁷⁰

The intermediate standard interprets the term "discrimination" in section 704(a) as being constrained by the language of section

¹⁶³ *Id.*

¹⁶⁴ 180 F.3d 426, 446 (2d Cir. 1999).

¹⁶⁵ *Von Gunten*, 243 F.3d at 865.

¹⁶⁶ *See id.*

¹⁶⁷ *See Akers*, 338 F.3d at 497-98; *Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 791-92 (6th Cir. 2000).

¹⁶⁸ 201 F.3d at 792.

¹⁶⁹ 338 F.3d at 497-98.

¹⁷⁰ *See id.* at 498-99. The Sixth Circuit refused to adopt the EEOC's deterrence approach and reaffirmed its reliance on the intermediate standard in 2004 in *White v. Burlington Northern & Santa Fe Railway Co.* *See* 364 F.3d 789, 800 (6th Cir. 2004).

703(a).¹⁷¹ Reading the two provisions together, courts hold that employment actions that materially affect the terms and conditions of employment are serious enough to satisfy the second prong of the prima facie case for retaliation.¹⁷² This standard requires less than an ultimate employment decision, but still focuses on the severity of the employer's action.¹⁷³

C. Broad Case-by-Case Approach

Other federal circuit courts of appeals have applied a more liberal standard.¹⁷⁴ Most of these circuits apply a case-by-case approach, focusing on the totality of the circumstances.¹⁷⁵ The U.S. Courts of Appeals for the First, Seventh, Tenth, Eleventh, and District of Columbia Circuits generally define adverse employment action liberally.¹⁷⁶ These courts tend to emphasize the employer's motive rather than the effect of the employment action.¹⁷⁷ Likewise, these circuits apply a case-by-case approach that takes into account all relevant circumstances in a given case.¹⁷⁸

The First Circuit Court of Appeals employed such a case-by-case approach, but at the same time required some level of materiality.¹⁷⁹ In 1995, in *Wyatt v. City of Boston*, the First Circuit held that the plaintiff being denied a promotion, receiving negative performance evaluations, and being transferred without a choice concerning which class to teach,

¹⁷¹ See *Morris*, 201 F.3d at 791–92.

¹⁷² See *id.*

¹⁷³ See *id.*

¹⁷⁴ See *Ray*, 217 F.3d at 1243; *Gunnell*, 152 F.3d at 1264; *Corneveaux*, 76 F.3d at 1507; *Wyatt*, 35 F.3d at 15–16; *Passer*, 935 F.2d at 331.

¹⁷⁵ See *Gunnell*, 152 F.3d at 1264; *Corneveaux*, 76 F.3d at 1507; *Wyatt*, 35 F.3d at 15–16; *Passer*, 935 F.2d at 331.

¹⁷⁶ See *Ray*, 217 F.3d at 1240.

¹⁷⁷ See *Rusie*, *supra* note 156, at 393.

¹⁷⁸ See *Wiles*, *supra* note 3, at 228–29.

¹⁷⁹ See *Blackie v. Maine*, 75 F.3d 716, 725 (1st Cir. 1996) (stating that significantly reducing an employee's responsibility can amount to an adverse employment action); *Wyatt*, 35 F.3d at 15–16 (holding that demotions, disadvantageous transfers, negative job evaluations, and toleration of harassment by coworkers can constitute adverse employment action). *But see* *Gu v. Boston Police Dep't*, 312 F.3d 6, 14–15 (1st Cir. 2002) (holding that unsupported assertions of loss of supervisory authority, exclusion from office meetings, and diminished communication regarding office matters were insufficient to establish the requisite material change in working conditions); *Marrero v. Goya of Puerto Rico, Inc.*, 304 F.3d 7, 25 (1st Cir. 2002) (holding that although adverse employment actions do not have to involve economic loss, in order to be adverse, a transfer has to be accompanied by a tangible change in duties or working conditions).

if proven, would constitute adverse employment actions.¹⁸⁰ The court noted that adverse actions include demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations, and toleration of harassment by other employees.¹⁸¹ Although adopting a broad approach, in *Blackie v. Maine*, the First Circuit established a limit to this liberal construction of adverse employment actions, stating that “[w]ork places are rarely idyllic retreats” and that employment decisions do not rise to the level of an adverse employment action merely because the plaintiff disagrees with or is upset by them.¹⁸²

The Eleventh Circuit has likewise broadly construed the requirement of adverse action.¹⁸³ In 1998, in *Wideman v. Wal-Mart Stores, Inc.*, the Eleventh Circuit expressly rejected the restrictive standard and reasoned that the language of section 704(a) extends protection against retaliation to adverse actions that fall short of ultimate employment decisions.¹⁸⁴ The court did not define the threshold for adverse employment actions, but noted that in that specific case, the acts the plaintiff described, taken together, were sufficient to constitute prohibited discrimination.¹⁸⁵ The acts included improperly listing the plaintiff as a no-show on a day she was scheduled to have off, forcing the plaintiff to work on that day without a lunch break, issuing written reprimands to the plaintiff, issuing a one-day suspension, soliciting employees for negative statements about the plaintiff, delaying medical treatment when the plaintiff was having an allergic reaction, and threatening to shoot the plaintiff in the head.¹⁸⁶ Although these actions were not ultimate employment decisions, the court found that they were adverse employment actions under section 704(a).¹⁸⁷

Similarly, in 2002, in *Shannon v. Bellsouth Telecommunications, Inc.*, the Eleventh Circuit held that the plaintiff's lateral reassignment alone was insufficient to amount to adverse employment action.¹⁸⁸ The reassignment, however, together with the denial of overtime and the alloca-

¹⁸⁰ 35 F.3d at 16.

¹⁸¹ *Id.* at 15–16.

¹⁸² 75 F.3d at 725.

¹⁸³ See *Shannon v. Bellsouth Telecomms., Inc.*, 292 F.3d 712, 716 (11th Cir. 2002); *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998).

¹⁸⁴ 141 F.3d at 1456.

¹⁸⁵ See *id.*

¹⁸⁶ See *id.* at 1455.

¹⁸⁷ See *id.* at 1456.

¹⁸⁸ 292 F.3d at 716.

tion of a more difficult assignment and an un-air-conditioned van, did amount to unlawful retaliation.¹⁸⁹

In endorsing a similarly broad approach to the adverse employment action requirement, in 1996, in *Knox v. State of Indiana*, the Seventh Circuit held that retaliatory harassment by a co-worker, which the supervisor knew about and failed to remedy, constituted an adverse employment action.¹⁹⁰ The court noted that the statute purposefully did not take a "laundry list" approach to retaliation, because it can come in as many types as employers can create.¹⁹¹

Likewise, the Tenth and District of Columbia Circuit Courts of Appeals have held that non-tangible, less severe acts or conduct constitute adverse actions.¹⁹² In 1998, in *Gunnell v. Utah Valley State College*, the Tenth Circuit held that sufficiently severe coworker harassment could amount to adverse employment action.¹⁹³ Similarly, in 1991, in *Passer v. American Chemical Society*, the District of Columbia Circuit ruled that canceling a public symposium in the plaintiff's honor, after he filed an age discrimination complaint, was sufficiently adverse to support his retaliation claim.¹⁹⁴

D. EEOC Deterrence Approach

The EEOC Compliance Manual offers guidance on how courts should approach the adverse employment action requirement.¹⁹⁵ The Ninth Circuit specifically applies the EEOC's deterrence approach.¹⁹⁶ The EEOC Compliance Manual reads, "The statutory retaliation clauses prohibit *any* adverse treatment that is based on a retaliatory motive and is *reasonably likely to deter* the charging party or others from engaging in protected activity."¹⁹⁷ The Manual goes on to point out that "petty slights and trivial annoyances are not actionable, as they are not likely to deter protected activity."¹⁹⁸ The EEOC opposes the strict inter-

¹⁸⁹ *Id.* at 715, 716.

¹⁹⁰ 93 F.3d 1327, 1334 (7th Cir. 1996).

¹⁹¹ *Id.* Although the Seventh Circuit has not explicitly adopted the EEOC deterrence approach, it has cited approvingly both *Ray* and the EEOC Compliance Manual, demonstrating that perhaps it is in line with the deterrence approach. See *Herrnreiter v. Chi. Hous. Auth.*, 315 F.3d 742, 745 (7th Cir. 2002).

¹⁹² See *Gunnell*, 152 F.3d at 1264; *Corneveaux*, 76 F.3d at 1507; *Passer*, 935 F.2d at 331.

¹⁹³ 152 F.3d at 1264.

¹⁹⁴ 935 F.2d at 331.

¹⁹⁵ See U.S. EQUAL OPPORTUNITY COMM'N, *supra* note 12, at 8-11 to -15.

¹⁹⁶ See *Ray*, 217 F.3d at 1243.

¹⁹⁷ See U.S. EQUAL OPPORTUNITY COMM'N, *supra* note 12, at 8-13 (emphasis added).

¹⁹⁸ *Id.*

pretations of this requirement and endorses the view that the degree of harm suffered by the individual goes to the issue of damages, not liability.¹⁹⁹ The Ninth Circuit has expressly adopted the EEOC's deterrence approach, whereas other circuits applying the broad standard employ a general case-by-case approach, which is nonetheless consistent with the EEOC's standard.²⁰⁰

In 2000, in *Ray v. Henderson*, the Ninth Circuit Court of Appeals adopted an expansive view of the type of actions sufficient to constitute adverse employment actions.²⁰¹ In *Henderson*, the court found that the plaintiff had alleged sufficient facts to survive summary judgment in his hostile work environment retaliation claim.²⁰² The plaintiff in *Ray* claimed he was verbally abused in a manner related to his complaints, was the subject of a number of pranks, and was falsely accused of misconduct.²⁰³ In analyzing the case, the Ninth Circuit traced the division among the circuits and aligned itself with the circuits endorsing the broad approach, specifically agreeing with the EEOC that adverse employment action means any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity.²⁰⁴ Thus, the court found that an employee has a cause of action under section 704(a) for retaliatory harassment.²⁰⁵

The case-by-case and deterrence approaches focus more on the employer's retaliatory motive than the objective severity of the action itself.²⁰⁶ Although minor changes or annoyances will not constitute an adverse employment action, actions less than those materially affecting the terms and conditions of employment can be sufficient.²⁰⁷ The various approaches courts take to the adverse employment action requirement produce varying results in cases with similar facts.²⁰⁸

¹⁹⁹ *Id.*

²⁰⁰ *See Ray*, 217 F.3d at 1240, 1243.

²⁰¹ *See id.* at 1243.

²⁰² *Id.* at 1245-46.

²⁰³ *Id.*

²⁰⁴ *Id.* at 1240-43.

²⁰⁵ *See Ray*, 217 F.3d at 1245.

²⁰⁶ *See id.* at 1240-41; U.S. EQUAL OPPORTUNITY COMM'N, *supra* note 12, at 8-13.

²⁰⁷ *See* U.S. EQUAL OPPORTUNITY COMM'N, *supra* note 12, at 8-13.

²⁰⁸ *See infra* notes 215-242 and accompanying text.

III. THE DETERRENCE APPROACH SHOULD BE UNIVERSALLY ADOPTED TO PUT AN END TO CONTRADICTORY RESULTS

The definition of adverse employment action should be uniform in all jurisdictions to give plaintiffs and employers a clear sense of their rights and responsibilities in the retaliation context.²⁰⁹ All federal circuit courts of appeals should adopt the Equal Employment Opportunity Commission's broad, deterrence approach because it is most consistent with the language of Title VII, as well as U.S. Supreme Court precedent.²¹⁰ Additionally, the EEOC's support of this standard should be accorded some deference, as it is the administrative body responsible for enforcing Title VII.²¹¹ The broad approach is also the most logical in light of the *Ellerth/Faragher* affirmative defense; otherwise, the result would be harsh and unfair to plaintiffs.²¹² Finally, critics' fear of the broad standard—that the ability of employers to effectively manage their workplace will be threatened by the broad approach—is best addressed in other elements of a retaliation claim.²¹³

A. Different Standards for Defining Adverse Employment Actions Produce Inconsistent Results

The standard a court uses to determine whether an employer has taken an adverse employment action can directly determine the plaintiff's success in proving his or her case.²¹⁴ The facts of *Morris v. Oldham County Fiscal Court*, decided by the Sixth Circuit Court of Appeals in 2000, provide a good example.²¹⁵ Judy Morris, the plaintiff, worked as a secretary providing clerical support for the Oldham County Road Department starting in 1984.²¹⁶ In 1994, Brent Likins became Morris's supervisor.²¹⁷ Morris alleged that Likins repeatedly made jokes with sexual overtones, made several comments about Morris's dress, and once referred to her as "Hot Lips."²¹⁸ During this time, Likins was responsible for evaluating Morris's job performance.²¹⁹ In November 1994, he gave

²⁰⁹ See *infra* notes 215–242 and accompanying text.

²¹⁰ See *infra* notes 245–279 and accompanying text.

²¹¹ See *infra* notes 280–288 and accompanying text.

²¹² See *infra* notes 289–299 and accompanying text.

²¹³ See *infra* notes 300–331 and accompanying text.

²¹⁴ See *infra* notes 234–242 and accompanying text.

²¹⁵ See 201 F.3d 784, 786–88 (6th Cir. 2000).

²¹⁶ *Id.* at 786.

²¹⁷ *Id.* at 787.

²¹⁸ *Id.*

²¹⁹ *Id.*

Morris a rating of "excellent."²²⁰ In March of 1995, he gave her a rating of "very good."²²¹ When Morris asked why her rating dropped, Likins stated, in front of another employee, that if she went into his office, after they were finished he would mark her as excellent.²²² Morris and the other employee interpreted this as meaning that if she performed sexual acts on Likins, he would change her performance review.²²³ Morris complained about these acts to County Judge John Black, who wrote a letter to Likins stating that he hoped the two of them would work it out.²²⁴ After receiving that letter, Likins began ignoring Morris.²²⁵ He also became overly critical of her work.²²⁶ Morris complained again, and Judge Black relocated Likins's office and ordered Likins not to communicate with Morris without a third person present.²²⁷

Likins ignored Judge Black's instructions.²²⁸ Instead, he visited Morris's office unaccompanied fifteen times, called her on the telephone over thirty times, and drove to her office and sat outside in his truck, making faces at her through her window.²²⁹ On one occasion, Likins followed Morris home and gave her "the finger" from his truck.²³⁰ Likins also destroyed the television Morris occasionally watched in the office and threw roofing nails onto her home driveway several times.²³¹ Because of this conduct, Morris began having anxiety attacks and took sick leave from work.²³² Ultimately, Morris filed sexual harassment and retaliation claims against her employer, Judge Black, and Likins.²³³

Did the plaintiff in *Morris* establish a prima facie case of retaliation?²³⁴ The outcome would likely depend on which circuit the case was heard in and which standard the court applied to define adverse

²²⁰ *Morris*, 201 F.3d at 787.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Morris*, 201 F.3d at 787.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Morris*, 201 F.3d at 787.

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *See id.*

employment action.²³⁵ In the Fifth and Eighth Circuits, the plaintiff would fail because she cannot show that she was subject to an ultimate employment decision.²³⁶ In circuits that employ the intermediate threshold, the results might differ because of the undeveloped state of the law on liability for retaliatory harassment.²³⁷ In circuits that adopt the liberal case-by-case or EEOC deterrence approach, the plaintiff would almost certainly establish a prima facie case for retaliation.²³⁸ This is because the plaintiff would likely have been deterred from opposing the perceived sexual harassment had she known that she would face Likins's increased inappropriate, harassing behavior.²³⁹ The Sixth Circuit Court of Appeals, employing the intermediate standard, held that although her sexual harassment claim failed, the plaintiff in *Morris* established a prima facie case for retaliation.²⁴⁰ The court reasoned that because the U.S. Supreme Court in *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*, held that severe or pervasive supervisory harassment constitutes discrimination under section 703(a), such harassment likewise can replace adverse employment action and fulfill that prong of the prima facie case for retaliation.²⁴¹ The court then stated that the defendant would have the opportunity to prove the affirmative defense outlined in *Ellerth*.²⁴²

Because of the potential for different results, employers and employees are left without a clear understanding of what facts are sufficient to establish a prima facie case of retaliation.²⁴³ The U.S. Supreme Court should grant certiorari to address the disagreement among the circuit courts of appeals and should adopt the broad, EEOC deterrence approach.²⁴⁴

²³⁵ Compare *Shannon v. Bellsouth Telecomms., Inc.*, 292 F.3d 712, 716 (11th Cir. 2002), with *Von Gunten v. Maryland*, 243 F.3d 858, 866 (4th Cir. 2001), and *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 708 (5th Cir. 1997).

²³⁶ See *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997); *Mattern*, 104 F.3d at 707.

²³⁷ See *Richardson v. N.Y. State Dep't of Corr. Svcs.*, 180 F.3d 426, 446 (2d Cir. 1999); Margery Corbin Eddy, *Finding the Appropriate Standard for Employer Liability in Title VII Retaliation Cases: An Examination of the Applicability of Sexual Harassment Paradigms*, 63 ALB. L. REV. 361, 363 (2000).

²³⁸ See *Ray v. Henderson*, 217 F.3d 1234, 1243-44 (9th Cir. 2000); *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456-57 (11th Cir. 1998); U.S. EQUAL OPPORTUNITY COMM'N, *supra* note 12, at 8-13.

²³⁹ See U.S. EQUAL OPPORTUNITY COMM'N, *supra* note 12, at 8-13.

²⁴⁰ 201 F.3d at 791, 792.

²⁴¹ See *id.* at 792.

²⁴² *Id.*

²⁴³ See *supra* notes 234-242 and accompanying text.

²⁴⁴ See *infra* notes 245-331 and accompanying text.

B. Language, Purpose, and U.S. Supreme Court Precedent Support the Broad, Deterrence Approach

1. The Plain Meaning of "Discrimination" Is Most Consistent with the Broad, Deterrence Approach

Although there is ambiguity in the term "discrimination" in section 704(a), the broad, deterrence approach is most consistent with the language and purpose of Title VII generally and section 704(a) specifically.²⁴⁵ The language of section 704(a) is best read to support the broad standard.²⁴⁶ Because section 704(a) lacks the limiting language of section 703(a), it is more likely that Congress intended for "discriminate" to be more broadly construed, rather than restricted only to ultimate employment decisions.²⁴⁷ The dictionary definition of "discriminate" is "to make a difference in treatment or favor on a basis other than individual merit," and thus the plain meaning of the term supports a broad rather than restrictive interpretation.²⁴⁸ Therefore, the language of the retaliation provision supports a liberal construction of the provision.²⁴⁹

2. Reading Section 703(a) Qualifiers into Section 704(a) Is Incompatible with U.S. Supreme Court Precedent

Rather than accord "to discriminate" its plain, broad meaning, some courts and advocates of the intermediate threshold read the qualifying language of section 703(a) into section 704(a).²⁵⁰ Some scholars invoke the principle of *ejusdem generis*.²⁵¹ This stands for the proposition that when a general term follows a specific one, it should be understood as a reference to similar subjects of the specific enumeration.²⁵² Therefore, the qualifying language of section 703(a) would be read into section 704(a), and would limit the term "discrimi-

²⁴⁵ See 42 U.S.C. §§ 2000e-2(a)(1), -3(a) (2000); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 345-46 (1997).

²⁴⁶ See 42 U.S.C. §§ 2000e-2(a), -3(a); U.S. EQUAL OPPORTUNITY COMM'N, *supra* note 12, at 8-14.

²⁴⁷ See 42 U.S.C. §§ 2000e-2(a), -3(a); U.S. EQUAL OPPORTUNITY COMM'N, *supra* note 12, at 8-14.

²⁴⁸ MERRIAM-WEBSTER ON-LINE DICTIONARY, at <http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=discriminate> (last visited Jan. 31, 2005).

²⁴⁹ See *id.*; see also 42 U.S.C. § 2000e-3(a).

²⁵⁰ See *Morris*, 201 F.3d at 791-92; *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir. 1997).

²⁵¹ See *Cude & Steger*, *supra* note 3, at 397-98; *Glover*, *supra* note 107, at 610.

²⁵² See *Cude & Steger*, *supra* note 3, at 397-98.

nate" in that provision to compensation, terms, conditions, or privileges of employment.²⁵³ Although this approach is not inconsistent with the U.S. Supreme Court's approach in *Robinson v. Shell Oil Co.*, where the Court looked to other provisions to define "employees" under section 704, the Court in *Robinson* also made clear that it was interpreting the term liberally to effectuate the broader goals of Title VII.²⁵⁴ Therefore, one should interpret the language in light of the purpose of Title VII generally and the retaliation provision specifically.²⁵⁵

The purpose of section 703(a) is to prevent discrimination on the basis of protected categories with respect to the terms, conditions, or privileges of employment.²⁵⁶ The goal of section 704(a), however, is somewhat distinct—to ensure access to Title VII statutory rights, so that people are not deterred from voicing their complaints of discrimination.²⁵⁷ A reading of section 704(a) in conjunction with the qualifying language of section 703(a) overlooks the specific goals of the provisions.²⁵⁸

Taking the language of section 704(a) together with U.S. Supreme Court precedent further supports a liberal approach.²⁵⁹ The Court has interpreted Title VII broadly to effectuate its remedial goals, and for example, has construed the retaliation provision liberally.²⁶⁰ In *Robinson*, the Court made it clear that the purpose of section 704(a) is to "[m]aintain[] unfettered access to statutory remedial mechanisms."²⁶¹ The Court in *Robinson* concluded that the term "employee" encompasses former as well as current employees.²⁶² To interpret "employee" otherwise would mean that employers could discharge employees in retaliation for their filing a discrimination charge and suffer no legal consequences.²⁶³ In adverse employment actions, courts should similarly employ a liberal standard in order to allow employees effective

²⁵³ See 42 U.S.C. §§ 2000e-2(a)(1), -3(a).

²⁵⁴ See 519 U.S. at 345–46.

²⁵⁵ See *id.*

²⁵⁶ See 42 U.S.C. § 2000e-2(a)(1)–(2).

²⁵⁷ See *Robinson*, 519 U.S. at 346.

²⁵⁸ See 42 U.S.C. §§ 2000e-2(a)(1)–(2), -3(a); *Robinson*, 519 U.S. at 346.

²⁵⁹ See 42 U.S.C. § 2000e-3(a)(1); *Faragher v. City of Boca Raton*, 524 U.S. 775, 802 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Robinson*, 519 U.S. at 346; *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 73 (1986).

²⁶⁰ See *Faragher*, 524 U.S. at 802; *Ellerth*, 524 U.S. at 765; *Robinson*, 519 U.S. at 346; *Meritor*, 477 U.S. at 73.

²⁶¹ 519 U.S. at 346.

²⁶² *Id.* at 345–46.

²⁶³ See *id.* at 345.

access to Title VII's remedies.²⁶⁴ By considering adverse employment actions to include any activity that would likely deter an employee from reporting discrimination, the purpose of section 704(a) will be most closely followed, as it was in *Robinson*.²⁶⁵

Likewise, the U.S. Supreme Court's 1986 decision, *Meritor Savings Bank, FSB v. Vinson*, demonstrates the Court's broad construction of section 703(a) of Title VII, the general discrimination provision.²⁶⁶ In *Meritor*, the Court held that discrimination in section 703(a) is not limited to economic or tangible discrimination; it can also be found where a plaintiff was subject to a hostile work environment that was sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and create an abusive working environment.²⁶⁷ Although section 703(a) does not provide an explicit cause of action for a hostile work environment, the Court held that in light of Title VII's purpose, something less than an ultimate employment decision may be actionable.²⁶⁸ Therefore, discrimination under section 704(a) should be interpreted at least as broadly as section 703(a), because the former does not contain the qualifying language of the latter.²⁶⁹ The statutory construction in *Meritor* and *Robinson*, along with the Court's articulation of the purpose of section 704(a), demonstrates that the deterrence or broad approach is most consistent with U.S. Supreme Court precedent.²⁷⁰

3. The Contention That the Lack of Qualifying Language Leads to a Narrower Interpretation Is Flawed

In addition to the split between the federal circuit courts of appeals resulting in varying outcomes, legal commentators likewise are divided as to what standard should be adopted in evaluating whether conduct amounts to an adverse employment action.²⁷¹ As with the split among the circuits, the disagreement can be traced to how the term "to discriminate" should be interpreted in section 704(a).²⁷² The scant legislative history of Title VII provides little guidance.²⁷³ Whereas section

²⁶⁴ See *id.* at 345-46.

²⁶⁵ See *id.*

²⁶⁶ See 477 U.S. at 73.

²⁶⁷ *Id.* at 64.

²⁶⁸ See *id.*

²⁶⁹ See 42 U.S.C. §§ 2000e-2(a)(1), -3(a) (2000); *Meritor*, 477 U.S. at 73.

²⁷⁰ See *Robinson*, 519 U.S. at 345-46; *Meritor*, 477 U.S. at 64.

²⁷¹ See Cude & Steger, *supra* note 3, at 396; Kravetz, *supra* note 3, at 368; Wiles, *supra* note 3, at 238.

²⁷² See 42 U.S.C. § 2000e-3(a).

²⁷³ See Zion, *supra* note 8, at 196.

703(a) lists the ways in which an employer cannot discriminate against employees, such as through "compensation, terms, conditions, or privileges of employment," section 704(a) does not.²⁷⁴ Proponents of the restrictive, ultimate employment decision standard construe the term "to discriminate" in section 704(a) to proscribe only ultimate employment decisions, rather than the other types of actions described in section 703(a).²⁷⁵ Instead of viewing the absence of qualifying language in section 704(a) as broadening the scope of discrimination, supporters of this view contend that it actually limits it to only ultimate employment decisions.²⁷⁶ If the drafters wanted retaliatory discrimination to include the actions enumerated in section 703(a), some commentators argue, they would have included them in section 704(a).²⁷⁷ As they did not, only ultimate employment decisions are actionable.²⁷⁸ This reasoning, however, is flawed in light of the plain language of the statute, as well as the way the U.S. Supreme Court has interpreted the statute in the past.²⁷⁹

*C. The EEOC's Adoption of the Deterrence Standard Bolsters the
Argument in Support of This Approach*

Not only do the language of the statute and U.S. Supreme Court precedent support the broad approach to defining adverse employment action, the EEOC also adopts a broad, deterrence approach.²⁸⁰ In *Meritor*, the U.S. Supreme Court noted that, although not binding, EEOC guidelines constitute a body of experience and informed judgment to which courts and litigants properly may resort for guidance.²⁸¹ The EEOC is the administrative agency with the task of enforcing Title VII; therefore, its interpretation should be accorded some weight.²⁸² In *Meritor*, the Court adopted the EEOC's view that harassment leading to non-economic injury could amount to a cause of action under Title VII.²⁸³

²⁷⁴ See 42 U.S.C. § 2000e-2(a)(1), -3(a).

²⁷⁵ See *Mattern*, 104 F.3d at 708-09 (stressing that the vague proscription present in section 703(a) is lacking from section 704(a), and therefore the provision was meant to address only ultimate employment decisions).

²⁷⁶ See *id.*

²⁷⁷ See *Wiles*, *supra* note 3, at 233.

²⁷⁸ See *Mattern*, 104 F.3d at 708-09.

²⁷⁹ See 42 U.S.C. § 2000e-3(a); *Robinson*, 519 U.S. at 345-46.

²⁸⁰ U.S. EQUAL OPPORTUNITY COMM'N, *supra* note 12, at 8-13.

²⁸¹ 477 U.S. at 65.

²⁸² See *id.*

²⁸³ *Id.* at 66.

In interpreting the retaliation provision, the EEOC makes its disapproval of restrictive standards clear in its Compliance Manual.²⁸⁴ The Compliance Manual states that the retaliation provision proscribes *any* adverse treatment that is based on a retaliatory motive and that is reasonably likely to deter the charging party or others from engaging in protected activity.²⁸⁵ Although the EEOC's standard is broad, it does not include trivial annoyances because these would not be sufficient to deter a person from opposing a discriminatory practice.²⁸⁶ In 2000, in *Ray v. Henderson*, the Ninth Circuit specifically adopted the EEOC's deterrence approach, stating that it is consistent with its prior case law and most closely upholds the language and purpose of Title VII.²⁸⁷ The EEOC's endorsement of this approach bolsters the argument in support of its adoption by all circuits.²⁸⁸

D. *The Deterrence Approach Is Necessary in Light of the Ellerth/Faragher Affirmative Defense*

In addition to being harmonious with Title VII's language, purpose, and precedent, the broad, deterrence approach is also the most logical given the affirmative defense announced by the U.S. Supreme Court in 1998 in *Ellerth* and *Faragher*.²⁸⁹ In *Ellerth*, the Court held that employers may be liable for supervisory harassment amounting to a hostile work environment.²⁹⁰ When there is no tangible employment action taken, an employer can avoid liability in a supervisory hostile work environment harassment claim by establishing an affirmative defense.²⁹¹ The employer must show (1) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or otherwise failed to avoid harm.²⁹²

The second prong becomes significant in a court's choice of standard in evaluating adverse employment action in retaliation

²⁸⁴ U.S. EQUAL OPPORTUNITY COMM'N, *supra* note 12, at 8-13.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ 217 F.3d at 1243.

²⁸⁸ See *Meritor*, 477 U.S. at 65; see also Timothy H. Madden, Note, *Adverse Employment Actions: The Wisdom of EEOC Guidance*, 54 RUTGERS L. REV. 739, 745 (2002) (discussing courts' deference to the EEOC).

²⁸⁹ See *Faragher*, 524 U.S. at 807-08; *Ellerth*, 524 U.S. at 765.

²⁹⁰ 524 U.S. at 765.

²⁹¹ *Id.*

²⁹² *Id.*

cases.²⁹³ If an employee who is being sexually harassed by a supervisor did not utilize internal grievance procedures, due to fear of being retaliated against, an employer in a formal charge could invoke the affirmative defense to avoid liability.²⁹⁴ The employer could argue that the plaintiff's fear was unreasonable, and therefore he or she unreasonably failed to use the opportunities provided by the employer.²⁹⁵

To encourage employees who are being discriminatorily harassed to use opportunities provided by the employer to remedy the situation, the law must protect against any retaliation that is likely to deter the employee from coming forward.²⁹⁶ If employees are not insulated against such retaliatory acts, employees might endure the harassment rather than report it and face reprisal not amounting to a material change in employment.²⁹⁷ This leaves employees in a lose-lose situation—if they fail to use the procedures provided by the employer, they could potentially lose out on recovery in a harassment case, or if they utilize internal procedures, they could risk facing employer retaliation amounting to less than an ultimate employment decision or a material change to the terms and conditions of employment.²⁹⁸ Therefore, in order to effectuate the purpose of the retaliation provision, it is necessary to apply the broad, deterrence standard.²⁹⁹

E. Employers' Workplace Autonomy Is Protected in Other Parts of a Retaliation Claim

The previous arguments focused on ensuring employees' access to Title VII remedies; employers, however, likewise have interests that should not be overlooked.³⁰⁰ Those in favor of the restrictive standard argue that without the strict limitation, employees will use section 704(a) to combat every employment decision with which they are unhappy.³⁰¹ This would prevent employers from being able to effectively

²⁹³ See *id.*; Marshall, *supra* note 124, at 577–78.

²⁹⁴ See *Ellerth*, 524 U.S. at 765; Marshall, *supra* note 124, at 578.

²⁹⁵ See Marshall, *supra* note 124, at 578.

²⁹⁶ See *Robinson*, 519 U.S. at 346; Marshall, *supra* note 124, at 576–78; U.S. EQUAL OPPORTUNITY COMM'N, *supra* note 12, at 8-15.

²⁹⁷ See Marshall, *supra* note 124, at 578.

²⁹⁸ See *id.* at 577–78.

²⁹⁹ See *id.*

³⁰⁰ See *Matima v. Celli*, 228 F.3d 68, 79 (2d Cir. 2000); *Rosser v. Laborers' Int'l Union, Local 438*, 616 F.2d 221, 224 (5th Cir. 1980); *Hochstadt v. Worcester Found. for Experimental Biology*, 545 F.2d 222, 233 (1st Cir. 1976).

³⁰¹ *Mattern*, 104 F.3d at 708; Cude & Steger, *supra* note 3, at 398.

manage the workplace.³⁰² An off-shoot of this argument is that courts will be inundated with retaliation claims and employers will have to expend massive resources to defend against frivolous lawsuits.³⁰³ Without a bright-line standard, proponents argue, employers will not be able to adequately identify and prevent illegal retaliation.³⁰⁴

Those in support of the intermediate standard—that adverse employment actions are those that materially affect the terms and conditions of employment—argue that this standard will effectuate the purpose of Title VII by allowing courts to respond to the facts of particular cases, without spurring trivial claims.³⁰⁵ Proponents of this standard, like those in support of the strict standard, contend that the broad approach will open the floodgates of litigation and bombard the courts with frivolous claims.³⁰⁶ Additionally, they maintain that employers are in the best position to manage the workplace effectively, and they should be able to do so without unwarranted judicial interference.³⁰⁷ Further, proponents argue that employers will not be able to prevent discriminatory retaliation if they do not know how to recognize it.³⁰⁸

Concerns that employers will not be able to discipline or terminate the employment of inappropriate or incapable employees without facing a lawsuit are valid.³⁰⁹ The requirement of adverse employment action, however, is not the appropriate portion of a retaliation claim to take these concerns into account.³¹⁰ Additionally, the deterrence standard will not provide a cause of action against merely trivial annoyances in which the plaintiff or others would not be deterred from engaging in the protected activity.³¹¹

Any action that an employer takes in retaliation of a protected activity, which would likely deter that activity, should be actionable.³¹² This is because it best serves the purpose of section 704, which is to maintain access to the remedies for discrimination provided in Title VII.³¹³ This

³⁰² See Cude & Steger, *supra* note 3, at 398.

³⁰³ See Wiles, *supra* note 3, at 237.

³⁰⁴ See *id.*

³⁰⁵ See Rusie, *supra* note 156, at 403; Wiles, *supra* note 3, at 238, 239–40.

³⁰⁶ See Cathy Currie, Note, *Staying on the Straighter and Narrower: A Criticism of the Court's Definition of Adverse Employment Action Under the Retaliation Provision of Title VII*, 43 S. TEX. L. REV. 1323, 1346 (2002); Wiles, *supra* note 3, at 237.

³⁰⁷ See Currie, *supra* note 306, at 1344; Wiles, *supra* note 3, at 237.

³⁰⁸ See Currie, *supra* note 306, at 1344; Wiles, *supra* note 3, at 237.

³⁰⁹ See Cude & Steger, *supra* note 3, at 408.

³¹⁰ See *Matima*, 228 F.3d at 79–80; *Hochstadt*, 545 F.2d at 233.

³¹¹ U.S. EQUAL OPPORTUNITY COMM'N, *supra* note 12, at 8-13.

³¹² *Id.*

³¹³ See *Robinson*, 519 U.S. at 346.

does not mean, however, that employers should be liable for disciplining or even discharging a troublesome employee.³¹⁴ A plaintiff should not be able to establish a prima facie case for retaliation when he or she constantly complains in a hostile or disruptive manner.³¹⁵

The protected activity prong of the prima facie case is the more appropriate aspect to take into account the disruptive nature of a plaintiff's complaints.³¹⁶ A plaintiff should not be able to meet this requirement when he or she engages in opposition that is hostile and excessively disruptive.³¹⁷ In 1976, the First Circuit Court of Appeals in *Hochstadt v. Worcester Foundation for Experimental Biology* held that because the employer was unable to effectively manage its workplace due to the disruptive and inappropriate complaints of the plaintiff, the employer was not liable for taking actions to eliminate the disruption.³¹⁸ Because the plaintiff's opposition to the employer's practices was exceedingly hostile and disruptive, the court balanced the workplace setting and the interests and motivations of the employer and the employee.³¹⁹ *Hochstadt* shows that the protected activity requirement can be used to ensure that courts do not constrain the employer's ability to manage its workplace effectively.³²⁰

Another way that the courts take into account the employer's ability to manage the workplace is through the "legitimate business reason" portion of the burden-shifting framework.³²¹ When an employee has clearly engaged in a protected activity, such as filing a charge with the EEOC, but also has been insubordinate or disruptive with complaints at work, an employer similarly should not be liable for disciplining or discharging that employee.³²² The employee could satisfy the protected activities requirement, but the employer could show that it had a legitimate business reason for its action, such as disciplining a hostile or disruptive employee.³²³ This is precisely what the Second Circuit Court of Appeals held in 2000 in *Matima v. Celli*.³²⁴ In that case, the plaintiff engaged in a number of oppositional activities

³¹⁴ See *Matima*, 228 F.3d at 79; *Rosser*, 616 F.2d at 224; *Hochstadt*, 545 F.2d at 233.

³¹⁵ See *Matima*, 228 F.3d at 79; *Rosser*, 616 F.2d at 224; *Hochstadt*, 545 F.2d at 233.

³¹⁶ See *Hochstadt*, 545 F.2d at 233.

³¹⁷ See *id.*

³¹⁸ *Id.* at 233, 234.

³¹⁹ *Id.* at 232.

³²⁰ See *id.* at 234.

³²¹ See *Matima*, 228 F.3d at 79-80.

³²² See *id.* at 80.

³²³ See *id.* at 80-81.

³²⁴ See *id.* at 81.

and filed a formal charge of discrimination.³²⁵ The employer, however, provided ample evidence that the plaintiff's actions disrupted his work and the work of his coworkers and supervisors.³²⁶ The plaintiff constantly confronted his supervisors in inappropriate ways, leaving the company with no choice but to discharge him in order to effectively manage the company.³²⁷

It is clear that employers retain the authority to discharge or discipline employees as they see fit, so long as their motivation in doing so is legitimate rather than retaliatory.³²⁸ Adopting the deterrence standard will not give plaintiffs a cause of action against trivial annoyances in the workplace.³²⁹ These would not be sufficient to deter the plaintiff or others from engaging in the protected activity.³³⁰ Therefore, the concern that employers would be liable for every small workplace decision they make is unfounded.³³¹

CONCLUSION

Because of the potential for inconsistent results, the U.S. Supreme Court should grant certiorari and establish a uniform standard for evaluating the adverse employment action requirement in a Title VII retaliation claim. The Equal Employment Opportunity Commission's broad, deterrence approach is the most appropriate standard in light of the language of section 704(a) and U.S. Supreme Court precedent. The Court has stated that the purpose of section 704(a) is to maintain unfettered access to Title VII's statutory remedial mechanisms. By focusing on whether an employer's act would deter the plaintiff or others from engaging in the protected activity, this purpose is followed most closely. The possible harsh results of the *Ellerth/Faragher* defense, absent applying the liberal standard, further bolsters this argument. Concerns that every workplace action would satisfy the deterrent standard are unsubstantiated because this standard would not consider trivial annoyances actionable. For these reasons, the Court should adopt the EEOC's broad, deterrence approach.

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³²⁵ See *id.* at 74.

³²⁶ See *Matima*, 228 F.3d at 80-81.

³²⁷ *Id.*

³²⁸ See *id.*; *Hochstadt*, 545 F.2d at 233.

³²⁹ U.S. EQUAL OPPORTUNITY COMM'N, *supra* note 12, at 8-13.

³³⁰ See *id.*

³³¹ See *id.*