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# The Meaning of Adverse Employment Actions in the Context of Title VII Retaliation Claims

Michael Rusie\*

## INTRODUCTION

Retaliation is a distinct and independent cause of action that arises under section 704(a) of Title VII of the 1964 Civil Rights Act.<sup>1</sup> The action provides redress to employees who are “discriminated” against at work, not for their membership in a protected class, but for either their involvement in a protected activity or their opposition to unlawful discrimination.<sup>2</sup> Due to the statutory ambiguity of what

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1. 42 U.S.C. § 2000e-3(a) (1994).

Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings. It shall be 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.*

2. The two areas of protection under the retaliation provision are commonly known as the opposition clause and the participation clause. Generally, the participation clause protects workers who initiate or cooperate in legal investigations or hearings based on discrimination in the workplace. Similarly, the opposition clause protects employees who openly express their concerns about workplace discrimination directed towards either the individual himself, or his co-workers, but which may or may not take on a legal form. The legal proceeding brought by an employee protected by the participation clause need not be meritorious, and the opposition to an employer’s alleged discriminatory practices need only be based on reasonable belief. See Edward T. Ellis and Paula Zimmerman, *Current Developments in Employment Law: Retaliation Claims*, A.L.I.-A.B.A. COURSE OF STUDY: EMPLOYMENT DISCRIMINATION AND CIVIL RIGHTS ACTIONS IN FEDERAL AND STATE COURTS, Feb. 3-5, 2000, at 881, 884-85.

constitutes “discrimination” in the retaliation context,<sup>3</sup> courts have judicially constructed the elements for a prima facie case of Title VII retaliation.<sup>4</sup> One of these elements is some retaliatory act by an employer that constitutes an “adverse employment action.” Currently, the circuits are split as to which employer actions are included in the definition of this judicially created term of art.<sup>5</sup> This Note examines the different constructions of “adverse employment actions” in the context of Title VII retaliation claims.<sup>6</sup>

In *Ray v. Henderson*,<sup>7</sup> the Ninth Circuit held that “adverse employment action” encompassed all “adverse treatment reasonably likely to deter an employee from engaging in the protected activity.”<sup>8</sup> When it adopted this standard, the court stated that it chose to define “adverse employment action” broadly.<sup>9</sup>

When it took the broad view of adverse employment actions in *Henderson*, the Ninth Circuit joined the First, Seventh, Tenth, Eleventh, and D.C. Circuits in the current three-way circuit split on this issue.<sup>10</sup> The Second and Third Circuits articulated a middle-

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3. The co-managers of the bill that became the Civil Rights Act of 1964 “entered an interpretive memorandum into the Congressional Record” that defined discrimination, in a general sense as follows: “to make a distinction, to make a difference in treatment or favor.” 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, 373-74 (1999) (quoting 110 CONG. REC. 7213 (1964)).

4. See, e.g., *Smalley v. City of Eatonville*, 640 F.2d 765, 769 (5th Cir. 1981) (listing the requirements that plaintiff must show to establish a prima facie case as: (1) statutorily protected expression; (2) an adverse employment action; and (3) a causal link between the protected expression and the adverse action). More recent cases replaced “protected expression” in element 1 with “protected activity” to cover cases under both the opposition and participation clause. See *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000).

5. This Note discusses the split as a three-way divide. It should be noted, however, that some courts and commentators discuss the split as a two-way split. See Margery Corbin Eddy, Note, *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 (1999) (characterizing the split as two-way). This depends on how one interprets the vague language often used to describe an “adverse employment action.”

6. As opposed to its application in retaliation provisions of other discrimination statutes or in other provisions of Title VII, like section 703.

7. 217 F.3d 1234 (9th Cir. 2000).

8. *Id.*

9. *Id.* at 1240.

10. See *Wyatt v. City of Boston*, 35 F.3d 13 (1st Cir. 1994) (adverse employment actions (AEA) “include demotions, disadvantageous transfers . . . , and refusals to promote”); *Knox v.*

ground construction of adverse employment action in requiring the alleged retaliatory acts to be “materially adverse.”<sup>11</sup> The Fifth and Eighth Circuits take the most restrictive view and require the retaliatory action to be an “ultimate employment decision” before it rises to the level of an adverse employment action.<sup>12</sup>

This Note demonstrates that the Ninth Circuit, despite a reasonable basis for its decision, took a view that leaves employers too vulnerable to retaliation claims.<sup>13</sup> Furthermore, this Note argues that courts should adopt the “materially adverse” requirement articulated by the Second and Third Circuits.<sup>14</sup> Courts will provide sufficient remedial protection to employees, while shielding employers from trivial or otherwise inconsequential claims.<sup>15</sup>

Part I of this Note briefly documents the history of Title VII retaliation and the court cases that carved out the parameters of the prima facie case of retaliation.<sup>16</sup> Part II outlines recent cases that

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Indiana, 93 F.3d 1327 (7th Cir. 1996) (AEA includes transfer to worse office and deprivation of support services); *Corneveaux v. CUNA Mut. Ins. Group*, 76 F.3d 1498 (10th Cir. 1996) (AEA includes making employee go through extra “hoops” to get severance benefits); *Berry v. Stevinson Chevrolet*, 74 F.3d 980 (10th Cir. 1996) (AEA includes malicious prosecution); *Wideman v. Walmart Stores, Inc.*, 141 F.3d 1453 (11th Cir. 1998) (AEA includes denying lunch break, one-day suspension, and changing schedule); *Passer v. Am. Chem. Soc’y*, 935 F.2d 322 (D.C. Cir. 1991) (AEA includes canceling public event in honor of aggrieved employee).

11. See *Robinson v. City of Pittsburgh*, 120 F.3d 1286 (3d Cir. 1997) (AEA must be action that alters compensation, terms, conditions, or privileges); *Torres v. Pisano*, 116 F.3d 625 (2d Cir. 1997) (AEA must be a materially adverse change in terms and conditions of employment).

12. See *Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir. 1997); *Ledergerber v. Stangler*, 122 F.3d 1142 (8th Cir. 1997).

13. “Retaliation” for the rest of this Note will refer strictly to the Title VII retaliation claims; if another discrimination statute’s retaliation provision is mentioned the author will so indicate.

14. See generally *Robinson v. City of Pittsburgh*, 120 F.3d 1286 (3d Cir. 1997); *Torres v. Pisano*, 116 F.3d 625 (2d Cir. 1997). Some courts may use “materially adverse” language in the opinion without really taking the intermediate position in the circuit split that this language suggests. See *Ledergerber*, 122 F.3d at 1144 (adopts “ultimate employment decision” test but also says that actions must have “effectuated a material change in the terms or conditions of [plaintiff’s] employment”).

15. In using the terms “trivial” and “inconsequential,” the author does not mean to belittle legitimate claims to differential treatment based on involvement in a protected activity, but rather to classify discrimination based on relative severity to make a judgment as to which levels of discrimination should be cognizable under Title VII.

16. Title VII’s retaliation provision has very little legislative history. Section 703 of the 1964 Civil Rights Act, which deals with discrimination based on membership in a protected

construe “adverse employment action” and the standards developed by those courts that form the basis of the current circuit split.<sup>17</sup> Part III analyzes these cases and the history of the conflict to illuminate the problems with the Ninth Circuit’s standard.<sup>18</sup> Part IV proposes that courts adopt the “materially adverse” standard to prevent a proliferation of retaliation claims by employees who seek to redress only trivial “discrimination” in the workplace.<sup>19</sup>

## I. HISTORY OF TITLE VII RETALIATION AND THE PRIMA FACIE CASE

The cause of action for employer-perpetrated retaliation<sup>20</sup> in the workplace originated in Title VII of the 1964 Civil Rights Act.<sup>21</sup> As opposed to causes of action based on section 703(a) of Title VII,<sup>22</sup> Congress meant the retaliation provision to protect any employee,<sup>23</sup>

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group, has received much more attention. Therefore, this section will focus primarily on the case law that developed the contours of this cause of action.

17. “Adverse employment action” is not a statutorily created term that courts have to construe, but rather a judicially created one. The retaliation provision only refers to “discrimination.” See Lidge, *supra* note 3; see also 42 U.S.C. § 2000e-3(2) (1994).

18. The Ninth Circuit is joined in its broad stance by the First, Seventh, Tenth, Eleventh, and D.C. Circuits. See *supra* note 10. Although these circuits advocate a “broad” view of adverse employment action, their articulation of this view is not always the same. This Note groups the circuits this way for comparison purposes.

19. Although no circuit explicitly advocates “trivial” discrimination as cognizable under Title VII *per se*, this term is value laden and relative. The term’s application varies based on one’s viewpoint and its relationship to other types of discrimination. In this author’s opinion, the broader view (of AEA) opens the door to litigation over minor matters that in some instances can be considered “trivial.” It should also be noted that the Equal Employment Opportunity Commission (EEOC) recognizes that “petty slights and trivial annoyances are not actionable.” EEOC COMPLIANCE MANUAL 6512 (Ronald Miller & Joanne Boy eds., 1999).

20. Although most cases and this Note generally deal with retaliation perpetrated directly by the employer to the employee, some cases suggest that retaliation at the hands of co-employees can be cognizable in some instances. See *Knox*, 93 F.3d at 1333 (an employer who is aware of retaliation by co-employees and does not take action can be held liable); see also *Gunnell v. Utah Valley State College*, 152 F.3d 1253, 1264 (10th Cir. 1998) (finding that “co-worker hostility or retaliatory harassment, if sufficiently severe, may constitute ‘adverse employment action’ for purposes of a retaliation claim”).

21. See 42 U.S.C. § 2000e-3(a).

22. 42 U.S.C. § 2000e-2(a). It is unlawful, *inter alia*, “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 . . . .” *Id.*

23. The Supreme Court extended this protection to former employees as well. *Robinson v. Shell Oil*, 519 U.S. 337 (1997) (holding the term “employee” in the Title VII retaliation provision to include former employees). *Robinson* involved a man who filed an EEOC charge

regardless of membership in a protected class,<sup>24</sup> from discrimination based on opposition to employer practices<sup>25</sup> or participation in a protected activity.<sup>26</sup>

Title VII's retaliation provision, although clearly not the predominant focus of Title VII, is essential to the protections afforded by Title VII.<sup>27</sup> The purpose of Title VII is to protect the employee who utilizes the remedial measures granted by Congress to protect his or her rights under its other provisions.<sup>28</sup> In section 704(a), Congress struck the balance in favor of employees when it weighed the competing interests of employers' need to protect their reputation against unwarranted discrimination complaints with employees' need to protect their rights to make such complaints.<sup>29</sup>

Congress' subsequent enactment of similar retaliation provisions, in recent discrimination statutes, reflects the importance of Title VII's retaliation provision in the protection of employee rights.<sup>30</sup> Since

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after being fired for allegedly discriminatory reasons that formed the basis of his EEOC claim. Robinson was subsequently given a poor reference by his former employer while in the process of seeking a new job.

24. Protected classes under Title VII are listed in section 703. 42 U.S.C. § 2000e-2(a). They include members of any racial classification, religious group, nationality, or gender. Membership in a protected class has significance in deciding who can bring a suit for disparate impact or disparate treatment in any given situation. For example, a man could not bring a disparate impact claim against his employer for actions that have a discriminatory impact on female workers at his place of employment. Only a woman could bring a claim in this instance, because the protected class is female employees.

25. See *supra* note 2 (describing the "opposition clause"). The "opposition" is typically discrimination based on section 703.

26. See *supra* note 2 (describing the "participation clause"). This is typically participation in a hearing related to discrimination based on section 703.

27. The major source of debate and discussion in the Act's legislative history involved the protections provided by section 703(a). See generally EEOC, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964 (1966). Also, most litigation that surrounds Title VII is grounded in the protections afforded in section 703(a). Indeed, by their very nature, retaliation claims are based on underlying alleged violations of section 703(a).

28. In *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1004-05 (5th Cir. 1969), the court states that "[t]here can be no doubt about the purpose of § 704(a). In unmistakable language it is to protect the employee who utilizes the tools provided by Congress to protect his rights." *Id.*

29. *Id.* at 1007.

30. One commentator suggested that if a statute does not contain a retaliation provision, an aggrieved employee may still find protection under a generic retaliation provision in 42 U.S.C. § 1985(2) (1994). This provision reads, in part:

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from

enactment of Title VII, Congress inserted parallel provisions into the Age Discrimination in Employment Act,<sup>31</sup> the Americans with Disabilities Act,<sup>32</sup> the Equal Pay Act of the Fair Labor Standards Act,<sup>33</sup> and the Family Medical Leave Act.<sup>34</sup>

Due to the ambiguities present in the retaliation provision of Title VII and these subsequent statutes, courts are left to develop the specific contours of the prima facie case for retaliatory discrimination.<sup>35</sup> Courts that face this challenge almost universally adopt a three part test: (1) employee involvement in a protected activity;<sup>36</sup> (2) an adverse employment action against the employee;<sup>37</sup> and (3) a causal link between (1) and (2).<sup>38</sup> The second part of this three-part test, the adverse employment action, is the most contentious.<sup>39</sup> The high level of contention that surrounds this

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attending such court, or from testifying to any matter pending therein . . . the party so injured or deprived may have an action for recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Ellis, *supra* note 2, at 883 n.1.

31. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(d) (2000).

32. Americans with Disabilities Act of 1990 § 503(a), 42 U.S.C. § 12203 (2000).

33. The Equal Pay Act of 1963, 29 U.S.C. § 215(a)(3) (2000).

34. The Family Medical Leave Act, 29 U.S.C. § 2615 (2000).

35. The ambiguity refers to the use of the word “discrimination” in the retaliation provision. It can be argued that this word is not ambiguous and should be used in any standard of liability. *Cf.* Lidge, *supra* note 3, at 340 (advocating “discriminatory employment action” instead). This author believes, however, that even if the word has a plain meaning on its face, it is ambiguous with regard to its application in the retaliation context. Congress surely did not intend for courts to apply strict and mechanically the term “discrimination,” which is a very broad term, because that would dictate liability even in the most “trivial” of circumstances. *See supra* note 19.

36. This factor implicates either the opposition or participation clauses. *See supra* note 2.

37. After *Robinson v. Shell Oil*, this factor can also include former employees. *See Robinson v. Shell Oil*, 519 U.S. 337 (1997).

38. For an example of an enunciation of this three-part test, see *Corneveaux v. CUNA Mut. Ins. Group*, 76 F.3d 1498, 1507 (10th Cir. 1996). Once courts determine that the plaintiff facially established the prima facie case of retaliation, they invoke a burden-shifting approach announced in the Supreme Court case of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Although the *McDonnell* case did not involve a retaliation claim, its burden-shifting approach as applied in a disparate treatment context has been almost universally applied to retaliation claims as well. A Ninth Circuit case enunciated the burden shifting approach in a retaliation context as follows: “If the plaintiff makes out a prima facie case, the burden shifts to the defendant ‘to articulate some legitimate, non-retaliatory reason for the adverse action.’ The burden then shifts back to the plaintiff to show that the asserted reason is pretextual.” Ellis, *supra* note 2, at 886-87 (quoting *Jordan v. Clark*, 847 F.2d 1368, 1376 (9th Cir. 1988)).

39. For the opposite view, see MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON

element of the prima facie case is evident in the current divide in the federal circuits as to the appropriate boundaries of “adverse employment action.”

## II. THE CIRCUIT SPLIT

The circuit split over the “construction”<sup>40</sup> of adverse employment action roughly breaks down into three categories.<sup>41</sup> First, some circuits define this element narrowly and find liability only for “ultimate employment actions” taken in retaliation for involvement in protected activities.<sup>42</sup> Other circuits take an intermediate position and find liability only where the action was “materially adverse.”<sup>43</sup> Finally, a majority of circuits find broad liability even in situations that fall below a materially adverse threshold.<sup>44</sup>

### *A. The Narrow View*

The minority of circuits find retaliation liability only where the employer’s action entails an “ultimate employment action.”<sup>45</sup> Courts have held that ultimate employment actions include hiring, firing, demotions, promotions, and compensation.

The Fourth Circuit, in *Page v. Bolger*,<sup>46</sup> first articulated the ultimate employment standard in a case that did not involve a Title VII retaliation claim.<sup>47</sup> In *Page*, a black postal employee alleged discrimination when his employer repeatedly denied him a

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EMPLOYMENT DISCRIMINATION 305 (2d ed. 1988) (“The second element, adverse effect, poses no peculiar problems for retaliation law; as with section 703(a), the only question is whether the employee was treated differently from employees who did not engage in protected conduct. The third element, causation, is the most difficult.”).

40. Construction refers to the interpretation of the judicially created term “adverse employment action,” rather than to construe a statute. *See supra* note 17.

41. *See supra* note 5.

42. *See supra* text accompanying note 12.

43. *See supra* text accompanying note 11.

44. *See supra* text accompanying note 10.

45. *See infra* text accompanying notes 52 and 65.

46. 645 F.2d 227 (4th Cir. 1981) (en banc).

47. Although this case did not involve a retaliation claim, the decision’s effect on future retaliation cases in the Fifth and Eighth Circuits is clear. In *Mattern v. Eastman Kodak*, 104 F.3d 702 (5th Cir. 1997), discussed in the following text, the court cites *Page* for the proposition that only ultimate employment decisions are actionable. *Id.* at 708.

supervisory position.<sup>48</sup> Page brought his action under section 717 of Title VII for disparate treatment of a federal employee.<sup>49</sup> The court held that the disparate treatment theory of Title VII typically focuses on discrimination that involves ultimate employment decisions.<sup>50</sup>

Page's articulation of the threshold of liability in disparate treatment cases subsequently formed the analytical basis used by courts that hear Title VII retaliation cases and adopt a narrow view of "adverse employment action."<sup>51</sup> In *Mattern v. Eastman Kodak Co.*,<sup>52</sup> the Fifth Circuit took exactly this position.<sup>53</sup> Mattern, a mechanic in Eastman Kodak's mechanic's apprenticeship program alleged sexual harassment by members of her on-the-job training crew. After she filed an Equal Employment Opportunity Commission (EEOC) charge for harassment, Mattern received poor evaluations from her supervisor, had her locker broken into, and experienced hostility from her co-workers.<sup>54</sup> Mattern subsequently brought an action for hostile work environment, constructive discharge, and retaliation.<sup>55</sup> The

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48. Page came up for promotions on three separate occasions. Each time the decision to promote was in the hands of three white employees, who collectively denied Page a promotion on each occasion, choosing a white employee instead. 645 F.2d at 229.

49. *Id.* at 227; Civil Rights Act of 1964, 42 U.S.C. § 2000e-16a (1996). Section 717 of this Act applies to employees of the federal government. Subsection (a), entitled "Discrimination Prohibited," provides, in part, "All personnel actions affecting employees or applicants for employment . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin." *Id.* (emphasis added).

50. 645 F.2d at 233 (saying that courts have "consistently focused on the question whether there has been discrimination in what could be characterized as ultimate employment decisions such as hiring, granting leave, discharging, promoting, and compensating").

51. These cases involve a situation where a person is treated differently by her employer because of her race, sex, nationality, or religion. The private cause of action for disparate treatment is found in section 703 provisions of Title VII. 42 U.S.C. § 2000e-2.

52. 104 F.3d 702 (5th Cir. 1997).

53. *Id.* at 707-09. The position that only "ultimate employment decisions" can constitute an adverse employment action. The Fifth Circuit has stuck with its view in subsequent cases, and appears to be the primary supporter of this position. *See* Burger v. Central Apt. Management, 168 F.3d 875, 878-80 (5th Cir. 1999) (holding that denial of a lateral transfer with the same job duties, wages, and benefits did not constitute an "ultimate employment decision"); Watts v. Kroger Co., 170 F.3d 505, 511-12 (5th Cir. 1999) (holding that Title VII is designed to protect employees from ultimate employment decisions and not every decision that might have some tangible effect on the employee).

54. 104 F.3d at 705-06. The Court also points out that Mattern failed a couple "major skills tests" at the same time and cites this as a possible reason for her missed pay increase and her slow progress in the apprenticeship program. *Id.* at 709.

55. *Id.* at 704. Mattern's hostile work environment sexual harassment claim and her constructive discharge action failed at the trial level. *Id.* The jury found that although Mattern

court held for the defendant on the retaliation claim,<sup>56</sup> stating: “Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions.”<sup>57</sup>

*Mattern* defined ultimate employment decisions<sup>58</sup> to include such decisions as hiring, firing, granting leave, discharging, promoting, and compensating.<sup>59</sup> The court further stated that hostility by co-workers did not constitute an adverse employment action<sup>60</sup> and, in general, *Mattern* could only prove “examples of many interlocutory or mediate decisions having no immediate effect upon employment decisions.”<sup>61</sup> The court held that the only action which *Mattern* could identify as a sufficiently adverse employment action was a missed pay increase.<sup>62</sup> Despite this fact, the court dismissed this claim because, *inter alia*, *Mattern* could not prove the increase would have taken effect before she resigned.<sup>63</sup> Thus, the *Mattern* decision carved out the Fifth Circuit’s restrictive view of adverse employment action

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was harassed by her co-workers, her employer took immediate remedial action. *Id.* The jury did find for *Mattern* on the retaliation claim, however, and awarded her \$50,000 in damages. *Id.* The jury was instructed, in part, as follows: “Now, adverse employment action could be defined as a discharge, a demotion, refusal to hire, refusal to promote, reprimand, [or] acts of sabotage . . . .” *Id.* at 707.

56. *Id.* at 703. The Appeals Court reversed the trial court’s denial of Defendant’s motion for a judgment as a matter of law following the jury verdict. *Id.*

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

58. *Id.* The court did not address competing conceptions of the standard for adverse employment decision, but rather assumed that “ultimate employment decision” was the only standard. *Id.* Indeed, the court states, in the opening line of the opinion, that, “The linchpin for this appeal is what constitutes an ‘ultimate employment decision’ as required for a retaliation claim under Title VII of the Civil Rights Act of 1964.” *Id.* at 703.

59. *Id.* at 707.

60. *Id.* Other courts have taken the opposite view and held that hostility by co-workers can constitute retaliation. See *supra* text accompanying note 20.

61. *Id.* at 708 (quoting in part from *Page v. Bolger*, 645 F.2d 227, 233) (4th Cir. 1981) (en banc)). The dissenting opinion in *Mattern*, written by Justice Dennis, strongly admonishes the majority for relying in part on rationale from the *Page* decision. *Id.* at 716-17. The dissent claims that the majority mistakenly reads the *Page* decision to limit the scope of Title VII discrimination liability, when in fact nothing in the opinion or Title VII suggests such an interpretation. *Id.* at 717.

62. *Id.* at 709.

63. *Id.* The court cites two other reasons as support for dismissal of *Mattern*’s retaliation claim. First, they argued that there was evidence that *Mattern* was not qualified for the job in the major skills tests she failed. *Id.* Second, the court noted a general lack of evidence for all her claims of retaliatory acts. *Id.*

by allowing only a narrow avenue of redress to employees retaliated against in the workplace.

The Eighth Circuit in *Ledergerber v. Stangler*,<sup>64</sup> took a similar approach to the Fifth Circuit,<sup>65</sup> and held that an employee's allegations were insufficient to establish a prima facie case of retaliation because the court did not consider the action an ultimate employment decision.<sup>66</sup> The employee who brought the suit, Diane Ledergerber, was a white income maintenance supervisor for the Division of Family Services of the Missouri Department of Social Services. Ledergerber alleged that she was discriminated against on account of her race and that she was subsequently retaliated against for opposing the department's policy of deference to black employees.<sup>67</sup> The alleged retaliatory acts included: replacement of her office staff with personnel transferred in from another office. In addition, she retained the same position and title in her office, and a negative statement was placed in her employee file.<sup>68</sup>

The Court found that Ledergerber's allegations if true, had only a "tangential effect" in this case.<sup>69</sup> The Court followed Fifth Circuit

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64. 122 F.3d 1142 (8th Cir. 1997).

65. *Id.* at 1144. The Court's decision was similar, but not entirely consistent with *Mattern* because of the fact that the *Ledergerber* court used both "ultimate employment decision" and "materially adverse" language in its opinion. *See supra* text accompanying note 14.

66. *Id.* at 1144 (stating that the action "did not rise to the level of an ultimate employment decision intended to be actionable under Title VII.>").

67. *Id.* at 1143-44. Ironically, Ledergerber's motives to file her claims of harassment and retaliation were retaliatory. In 1993, sixteen black co-worker's alleged that the office Ledergerber worked in discriminated against them based on race. This initial complaint did not include specific charges against Ledergerber. Later that same year, however, three more black employees came forward with a new complaint that alleged that Ledergerber retaliated against them for participating in the original discrimination complaint. Following this second charge, the Department of Social Service (DSS) director, also defendant, Gary Stangler, determined that the office's hiring practices were flawed and that two of the six allegations of retaliation at the hands of Ledergerber were substantiated. *Id.* In response, Stangler recommended changes in the office's hiring practices and corrective action against Ledergerber. *Id.* The corrective action that ensued transferred out the caseworkers in Ledergerber's office and transferred in other caseworkers from another division, ostensibly to avoid personal clashes, and placing a notice in Ledergerber's employee file that discriminatory practices would not be tolerated. This action is the point at which Ledergerber brought her suit for racial discrimination and retaliation. *Id.* at 1143.

68. *See supra* text accompanying note 64. The statement placed in Ledergerber's file was arguably not negative, because it did not mention wrongdoing on the part of Ledergerber and was similarly placed in the files of co-workers. 122 F.3d at 1145.

69. *Id.* at 1144.

precedent<sup>70</sup> and appeared to utilize two distinct standards to determine the threshold for an adverse employment action.<sup>71</sup> The Court said that in order to make out a prima facie case, an employee needed to show a “materially significant disadvantage.”<sup>72</sup> Thus, the Court seemed to walk the line between adopting the most restrictive view, that of the “ultimate employment decision,” and the more intermediate position of a materially adverse action.

### *B. The Intermediate View—Materially Adverse Action*

At least three federal circuits, the Second, Third, and Fourth, employ a lower threshold of liability than the Fifth and Eighth Circuits, and have adopted a materially adverse requirement.<sup>73</sup> This standard includes actions that fall short of ultimate employment decisions, but which nonetheless require relatively significant consequences to the employee before liability attaches.

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70. *Id.* The court follows, in part, the precedent of *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379 (8th Cir. 1994) (using “materially significant disadvantage language”). 122 F.3d at 1144. The dissent criticizes the majority for what it deems to be a mis-read of *Harlston*, saying, “I do not believe, however, that *Harlston* stands for the proposition that an employer can avoid Title VII liability by characterizing all changes in duties as qualitative and, therefore, non-adverse.” *Id.* at 1145. In addition, the dissent questions the majority’s application of the materially adverse requirement, saying, “I cannot accept the premise that being identified as a racist by one’s employer ‘cause[s] no materially significant disadvantage.’” *Id.* (quoting *Harlston*, 37 F.3d at 382).

71. *Id.* at 1144-45. The court uses both the “materially adverse” standard and the “ultimate employment decision” standard. *See supra* text accompanying notes 14 and 62.

72. *Id.* at 1144 (quoting *Harlston* in saying “changes in duties or working conditions that cause no materially significant disadvantage . . . are insufficient to establish the adverse conduct required to make a prima facie case”).

73. *Torres v. Pisano*, 116 F.3d 625 (2d Cir. 1997); *Robinson v. City of Pittsburgh*, 120 F.3d 1286 (3d Cir. 1997); and *Munday v. Waste Mgmt. of N. Am., Inc.*, 126 F.3d 239 (4th Cir. 1997). The case that initially introduced the adverse requirement was *Spring v. Sheboygan Area School Dist.*, 865 F.2d 883 (7th Cir. 1989). Although *Spring* did not involve a retaliation claim, numerous subsequent cases that deal with retaliation utilize its articulation of “materially adverse employment action.” *See Lidge, supra* note 3, at 350-51. Since *Spring*, it seems that the Seventh Circuit remains in a state of confusion as to the standard for adverse employment actions. *Compare Knox v. State of Indiana*, 93 F.3d 1327, 1334 (taking an exceptionally broad view of adverse employment action to include moving an employee to a less desirable office and to deprive her of previously available support services), *with Smart v. Ball State Univ.*, 89 F.3d 437, 442 (7th Cir. 1996) (taking a narrower view that an unfavorable employment evaluation is insufficient by itself to trigger Title VII retaliation liability), *with Rabinovitz v. Pena*, 89 F.3d 482, 488 (7th Cir. 1996) (taking middle ground in adopting “materially adverse” requirement).

The Third Circuit adopted this middle-of-the-road approach in *Robinson v. City of Pittsburgh*.<sup>74</sup> In *Robinson*, a female police officer accused her supervisors of sexual harassment and retaliation.<sup>75</sup> Once the officer filed a charge with the EEOC, she allegedly received a reassignment, an oral reprimand, and derogatory comments.<sup>76</sup> At the trial level, the court granted the defendant's motion for summary judgment with respect to the retaliation claim.<sup>77</sup> The court claimed that Robinson failed to prove the third requirement in a prima facie case of retaliation: the causal link between the alleged adverse acts and her participation in an EEOC claim.<sup>78</sup>

The Third Circuit affirmed the lower court's dismissal of Robinson's retaliation claim and agreed that Robinson did not prove a causal link. The court added that her claim also failed because the alleged adverse acts committed by her employer did not constitute adverse employment actions.<sup>79</sup> The court established that, "retaliatory conduct must be serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment . . . ."<sup>80</sup>

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74. 120 F.3d 1286 (3d Cir. 1997).

75. *Id.* at 1292. Robinson complained of both hostile work environment and quid pro quo sexual harassment. *Id.*

76. Unlike most cases that involve a transfer in the retaliation context, Robinson alleged that a *failure* to transfer constituted the adverse employment action. Robinson claims that her employment forced her to continue to work under the supervisor against whom she lodged her sexual harassment claim. *Id.* at 1300. Ultimately, both the trial and appellate courts found that many of these alleged acts of reprisal occurred before Robinson filed her EEOC charge, and thus did not constitute retaliation. *Id.* at 1301.

77. The court dismissed all three retaliation claims brought by Robinson, two against individual supervisors and one against the city. *Id.* at 1292.

78. *Id.*; see ZIMMER ET AL., *supra* note 39 (stating that the causation element of retaliation claim is hardest to prove).

79. 120 F.3d at 1300-01. Although the *Robinson* court does not impose a "materially adverse" requirement, the court implicitly takes this intermediate position in its language and in the cases it cites to support its position. The court quotes *McDonnell v. Cisneros*, 84 F.3d 256 (7th Cir. 1996), a case that utilizes the materially adverse standard, and interprets it to say that this standard "is a paraphrase of Title VII's basic prohibition against employment discrimination, found in 42 U.S.C. §§ 2000e-2(a)(1) and (2)." 120 F.3d at 1300-01 (quoting *McDonnell*, 84 F.3d at 258). Likewise, the court cites *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996), another case that adopts the materially adverse position. 120 F.3d at 1300-01; see also *Mondzelewski v. Pathmark Stores*, 162 F.3d 778, 787 (3d Cir. 1998) (following the *Robinson* decision and citing it for the proposition that the term "discrimination" equates with "materially adverse employment action").

80. 120 F.3d at 1300. Again, the language used by the court, i.e. "tangible" and "serious," practically imposes a standard very similar to a "materially adverse" requirement. Although,

In accordance with the court's view that the test for adverse employment action arises from the same principles that govern disparate treatment under section 703 of the Civil Rights Act,<sup>81</sup> the court said that retaliatory conduct is generally to be proscribed if it: (1) alters compensation, terms, conditions, or privileges of employment; (2) deprives the employee of an employment opportunity; or (3) adversely affects the status of the employee.<sup>82</sup> The court then added the general disclaimer that "not everything that makes an employee unhappy qualifies as retaliation . . . ."<sup>83</sup> Thus, like most courts that addressed this issue, the *Robinson* court made it clear that trivial effects on one's employment situation will not give rise to a retaliation claim.

Similar to the approach taken in *Robinson*, the Second Circuit adopted the intermediate standard of "materially adverse change" in *Torres v. Pisano*.<sup>84</sup> In *Torres*, the plaintiff alleged both racial and sexual discrimination under Title VII.<sup>85</sup> After the plaintiff filed an EEOC charge based on these claims, she alleged that two of her supervisors retaliated by telling her to drop the charges.<sup>86</sup> The trial court granted summary judgment in favor of the defendant, and the

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courts use language from the disparate treatment provision of 42 U.S.C. § 2000e-2(a), section 703 of the Civil Rights Act, to adopt the broad view, the court's opinion rejects this view. This rejection is evident from the cases the court cites and the court's strong feeling that only truly serious actions will trigger liability. *See supra* text accompanying note 79 for the court's position. The court states that, "not everything that makes an employee unhappy' qualifies as retaliation, for '[o]therwise, 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.'" *Id.* at 1300 (quoting *Williams*, 85 F.3d at 274)).

81. *See supra* text accompanying notes 22 and 78.

82. 120 F.3d at 1300.

83. *Id.* at 1300 (quoting *Smart*, 89 F.3d at 441).

84. 116 F.3d 625 (2d Cir. 1997). Although much of the *Torres* decision focuses on an issue tangential to the present topic, the court's decision is nonetheless important in that it makes a clear stand for the "materially adverse" standard. *See Richardson v. N.Y. State Dep't of Corr. Serv.*, 180 F.3d 426, 446 (2d Cir. 1999) (interpreting *Torres* to hold that "a plaintiff may suffer an 'adverse employment action' if she endures a 'materially adverse change in the terms and conditions of employment'").

85. *Torres* was a Puerto Rican woman employed by New York University as a secretary in the Dental Center. Her supervisor, Eugene Coe, made sexually disparaging remarks and called her a "dumb spic" and other racially-charged nicknames. 116 F.3d at 628.

86. *Id.* at 629. Two supervisory officials in the school administration allegedly intimidated *Torres*. *Id.*

Second Circuit affirmed.<sup>87</sup>

The Second Circuit held that Torres failed to prove a “materially adverse change in the terms and conditions of employment.”<sup>88</sup> The court said that although she was possibly intimidated and frightened, these actions did not meet the standard, because nothing changed in her employment situation.<sup>89</sup> ““Reasonable defensive measures,”” as the court described them, “do not violate the anti-retaliation provision of Title VII, even though such steps are adverse to the charging employee’ . . . so long as they ‘do not affect the complainant’s work, working conditions, or compensation.’”<sup>90</sup> The court noted in dicta, however, that repeated attempts to demand a withdrawal of charges could constitute adverse employment actions in some cases, provided that the pressure from these demands altered the conditions of employment.<sup>91</sup> Thus, the Second Circuit seemed to advocate the materially adverse standard in *Torres* and acknowledged that liability rests not on the specific act committed by the employer, but the effect this act has on the employment conditions of the aggrieved employee.<sup>92</sup>

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87. *Id.* at 641.

88. *Id.* at 640 (quoting *McKenney v. N.Y. City Off-Track Betting Corp.*, 903 F. Supp. 619, 623 (S.D.N.Y. 1995)).

89. 116 F.3d at 640. In fact, as the court points out, Torres’ job conditions actually improved after she complained to supervisory personnel and filed her EEOC charge. Her immediate supervisor and the alleged harasser, Coe, were fired while Torres received a transfer and a substantial raise. *Id.*

90. *Id.* (quoting *United States v. N.Y. City Transit Auth.*, 97 F.3d 672, 677 (2d Cir. 1996)). Presumably, when the court uses the term “reasonable defensive measures” it refers to actions like the one in this case, i.e. to request that an employee drop the charges.

91. 116 F.3d at 640. The court adds,

For instance, repeated and forceful demands accompanied even by veiled suggestions that failure to comply would lead to termination, discipline, unpleasant assignments or the like, might in some circumstances affect an employee’s working conditions. But here Torres admits that Heller and Pisano did not repeat their requests, that she in fact refused their requests, and that she suffered no negative consequences as a result of having turned them down.

*Id.*

92. *See supra* text accompanying notes 88-90.

### C. *The Broad View*

The First, Seventh, Tenth, Eleventh, and D.C. Circuits take a broad view of what constitutes an adverse employment action and place more emphasis on the employer's motive than on the effect of the employment action.<sup>93</sup> In addition, the EEOC explicitly adopted this approach and explicitly rejected both the ultimate employment decision test and the materially adverse test.<sup>94</sup> Although the broad approach is articulated in various ways, all courts that adopt this position give considerable remedial affect to Title VII's retaliation provision.

In *Ray v. Henderson*,<sup>95</sup> the Ninth Circuit sided with the EEOC to hold that, "an adverse employment action is adverse treatment that is reasonably likely to deter employees from engaging in a protected activity."<sup>96</sup> Ray, a postal carrier for twenty-eight years, brought suit when his employer allegedly retaliated against him for opposing gender bias and harassment against female co-workers.<sup>97</sup> The alleged acts of retaliation included: the elimination of employee meetings, the cancellation of the post office's policy of flexible start times, the

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93. See *supra* text accompanying note 10 (discussing only the *Ray* and *Passer* cases).

94. EEOC COMPLIANCE MANUAL, *supra* note 19. The *EEOC Compliance Manual* contains a section entitled, "Adverse Actions Need Not Qualify as 'Ultimate Employment Actions' or Materially Affect the Terms and Conditions of Employment to Constitute Retaliation." *Id.* The Manual says that these two opposing standards are "unduly restrictive" and "[t]he 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." *Id.* In further support of its position, the EEOC notes that no qualifiers attach to the word discrimination in section 704, and thus coverage was intended for "any discrimination." *Id.* at 6513. The EEOC also suggests that the Supreme Court may endorse the broad approach in that it has held that the purpose of the anti-retaliation provision was to "[m]aintain[] unfettered access to statutory remedial mechanisms." *Id.* (quoting *Robinson v. Shell Oil Co.*, 519 U.S. at 346).

95. 217 F.3d 1234 (9th Cir. 2000).

96. *Id.* at 1237. This is almost a direct quote from the *EEOC Compliance Manual*. See *supra* note 94.

97. *Supra* text accompanying note 95, at 1237. Ray's claim here fell under both the opposition and participation clauses. He initially opposed his employer's alleged discrimination of female co-workers through verbal complaints at employee meetings and written letters. *Id.* Later, after he himself began to experience a hostile work environment, Ray requested EEOC counseling. *Id.* at 1238. Ray claimed he suffered retaliatory acts both after he opposed discrimination by his employer and then again after he participated in an EEOC counseling request on behalf of himself and his co-workers.

institution to a “lockdown” during the day, and the reduction of Ray’s salary.<sup>98</sup>

After the *Ray* Court addressed and chronicled the circuit split on this issue, it announced that the Ninth Circuit defines adverse employment action broadly.<sup>99</sup> The court adopted the EEOC approach and noted that the standard focused on deterrent effects and discrimination rather than ultimate effects and the level of severity involved.<sup>100</sup> Furthermore, the court reasoned that the broad standard was consistent with both prior case law and the language and purpose of Title VII.<sup>101</sup>

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98. *Id.* at 1238-39, 1243-44. After Ray initially wrote a letter to complain of the harassment of women in his office to one of the top supervisors, Ray’s immediate supervisor consistently berated him publicly and threatened to change his policy of “self-management.” *Id.* at 1237-38. Ultimately, the supervisor did cancel employee meetings and mandated that employees come in at 7:00 a.m., rather than 6:00 a.m. as Ray was accustomed to, which gave the carriers less time to sort their mail. *Id.* Also, Ray was personally singled out for harassment; he was falsely charged with misconduct and subjected to numerous pranks. *Id.* at 1238. In response to these episodes, Ray filed his first formal complaint with the EEOC. *Id.* It was after this complaint that Ray and his co-workers were subject to “lockdown,” by which they were required to ring a bell and wait for a fellow employee to let them in each time they went in and out of the post office. *Id.* at 1238-39. This process considerably increased the time it took for the carriers to complete their jobs. Ray complained again to the EEOC on three more occasions, only to have his route cut in size, thereby reducing his salary by approximately \$3,000. *Id.* at 1239.

99. *Id.* at 1240-41. The court, like this Note, characterizes the circuit split as a three-way split. *Id.* at 1240. The court took the broad position and followed circuit precedents citing cases in support thereof. *See Strother v. Southern California Permanente Med. Group*, 79 F.3d 859, 869 (9th Cir. 1996) (stating that “mere ostracism does not constitute an adverse employment action,” but a lateral transfer does); *Yartsoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1997) (holding that “transfers of job duties and undeserved performance ratings, if proven, would constitute adverse employment action”); *St. John v. Employment Dev. Dept.*, 642 F.2d 273, 274 (9th Cir. 1981) (holding that transfer to another job of the same pay and status may constitute an AEA); *Hashimoto v. Dalton*, 118 F.3d 671, 676 (9th Cir. 1997) (holding that dissemination of an unfavorable job reference was an AEA “because it was a “personnel action” motivated by retaliatory animus”). *Id.* at 1241.

100. *Id.* at 1243. The court quotes from *Hashimoto*, 118 F.3d at 676, when it states that “the severity of an action’s ultimate impact (such as loss of pay or status) ‘goes to the issue of damages, not liability.’” *Id.*

101. *Id.* at 1243. To reason that their position is consistent with the language of Title VII, the court looked to the word “discrimination” within the statute and noted that it contains no qualifiers. 217 F.3d at 1243. Thus, the court reasoned, “[t]his provision does not limit what type of discrimination is covered, nor does it prescribe a minimum level of severity for actionable discrimination.” *Id.* In support of this position, the court quotes *Passer* as saying: “The statute itself proscribes “discrimination” against those who invoke the Act’s protections; the statute does not limit its reach only to acts of retaliation that take the form of cognizable employment actions such as discharge, transfer or demotion . . . .” *Id.* (citing *Passer v. Am. Chem. Soc’y*,

Like the *Ray* court, the D.C. Circuit chose to adopt a broad standard of liability in the context of retaliation claims. In *Passer v. American Chemical Society*,<sup>102</sup> the D.C. Circuit addressed a retaliation claim based on the Age Discrimination in Employment Act.<sup>103</sup> The ADEA contains a virtually identical retaliation provision as the one found in Title VII.<sup>104</sup> The *Passer* case involved a distinguished director in the American Chemical Society (ACS) who was forced to retire upon reaching the age of seventy.<sup>105</sup> Passer did not want to end his career that early, so he filed an age discrimination claim shortly before his employment expired.<sup>106</sup> After Passer filed his claim, the ACS cancelled a planned symposium in his honor.<sup>107</sup>

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935 F.2d 322, 331 (D.C. Cir. 1991); see also *supra* text accompanying notes 10 and 100.

102. 935 F.2d 322 (D.C. Cir. 1991). For Title VII retaliation cases in the D.C. Circuit that follow the lead of *Passer*, see *Cones v. Shalala*, 199 F.3d 512 (D.C. Cir. 2000) (citing *Passer* to advocate a broad definition of adverse employment action); *Brown v. Brody*, 199 F.3d 499 (D.C. Cir. 1999) (citing *Passer* throughout and noting that ADEA and Title VII retaliation cases often utilize same standard of conduct).

103. 29 U.S.C. § 623(d).

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act.

*Id.*

104. See *Passer*, 935 F.2d at 330. Because the ADEA has an almost identical retaliation provision, Title VII cases are often used to analyze ADEA retaliation cases and vice versa. *Id.* See also *Brown*, 199 F.3d at 456.

105. See *Passer*, 935 F.2d at 324. Passer was made to retire pursuant to an internal policy of the American Chemical Society (ACS). *Id.* He was to retire in January 1987, the exact month the ADEA took effect. *Id.* As of January 1, 1987 employers could no longer enforce mandatory retirement policies. *Id.* However, the ACS argued that Passer's situation fell within a narrow exception to the ADEA because he could be classified as a "bona fide executive." *Id.* Thus, the ACS denied Passer's request based on their assumption that they would be exempt from the ADEA in this particular situation. *Id.* As it turned out, this assumption was incorrect and the court reversed the District Court's motion of summary judgment for defendant on the age discrimination issue. *Id.* at 332.

106. *Id.* at 324.

107. *Id.* at 325. Passer filed his complaint in February 1987, a week after he was forced to retire. *Id.* at 324-35. The symposium, to be held at the annual membership meeting in April 1987, was cancelled the day before the event was to take place. *Id.* at 325. Both parties acknowledge that the symposium was to be a "rare and prestigious" laurel for Passer and that it was "one of the highest honors that could have been bestowed upon him by his peers." *Id.*

Passer claimed that the cancellation constituted a retaliatory act in violation of the ADEA's anti-retaliation provision.<sup>108</sup>

The D.C. Circuit reversed the district court's dismissal of the retaliation complaint. The court explicitly rejected the ultimate employment decision standard and implicitly joined those circuits taking a broad view in the circuit split when it chose an "adverse impact" approach.<sup>109</sup>

### III. ANALYSIS

#### *A. The Broad View Is Inadequate to Protect Employers' Interests*

The expansive view of Title VII's retaliation provision, recently adopted by the Ninth Circuit in *Ray v. Henderson* is too broad in its application of "adverse employment action."<sup>110</sup> Congress undoubtedly intended Title VII as remedial legislation.<sup>111</sup> The courts that employ this standard, however, expand liability to employers for actions beyond the scope of the statutory language of section 704.<sup>112</sup>

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108. *Id.* In fact, ACS did not challenge that the cancellation of the symposium was in retaliation for Passer's age discrimination complaint. *Id.* at 330. The ACS, however, argued that the retaliation provision was inapplicable because: (1) the alleged retaliatory action occurred when Passer was no longer an "employee" of ACS; and (2) the penalty imposed by ACS did not rise to the level of the adverse action proscribed by the statute. *Id.* at 330.

109. *Id.* at 331-32. The court stated: "[T]he statute does not limit its reach only to acts of retaliation that take the form of cognizable employment actions such as discharge, transfer, or demotion." *Id.* With regards to the claim that "employment action" could not include actions against former employees, the court said, "[I]t is well established that efforts by an employer to scuttle a former employee's search for a new job, such as by withholding a letter of recommendation or by providing negative information to a prospective employer, can constitute illegal retaliation within the meaning of ADEA and parallel antiretaliation provisions." *Id.* at 331. This quote is of interest because it was written six years before *Robinson v. Shell Oil Co.*, where the Supreme Court held the term "employees" in the Title VII retaliation provision to include former employees. *See Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997).

110. 217 F.3d 1234 (9th Cir. 2000).

111. *See supra* note 27. Clearly, courts must give the statute remedial significance to give the retaliation section any meaning. Without a meaningful retaliation provision, the remedial effect of section 703 would likewise be hampered, because employees would be cautious to exercise their rights under that section.

112. Section 703 outlaws "[d]iscrimination for making charges, testifying . . ." *See* 42 U.S.C. § 2000e-3(a) (1994). In this author's view, the term "discrimination" as used in this provision is ambiguous. The language fails to help see the threshold intended by Congress for an unlawful retaliation. *See supra* note 19. Indeed, with very little legislative history on this matter, the intentions of Congress are left to speculation. At one extreme, it seems obvious that

Use of this standard can lead to liability for “trivial” acts of alleged retaliation.<sup>113</sup> Accordingly, employers are faced with a vague, subjective, and amorphous standard that fails to consider businesses’ legitimate interest to plan their activities in accordance with federal employment laws.<sup>114</sup>

The potential for liability that stems from trivial employment actions is evident from the language of opinions that advocate the broad position. The most recent case, *Ray v. Henderson*,<sup>115</sup> recited the language of the *EEOC Compliance Manual*<sup>116</sup> and declared: “In our circuit an adverse employment action is adverse treatment that is reasonably likely to deter employees from engaging in protected activity.”<sup>117</sup> On its face, this holding appears somewhat innocuous, seeming to advocate a substantiality requirement to the “adverse

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Congress did not intend a strict application of the word “discrimination” in the retaliation context. This lack of intent follows from the unique nature of a retaliation claim. In a retaliation case, as opposed to one that involves a section 703 claim, the employee is often still employed by the very employer they sue in federal court. This situation lends itself to an inevitable awkwardness in the workplace. Congress plainly wanted to insure, through section 704, that employees could remain in their job while “participating” or “opposing” their employers’ actions without enduring harassment. It also, however, seems likely that Congress would have recognized the unique nature of this situation and therefore, would not have advocated liability for minor acts of “discrimination” towards the employee that files suit against the employer. For example, a transfer to a different office or department is necessary to insure productivity and to separate acrimonious employees who no longer get along due to matters related to the lawsuit. Likewise, it would not seem as though systematic shunning of an employee by implicated fellow employees, provided it is not at the direction of management, would constitute compensable discrimination under section 704. In other words, it seems obvious that Congress wanted to protect an employee’s legitimate interest to remain in the same job with the same benefits, but it does not follow that Congress intended to mandate harmonious relations in the workplace following the filing of a Title VII suit.

113. See *supra* note 15.

114. First, the broad view provides a vague, amorphous standard by which it only requires employees to show the employment action was “adverse.” This “standard” begs the question of “How adverse?” To cancel a symposium that honors an employee is surely “adverse” to that employee, but it does not logically follow that such an action should trigger liability for the employer under federal anti-discrimination laws. Second, this amorphous standard is highly fact-sensitive and thus provides no guidance to employers about the level of “discrimination” that constitutes retaliation. Employers are not able to adequately educate their employees on what constitutes retaliation, nor are they able to effectively monitor employee behavior in this regard.

115. 217 F.3d 1234 (9th Cir. 2000).

116. See *supra* text accompanying note 10. In fact, the *Ray* holding explicitly adopts the EEOC position and quotes directly from the *EEOC Compliance Manual*.

117. 217 F.3d at 1242-43.

employment action.”<sup>118</sup> Looking more closely at the opinion, it is quite evident that the *Ray* Court advocates a much broader application than its holding suggests.<sup>119</sup> The court cites with approval decisions from other circuits that found “adverse employment actions” from, among other things, cancelled lunch breaks,<sup>120</sup> deprivation of support services,<sup>121</sup> and the creation of “several hoops” for the employee to obtain her severance payments.<sup>122</sup> The broad view the court announced imprudently expanded the scope of Title VII’s retaliation provision.<sup>123</sup>

Like the Ninth Circuit in *Ray*, the D.C. Circuit in *Passer v. American Chemical Society*<sup>124</sup> defined the term “adverse employment action” too liberally in its holding.<sup>125</sup> In fact, the court did not go beyond the face of the judicially constructed “adverse employment action”<sup>126</sup> and merely proscribed a test of “any conduct having an

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118. One would think this holding would add a substantiality requirement to “adverse employment action” because “reasonably likely to deter” seems to rule out a wide range of minor matters. Such minor issues probably would not deter a determined employee from standing up for their rights or the rights of a co-worker. In other words, an employee who was discriminated against, and then decides to take the difficult step to oppose such discrimination is not likely to withdraw her opposition, e.g. after having her office moved to a less desirable location. In fact, one could assume that such a determined employee will become more resilient in her quest to be vindicated when she is further “discriminated” against in this relatively minor way. In consideration of this premise, the “reasonably likely to deter” standard comes awfully close to the materially adverse standard adopted by other circuits.

119. This position is shown, in part, by the *Ray* Court’s explicit adoption of the EEOC position. *See supra* note 19. The EEOC’s elaboration on its “reasonably likely to deter” standard suggests that the EEOC’s actual position is broader than their standard suggests. If the *Ray* court did indeed adopt the EEOC’s position, then it can also be inferred that it adopted the more elaborate reasoning as well.

120. *Wideman v. Walmart Stores, Inc.*, 141 F.3d 1453, 1455 (11th Cir. 1998) (the employee was made to work on her day off without a lunch break after she allegedly skipped a day of work).

121. *Knox v. Indiana*, 93 F.3d 1327, 1334 (7th Cir. 1996) (the employee was moved to a worse office and deprived of challenging work).

122. *Corneveaux v. CUNA Mut. Ins. Group*, 76 F.3d 1498, 1507 (10th Cir. 1996).

123. Due to the facts of the *Ray* case, it is very plausible that a court that employ the “materially adverse” standard would reach the same ultimate conclusion. The employee in this case, in this author’s opinion, suffered from unlawful retaliation for opposing his employer’s practices and for participating in an EEOC investigation.

124. 935 F.2d 322 (D.C. Cir. 1991)

125. Again, although this case involved an ADEA claim rather than a Title VII cause of action, the *Passer* court acknowledged the identical nature of the two provisions by using Title VII retaliation cases to interpret the ADEA’s retaliation provision. *Id.* at 330.

126. *See supra* note 17.

adverse impact of plaintiff.”<sup>127</sup> In its application of this overly-broad and vague standard, the court found liability when an employer canceled a symposium that honored the plaintiff-employee. The cancellation occurred after the employee filed an age discrimination claim against the employer.<sup>128</sup> The employer admitted the cancellation and argued that the action was nonetheless justified by “legal prudence” and not an act of retaliation.<sup>129</sup> Indeed, one would not suppose that an employer would want to continue financially sponsoring a symposium that honors an outgoing employee while simultaneously having that employee drag the employer into court for an expensive round of litigation.<sup>130</sup> The D.C. Circuit turns a blind eye to common sense when it suggests that an employer remains obligated to continue to provide extra-occupational benefits to an employee who files federal discrimination charges against his employer.<sup>131</sup> The retaliation provision of Title VII<sup>132</sup> requires employers to refrain from unlawful discrimination in the form of retaliatory actions. The provision does not require the employer to positively reinforce an employee who seeks to expose that employer to liability in federal court.<sup>133</sup>

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127. 935 F.2d at 331. The court announced its standard and explicitly rejected the “ultimate employment decision” test: “[T]he statute does not limit its reach only to acts of retaliation that take the form of cognizable employment actions such as discharge, transfer or demotion.” *Id.* The court does not address the “materially adverse” standard.

128. *Id.* at 330.

129. *Id.* This “legal prudence” argument is not outlined in any detail in the case. One could understand, however, why an employer would want to avoid “honoring” an employee whom the employer attempts to oust through mandatory retirement. Passer argued that he could still function effectively in his former directorship despite his age. A symposium “honoring” Passer could provide factual credence to his argument, and actually help Passer’s case.

130. This does not suggest that the cancellation of the symposium was meaningless to Passer. Indeed, ACS cancelled the event a day before it was to occur, undoubtedly causing embarrassment to Passer. *Id.* at 324.

131. A situation may exist where an employer could be liable for retaliation after it withdraws an extra-occupational benefit. This situation requires a very significant reliance on interest and/or potential malice on the part of the employer. From the facts of this case, neither is present.

132. Of course, in this case it was the ADEA retaliation provision.

133. This provision is not to say that an employer should not encourage employees to seek remedial help for discrimination in the workplace or provide channels for redress. It is simply to suggest that once the case gets to federal court, the parties become adversaries. While the employer cannot and should not retaliate, he/she cannot be expected to reinforce the employee’s position.

*B. The Narrow View is Too Restrictive and Fails to Give Remedial  
Affect to Section 704*

While the broad view of Title VII's retaliation provision allows for litigation over trivial matters of discrimination, the restrictive view, which adheres to the ultimate employment action test, fails to provide adequate protection to employees seeking to exercise their rights under Title VII.<sup>134</sup> The circuits that employ this test allow too much latitude to employers to retaliate against employees in ways that are not as easily cognizable as a hiring, firing, or demotion.<sup>135</sup> Limiting the definition of retaliation to these ultimate decisions is antithetical to the purposes of section 704.<sup>136</sup> If the goal of section 704 was to ensure "unfettered access"<sup>137</sup> to the remedial mechanisms of Title VII, then employers should not have at their disposal a wide range of retaliatory tactics short of ultimate decisions that could deter employees from exercising their rights.<sup>138</sup>

While *Ledergerber v. Stangler*<sup>139</sup> presents an example of the restrictive view's potential for injustice, the language of the Eighth Circuit is nonetheless instructive.<sup>140</sup> Unfortunately, for the purposes

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134. The test fails to protect workers in two respects. First, the test fails to give workers adequate protection from retaliation to make it worthwhile to engage in opposition to employer actions or to participate in an EEOC investigation. Second, even if the test does not prevent an employee to take part in a protected activity, it still fails to provide employees an adequate remedy for retaliation beyond the remedy available through the underlying Title VII complaint.

135. Examples of such less cognizable retaliatory acts include transfers that result in substantially worse working conditions for the employee and significant reductions in responsibility. See *Flaherty v. Gas Research Inst.*, 31 F.3d 451 (7th Cir. 1994).

136. The Supreme Court said that Congress' purpose in creating the anti-retaliation provision of Title VII was to "maintain unfettered access to statutory remedial mechanisms." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997).

137. See *supra* text accompanying note 135.

138. This statement may sound similar to the EEOC's stance on actions that might reasonably deter an employee to bring a claim. While the phrase is compelling as a framework for a standard of retaliation, this author does not intend to advocate the EEOC's broad position to employ these words. In other words, this author believes that while the language of the EEOC's standard is appealing, the EEOC's explanation of how this standard should play out in practice is not appealing.

139. 122 F.3d 1142 (8th Cir. 1997).

140. This case is a bad example of the injustice that can result from application of the narrow view because the plaintiff in *Ledergerber* did not present a very strong case. *Id.* at 1144. The court correctly decided the case based on the facts, and a court that applies any of the three tests discussed in this Note would have likely ruled against the plaintiff here.

of this analysis, the court mixes the use of the “materially adverse” and “ultimate employment decision” tests.<sup>141</sup> Whether the court intended to take a strict “ultimate employment decision” stance is unclear, however, its use of this term of art is troubling. With a more confounded set of facts than were present here, the court may have made a stronger case for the more intermediate, more pro-employee position of “materially adverse action.”<sup>142</sup> As it stands, the *Ledergerber* court unfortunately leaves a precedent in the Circuit to find actionable retaliation only when there is a hiring, firing, or demotion involved.<sup>143</sup>

More troubling than the *Ledergerber* decision, is the Fifth Circuit’s position in *Mattern v. Eastman Kodak*.<sup>144</sup> The *Mattern* Court did not even mention the possibility of using a barometer of liability other than the ultimate employment action test. The court assumed away this position in the opening line of the opinion.<sup>145</sup> As a consequence, the *Mattern* decision is a more “pure” application of the ultimate employment test than *Ledergerber*.<sup>146</sup> The court seemed to focus primarily on the lack of consequence to the employee charging the alleged retaliation.<sup>147</sup> The court’s perception of what constituted a

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141. *Id.* at 1144 (finding no adverse employment action because the actions had not “effectuated a material change in the terms or conditions of her employment,” and alternatively holding that the actions, “did not rise to the level of an ultimate employment decision”).

142. If the court was presented with a more sympathetic plaintiff with a stronger case, the court may have been more inclined to use only the more lenient position of “materially adverse action.” In fact, the dissent uses this standard. *Id.* at 1145.

143. *Id.* at 1144.

144. 104 F.3d 702 (5th Cir. 1997).

145. *Id.* at 703 (“The linchpin for this appeal is what constitutes an ‘ultimate employment decision’ as required for a retaliation claim under Title VII of the Civil Rights Act of 1964.”).

146. This comment is in reference to the *Ledergerber* decision’s mixed use of “ultimate employment decision” and “materially adverse employment action.” In contrast to the confusing standards in *Ledergerber*, the *Mattern* court is consistent in its use of the “ultimate employment decision.” *See, e.g., id.* at 708.

147. *Id.* (“The other events, such as the visit to Mattern’s home, the verbal threat of being fired, the reprimand for not being at her assigned station, a missed pay increase, and being placed on ‘final warning,’ do not constitute ‘adverse employment actions’ because of their lack of consequence.”). This statement by the *Mattern* court clearly illustrates the court’s intention to take a strict “ultimate employment decision” approach. The court suggests in this quote that intermediate actions taken against an employee cannot constitute adverse employment actions even if they occur frequently. This approach has the potential for substantial injustice and tips the balance in litigation to those employers whose “retaliatory” acts fall just short of ultimate decisions.

“consequence” to the employee is instructive.<sup>148</sup> The court did not find that theft of items from the employee’s locker, systematic hostility from fellow employees, and the lack of a potential pay increase had any immediate effect on the employee, simply because these actions did not result in the firing or demotion of the employee.<sup>149</sup> As a result of this characterization, the court could easily dismiss the employee’s significant emotional distress and property loss as “tangential” to any ultimate decisions.<sup>150</sup>

Armed with the predetermined test of “ultimate employment decision” the *Mattern* Court justified their holding with reference to Title VII’s definition of discrimination.<sup>151</sup> This definition utilizes the Title VII catchphrase of “compensation, terms, conditions, or privileges of employment” as the bounds of Title VII discrimination.<sup>152</sup> In other words, Title VII considers these factors as part of an unlawful “discrimination” for the purposes of the statute.<sup>153</sup> Surely, Ms. Mattern, while subjected to widespread hostility and harassment in the workplace, could be said to have been discriminated against with regard to the conditions of her employment after taking part in a protected activity.<sup>154</sup> The *Mattern*

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148. The court’s idea of what constituted a consequence to the employee is instructive to understand the court’s holding.

149. *Id.* at 707-08; *see also* *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997). The court did, however, acknowledge that the missed pay increase could have constituted retaliation, but that Mattern failed to prove the increase would have taken effect before she resigned. *Id.* at 709.

150. 104 F.3d at 708. According to the court, employer actions do not constitute “adverse employment actions” if they are “tangential” to future decisions, and that Mattern “could only prove examples of the many interloctory or mediate decisions having no immediate effect upon employment decisions.” *Id.* (quoting *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981) (en banc)).

151. *Id.* (remarking that “[o]bviously, this reading [the court’s reading of section 704] is grounded in the language of Title VII”). The court then quotes directly from Title VII’s definition of discrimination. *Id.* at 708-09 (quoting from 42 U.S.C. § 2000e-2(a)(1)).

152. 42 U.S.C. § 2000e-2(a)(1).

153. Thus, treating somebody differently for the purposes of employment decisions based on any of the classifications enumerated, i.e. race, national origin, sex, is unlawful “discrimination” for Title VII purposes.

154. If we accept the *Mattern* court’s notion that we should look to Title VII’s definition of discrimination, which speaks of it as disparate treatment relating to compensation, terms, conditions, or privileges of employment, how can it seriously be argued that the “ultimate employment decision” test is dictated by Title VII? In other words, the wording of Title VII in this regard suggests liability for actions that have less than an “ultimate” effect. The use of the words “condition,” “privilege,” and “term” all connote a less fundamental component of employment than hiring, firing, or demotion.

Court, in its holding, ignored the apparent incongruity of their reference to Title VII's discrimination definition as support for their position that only ultimate employment decisions are cognizable under section 704.<sup>155</sup>

#### IV. THE PROPOSAL

The intermediate position, which requires that an action be “materially adverse”<sup>156</sup> in order to constitute an “adverse employment action” should be adopted by all circuits as the standard for this element of the prima facie case of retaliation under Title VII.<sup>157</sup> This standard, as utilized by both the Second and Third Circuits,<sup>158</sup> is firm but flexible; it eliminates trivial cases and allows the court to respond to fact-specific nuances of the particular case at bar.<sup>159</sup> Moreover, the standard effectuates the purpose of the retaliation provision to maintain unfettered access to the remedial mechanisms of Title VII.<sup>160</sup> Lastly, the standard appears to comport with a recent Supreme Court decision which advocates a similar approach in closely related Title VII context.<sup>161</sup>

First, circuits should adopt “materially adverse” action because it is a flexible, but firm standard. Unlike the broad position which is vague and hard to apply, and the restrictive position which is easy to

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155. See *supra* note 153.

156. This test has alternately been described as requiring “materially adverse *change*.” See *Torres v. Pisano*, 116 F.3d 625, 640 (2d Cir. 1997). It is also described as having a “materially adverse *affect* [on employment conditions].” See *supra* note 19. Moreover, this test was also characterized as having a “materially adverse employment action.” See *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir. 1997). This author agrees with the EEOC in its criticism of “materially adverse affect” as focusing too closely on matters that should pertain to damages, not liability. See *supra* note 19 (“More significant retaliatory treatment however, can be challenged regardless of the level of harm.”).

157. See *supra* text accompanying note 4 (listing elements of the prima facie case).

158. See *Torres v. Pisano*, 116 F.3d 625 (2d Cir. 1997); *Robinson v. City of Pittsburgh*, 120 F.3d 1286 (3d Cir. 1997).

159. Presumably, this standard would occur because trivial matters would not be considered “material,” and yet, the court is free to determine what is “material” in a given factual circumstance. Because what constitutes a material employment action in one office may not be so in another, the court needs a flexible standard to make these determinations.

160. *Robinson v. Shell Oil*, 519 U.S. 337, 346 (1997) (the primary purpose of the anti-retaliation provision is “[m]aintaining unfettered access to statutory remedial mechanisms.”).

161. *Burlington Induss., Inc. v. Ellerth*, 524 U.S. 742 (1998) (using “tangible employment action” as a standard in a quid pro quo harassment case).

apply but rigid in its application, the intermediate position is easy to understand and adaptable to changing factual contexts.<sup>162</sup> For example, in a hypothetical situation in which an employer transfers an employee within the employer's company, following that employee's participation in a protected activity, only the "materially adverse" standard allows a court the clarity and flexibility to reach a just result. Under the broad test, a transfer, with a few limited exceptions, would always constitute an adverse employment action.<sup>163</sup> Under the restrictive test a transfer would never constitute an adverse employment action because it could not rise to the level of an "ultimate employment decision."<sup>164</sup> Under the "materially adverse" standard, however, the court would be given the flexibility to consider a number of factors and determine whether the presence or absence of these factors constitutes a "materially adverse" action to the particular plaintiff under his or her particular circumstances.<sup>165</sup>

In addition to flexibility, the materially adverse standard effectuates the purpose of Title VII's retaliation provision. This purpose is to shield the employee from retaliation, when the employee chooses to take advantage of Title VII to protect his rights in the workplace.<sup>166</sup> Although the statute clearly struck a balance in favor of the employee, employers' interests have to be considered as well. Therefore, the broad standard, which on its face is potentially

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162. One court that employed the "materially adverse change" standard explained the test as follows:

[A] materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.

*Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993), *cited in* *Rabinovitz v. Pena*, 89 F.3d 482, 488 (7th Cir. 1996).

163. *See Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000) (citing with approval other Ninth Circuit cases holding that a lateral transfer constitutes an adverse employment action under the Circuit's broad position).

164. *See Mattern v. Eastman Kodak*, 104 F.3d 702, 707 (5th Cir. 1997) (defining ultimate employment action as "acts such as hiring, granting leave, discharging, promoting, and compensating").

165. Such factors in this hypothetical might include the employer's interests in a collegial atmosphere in the workplace and the employee's interest in remaining at a particular office.

166. *See Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998, 1005 (5th Cir. 1969).

more apt to protect an employee invoking Title VII, goes too far in its application.<sup>167</sup> The “materially adverse” standard, to the contrary, protects employers from trivial claims, but still leaves employees with “unfettered access to statutory remedial mechanisms.”<sup>168</sup> Any employer action that prevents, is intended to prevent, or could potentially prevent an employee from participating in an EEOC investigation or complaint would be considered “material” by any reasonable court that applies this standard.

Finally, although the Supreme Court has not addressed specifically the issue of what constitutes an adverse employment decision, the Court has alluded to a standard similar to the “materially adverse” criterion. *Burlington Industries, Inc. v. Ellerth*<sup>169</sup> involved a quid pro quo and hostile work environment sexual harassment claim under Title VII. The Supreme Court discussed “tangible employment actions” to determine a standard to apply to employer liability for harassment by fellow employees.<sup>170</sup> When it defined “tangible employment action” the Supreme Court referred to “significant changes” in various aspects of one’s employment.<sup>171</sup> Tangible actions that cause significant changes in one’s employment would almost always be considered “materially adverse” to the employee. Thus, in this similar context, the Supreme Court advocated a standard that

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167. Another problem with the considerable scope of the broad position is that it leaves employers potentially open for frivolous harassment suits. If there is a low threshold for establishing a prima facie case, it will be harder for employers to dispose of meritless claims on summary judgment. Thus, an employer will be forced to either settle the claim, or face expensive litigation. This choice, of course, has broader societal implications if businesses pass on the high costs of litigation to consumers.

168. See *supra* note 159.

169. 524 U.S. 742 (1998).

170. The *Ellerth* case dealt with a supervisor that threatened to take certain employment actions against a female employee if that employee did not succumb to his sexual advances. *Id.* at 747-48. The precise question before the Court was, “whether an employer has vicarious liability when a supervisor creates a hostile work environment by making explicit threats to alter a subordinate’s terms or conditions of employment, based on sex, but does not fulfill the threat.” *Id.* at 754. After it framed the precise issue, the Court declared that a “uniform and predictable standard must be established as a matter of federal law.” *Id.* In response to this self-appointed task of adopting a standard, the Court decided on “tangible employment action.” *Id.* at 760-62.

171. *Id.* at 761 (“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.”).

facially excludes minor matters from litigation, but leaves much room for actions that fall short of ultimate employment decisions.

#### V. CONCLUSION

All federal circuits should adopt the “materially adverse” standard of liability when they construe the judicially-created “adverse employment action” as an element of the prima facie case of Title VII retaliation. The present alternatives, a broad, ambiguous standard and a narrow, restrictive “ultimate employment decision” test, both fail to strike an adequate balance between the competing interests of the employee and employer in a Title VII action. Accordingly, the “materially adverse” test currently stands as the only fair, balanced approach to determine what constitutes an “adverse employment action” in Title VII retaliation cases.





