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Equal Opportunity for Employers: Elevating the Adverse Employment Action Standard to Allow Only Meritorious Retaliation Claims

BY WENDY HYLAND*

I. INTRODUCTION

A. American Values: Freedom of Speech at the Workplace

The Protestant work ethic, as much a part of being American as baseball and apple pie, permeates our collective psyche and does much to explain why so many of us sacrifice time with family and friends to spend the majority of our waking hours at work. As a result, many of us consider what we do for a living as making up a large part of our identity. When asked, we explain who we are by what we do. As we strive to maintain an efficient, healthy economy, employee relationships with their employers are more important than ever.

Juxtaposed with American pride in job quality and loyalty to employers is another esteemed American value—the freedom to voice opinions over issues of concern in the workplace. Title VII of the Civil Rights Act of 1964 protects this freedom by allowing employees to address concerns of perceived discriminatory workplace practices or to participate in a proceeding challenging employer practices without fear of retaliatory action as a result of this expression. The anti-retaliation provision, § 704 of Title VII, exemplifies the value placed on freedom to speak in this country, even at times sacrificing the order and harmony in the employer/employee relationship.

The flip side of the coin involves an assessment of the actions of an employer following an employee’s challenge to discriminatory workplace

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* J.D. expected 2002, University of Kentucky.
2 Id.
practice. The determination of appropriate employer action following the formally expressed concerns of an employee is at the heart of a dispute between the circuits. What constitutes retaliatory action by an employer? The courts’ responses vary widely. Some hold that an employee must be fired to constitute retaliation, while others state that dilatory remarks by fellow employees may rise to the level of prohibited retaliatory behavior.

Striking a balance between an employee’s statutory right to challenge employer practices and an employer’s right to manage its employees without constant fear of exposure to liability for its every move is at the forefront of the dispute. An employee’s right to speak out against employer practices, as protected by Title VII, is a value that should be guarded fiercely. At the same time, employers should not fear a cry of retaliation with every negative comment made to an employee subsequent to exercising her right to speak. The resolution of this issue is critical in outlining the boundaries of appropriate behavior for employers after an employee makes a complaint regarding alleged discriminatory practices.

B. Title VII: What Does It Protect?

Penning the majority opinion for the Supreme Court in Faragher v. City of Boca Raton, Justice Souter highlights an insight that is crucial to the resolution of the circuit split surrounding Title VII’s anti-retaliation provision: “[a]lthough Title VII seeks ‘to make persons whole for injuries suffered on account of unlawful employment discrimination’ its ‘primary objective,’ like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm.” Broadly, Title VII of the Civil Rights Act of 1964 protects employees from discrimination by employers in the workplace. Once employees have either opposed unlawful employment practices of an employer or have participated in an Equal Employment Opportunity Commission ("EEOC") proceeding challenging employment practices, § 704(a) of Title VII prohibits retaliatory behavior.

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3 See infra Part II.
4 See infra Part II.
5 It is important to note that Title VII protects an employee’s right to speak out regarding employer behavior defined as discriminatory under the statute. 42 U.S.C. § 2000e-3(a). It does not, however, provide employees a general “protesting” protection. Id.
by the employer. Establishing a prima facie case of retaliatory behavior requires a showing of: (1) engagement in a protected activity; (2) subjection to an adverse employment action by the employer; and (3) existence of a causal link between the protected activity and the adverse action.

This Note focuses on the heart of the controversy among the circuits surrounding the scope of the second element’s “adverse employment action” language. Prohibited employer behavior characterized as adverse employment action varies markedly. Its definition ranges from a liberal construction of adverse employment action, including such things as mere changes in the workplace, to a restrictive interpretation characterizing

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8 Id. § 2000e-3(a). The statute reads:

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.

9 Ray v. Henderson, 217 F.3d 1234, 1240 (9th Cir. 2000). Although the quoted case stems from the Ninth Circuit, other circuits use these elements with minimal semantic differences. See, e.g., Berry v. Stevinson Chevrolet, 74 F.3d 980, 985 (10th Cir. 1996); see also McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

10 The most widely accepted interpretation, used by the First, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits, is that changes in the workplace constitute an adverse employment action. See, e.g., Ray, 217 F.3d at 1243-44 (finding that an elimination of a program, a change in an employee’s start time, and changes in standard procedures constituted adverse employment action); Wideman v. Walmart Stores, Inc., 141 F.3d 1453, 1456 (11th Cir. 1998) (holding that the “totality” of several actions by an employer could meet the adverse employment element); Knox v. Indiana, 93 F.3d 1327, 1334 (7th Cir. 1996) (recognizing that the demeaning statements of other employees could meet the “adverse” standard); Berry, 74 F.3d at 986 (holding that a malicious prosecution action against a former employee constituted adverse employment action); Wyatt v. City of Boston, 35 F.3d 13, 16 (1st Cir. 1994) (per curiam) (recognizing actions ranging from discharge to toleration of other employee harassment as potentially retaliatory); Passer v. Am. Chem. Soc’y, 935 F.2d 322, 331 (D.C. Cir. 1991) (finding that cancellation of a speaking engagement resulted in professional humiliation and thus could constitute adverse action).
only ultimate employment decisions as adverse.\textsuperscript{11} Between these two extremes, some courts require a finding that employer behavior materially affects terms or conditions of employment before it constitutes adverse action.\textsuperscript{12}

\textbf{C. Persistent Proliferation of Retaliation Claims: Why This Issue is Important}

The grave nature of the controversy surrounding the interpretation of adverse employment action is illustrated by the ever increasing number of retaliation suits filed by employees against their employers. Retaliation suits escalated seventy-two percent between 1992 and 1998,\textsuperscript{13} making retaliation claims twenty-four percent of the total number of claims handled by the EEOC in that year.\textsuperscript{14} In fact, retaliation claims numbered 31,059 in 1998, up from only 7900 just seven years earlier, in 1991.\textsuperscript{15}

What is the explanation for the proliferation of these claims in recent years? One source indicates that because of widespread knowledge about sexual harassment, employees are now more apt to stay with the employer pending the outcome of their claims.\textsuperscript{16} Perhaps the increase can be partially explained by the fact that a plaintiff need not prevail on the discrimination

\textsuperscript{11} The Fifth and Eighth Circuits hold that only ultimate employment decisions, such as hiring and firing, equate to adverse employment actions. See, e.g., Ledergerber v. Stangler, 122 F.3d 1142, 1143 (8th Cir. 1997) (finding that actions having only a "tangential" effect on employment do not constitute adverse employment action); Mattern v. Eastman Kodak Co., 104 F.3d 702, 708-09 (5th Cir. 1997) (holding that only "ultimate" employment decisions constitute adverse employment action within the context of a retaliation claim).

\textsuperscript{12} See, e.g., Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997) (holding that the action must have some material affect on the employment to be "adverse"); Torres v. Pisano, 116 F.3d 625, 640 (2d Cir. 1997) (holding that requests made by university officials to an employee asking that she drop sexual harassment charges filed with the EEOC did not constitute retaliation).


\textsuperscript{14} Id.


claim to win the day on a retaliation cause of action. Additionally, some sources claim that juries have become more sympathetic to retaliation claims by employees, asserting that "employers have a hard time winning those [retaliation] claims. Juries may be reluctant to believe that an employer fired someone for being a woman or being black, but find it easier to believe that the employer fired the employee for complaining about supposed discrimination." In fact, the chances of receiving a favorable jury verdict on a retaliation claim are purported to be fifty-seven percent. A broad interpretation of adverse employment action has resulted in the phenomenon of significantly increased litigation in this area. Without some restraint on the interpretation of unlawful retaliation action by employers, this litigation will spiral out of control, much to the detriment of the spirit of Title VII and to all parties involved.

D. Striking the Balance for Employers and Employees: A Roadmap

This Note advocates the adoption of the position of the Second and Third Circuit Courts of Appeals on adverse employment action, which requires courts to find that employer behavior materially affected terms or conditions of employment. This is a minority approach. However, it protects employees from viable threats relating to their employment status without forcing employers to police their every action following an employee complaint. Part II outlines the tripartite circuit split. It considers the analysis used by the majority and minority positions in reaching their respective conclusions about the scope of employer action covered by the adverse employment action element of a retaliation claim. Part III considers the term "discrimination" in varying contexts in an attempt to establish a uniform statutory interpretation. It compares the adverse

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19 Odds Stack Up Against Employers in Retaliation Suits, DEATH CARE BUS. ADVISOR, Apr. 27, 1999.
20 The circuits that give a liberal interpretation of adverse employment action far outnumber the more conservative circuits. The most conservative cadre consists of only the Fifth and Eighth Circuit Courts of Appeals. The middle position is occupied by the Second and Third Circuit Courts of Appeals. See supra notes 10-12 and accompanying text. Sheer numeric majority, however, should not necessarily be dispositive on the most appropriate standard for determining this issue.
21 See discussion infra Part II.
employment action analysis with the underlying purposes of Title VII, asserting that Title VII is not a “remedial” statute meant to encompass a broad spectrum of “retaliatory” actions by employers. In addition, this section analyzes § 703 of Title VII and evaluates its utility in determining the scope of the anti-retaliation provision in § 704. Part IV examines the current EEOC guidelines regarding the nature of adverse employment action and asserts that their scope encompasses a spectrum of employment action that is too wide. Finally, Part V concludes that the lack of a popular majority does not preclude the intermediate approach from being the most appropriate standard for adverse employment action.

II. ORIGINS OF THE TRIPARTITE CIRCUIT SPLIT:
WHAT CONSTITUTES AN ADVERSE EMPLOYMENT ACTION AND WHY THE LIBERAL AND CONSERVATIVE APPROACHES DO NOT RESOLVE THE DISPUTE

A. The Liberal Approach

The most liberal group of federal circuit courts identifies changes in the workplace as satisfying the adverse employment action requirement. The changes do not necessarily have to have a substantial effect on a term or condition of employment to be considered retaliatory. Outnumbering the other two approaches by a significant margin, the number of liberal circuits is a potential red herring which diverts attention away from questioning the soundness of their approach. Examining each circuit’s opinions reveals that some interpretations rely on secondary sources rather than examining the anti-retaliation provision in the context of Title VII’s other language, overall purpose, and relation to Supreme Court decisions regarding a prima facie discrimination case.

The First Circuit’s position on this issue is set forth in Wyatt v. City of Boston. The plaintiff, a public school teacher, alleged retaliation by a Boston public school after “opposing what he viewed as sexual harassment and for filing a complaint with the Massachusetts Commission Against

22 See discussion infra Part III.
23 Although the EEOC guidelines carry some authority, they should not bind courts as dispositive statements regarding employer action properly characterized as adverse within the ambit of a retaliation claim. See discussion infra Part IV.
24 See discussion infra Part V.
25 Wyatt v. City of Boston, 35 F.3d 13 (1st Cir. 1994) (per curiam).
Discrimination.\textsuperscript{26} The court concluded that lack of choice regarding the classes plaintiff could teach, negative performance evaluations, and the denial of a promotion could satisfy the adverse employment action requirement.\textsuperscript{27} The court cited a secondary source as it broadened the various actions it considered adverse in a retaliation claim.\textsuperscript{28} \textit{Wyatt} represents an expansion of the First Circuit's approach to the adverse employment element that had previously required the employee to be "subsequently discharged from employment."\textsuperscript{29}

The Seventh Circuit's case law also incorporates a broad spectrum of behavior as potentially retaliatory.\textsuperscript{30} In \textit{Knox v. Indiana}, the court held that demeaning statements of other employees potentially qualify as adverse employment action and noted that "[t]he law deliberately does not take a 'laundry list' approach to retaliation, because unfortunately its forms are as varied as the human imagination will permit."\textsuperscript{31}

Similarly, \textit{Ray v. Henderson},\textsuperscript{32} from the Ninth Circuit, provides the latest addition to the broadening of the adverse employment element. The facts involved a plaintiff who claimed retaliation by the Post Office after he complained to the EEOC of discriminatory practices.\textsuperscript{33} The nature of the retaliatory acts included a reduction in salary, elimination of employee meetings, and elimination of its flexible time schedule.\textsuperscript{34} In holding that the actions met the adverse employment element, the court succinctly described the respective positions of the different circuits:

\begin{quote}
The government urges us to turn from our precedent, and to adopt the Fifth and Eighth Circuit rule that only "ultimate employment actions"
\end{quote}

\textsuperscript{26} \textit{Id.} at 14.
\textsuperscript{27} \textit{Id.} at 16.
\textsuperscript{28} \textit{Id.} at 15-16 (citing Employment Discrimination, § 87.20 at 17-01 to 17-107 (1994)). The court recited the list of "other adverse actions" that constitute adverse employment action as including "demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations and toleration of harassment by other employees." \textit{Id.}
\textsuperscript{29} Hoeppner v. Crotched Mountain Rehab. Ctr., Inc., 31 F.3d 9, 14 (1st Cir. 1994) (emphasis added).
\textsuperscript{30} See, e.g., Knox v. Indiana, 93 F.3d 1327 (7th Cir. 1996); McDonnell v. Cisneros, 84 F.3d 256 (7th Cir. 1996).
\textsuperscript{31} Knox, 95 F.3d at 1334.
\textsuperscript{32} Ray v. Henderson, 217 F.3d 1234 (9th Cir. 2000).
\textsuperscript{33} \textit{Id.} at 1237-39.
\textsuperscript{34} \textit{Id.}
such as hiring, firing, promoting and demoting constitute actionable adverse employment actions. But we cannot square such a rule with our prior decisions. Actions that we consider adverse employment actions, such as ... lateral transfers, ... the unfavorable reference that had no effect on a prospective employer's hiring decisions, ... and the imposition of a more burdensome work schedule ... are not ultimate employment actions. Nor, for that matter, does the test adopted by the Second and Third Circuits comport with our precedent. While some actions that we consider to be adverse (such as disadvantageous transfers or changes in work schedule) do "materially affect the terms and conditions of employment," others (such as an unfavorable reference not affecting an employee's job prospects) do not.\textsuperscript{35}

The Tenth Circuit, another arm of the liberal approach to interpreting adverse employment action, has as its leading authority Berry v. Stevinson Chevrolet.\textsuperscript{36} In Berry, the court held "that the filing of [criminal] charges against a former employee may constitute adverse [employment] action."\textsuperscript{37} Its basis for this conclusion is that Title VII, at base, is a remedial statute that should be liberally construed.\textsuperscript{38} Therefore, a more flexible, liberal standard of adverse employment action best comports with the spirit of Title VII as it was enacted because including a wide range of behavior facilitates one's opportunity to bring a claim.\textsuperscript{39} The opinion instructs that allowing retaliation actions by former employees is inconsistent with a restricted definition of adverse employment action.\textsuperscript{40} Allowing an employee to bring a claim, even after the employment relationship has formally ended, exemplifies the court's broad interpretation of the anti-retaliation provision.

Finally, Passer v. American Chemical Society,\textsuperscript{41} in the D.C. Circuit, has one of the most liberal interpretations of adverse employment action under the companion anti-retaliation provision of the Age Discrimination in Employment Act. The facts involved a chemist who protested his company's forced retirement policy and then suffered retaliatory action in the

\textsuperscript{35} Id. at 1242.
\textsuperscript{36} Berry v. Stevinson Chevrolet, 74 F.3d 980 (10th Cir. 1996).
\textsuperscript{37} Id. at 986.
\textsuperscript{38} See id.
\textsuperscript{39} Cf. id.
\textsuperscript{40} Id. ("It would be illogical to define a section 704(a) employee liberally ... and to simultaneously define an adverse employment action narrowly ... ").
form of a last minute cancellation of a forum in which he was the featured speaker. The court believed that the humiliation Passer suffered in his professional community could render future employment opportunities more difficult. The ability to obtain future employment at least marginally connects the employer’s behavior to some material term of employment rather than actions that have, at best, only a tangential effect on the employment relationship.

Imposing a duty on employers to police every negative comment from one employee to another is too burdensome and unduly interjects the courts into resolving disputes that may be nothing more than office politics. Allowing employers a certain degree of autonomy in managing employee disputes, or in giving unfavorable references when warranted, protects employers from unlimited retaliation liability for every subjectively perceived negative action against an employee after she challenges an employer practice. In the final analysis, these circuits’ connection between actions occurring in the workplace and the element of adverse employment action is too tenuous.

**B. The Conservative Approach**

At the opposite end of the spectrum lie the Fifth and Eighth Circuits, holding that only “ultimate employment decisions” qualify as adverse employment action. In *Mattern v. Eastman Kodak Co.*, an employee claimed retaliation after she was transferred to a different crew, received a negative evaluation, and allegedly suffered harassment by other employees following the filing of her sexual harassment and hostile work environment charges with the EEOC. The court found the actions did not meet the adverse employment action element as the actions did not rise to the level of an “ultimate employment decision.” “Hiring, granting leave, discharging, promoting, and compensating” are illustrative examples of ultimate employment decisions. The court stated “[t]he anti-relation provision speaks only of ‘discrimination’; there is no mention of the vague

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42 Id. at 324.
43 Id. at 331.
44 See, e.g., Ledergerber v. Stangler, 122 F.3d 1142, 1144 (8th Cir. 1997); Mattern v. Eastman Kodak Co., 104 F.3d 702, 708 (5th Cir. 1997).
45 Mattern, 104 F.3d at 704.
46 Id. at 708.
47 Id. at 707.
harms contemplated in [Title VII]. Therefore, [it] can only be read to exclude such vague harms, and to include only ultimate employment decisions. 48

The Eighth Circuit similarly holds that ultimate employment decisions qualify as adverse employment action. 49 In Ledergerber v. Stangler, an employee-supervisor alleged retaliation when her maintenance staff was reassigned and replaced with new staff. This action was taken subsequent to the plaintiff’s opposition to her employer’s implementation of policies “deferential” to African-Americans. 50 The court found that the reassignment in staff may have resulted in plaintiff’s “loss of status and prestige,” but that it did not rise to the level of retaliation. 51 The court explained, “[w]hile the action complained of may have had a tangential effect on her employment, it did not rise to the level of an ultimate employment decision intended to be actionable under Title VII.” 52

Allowing only ultimate employment decisions to be considered adverse employment action is the opposite of too little court interference in the workplace after an employee has challenged an allegedly unlawful practice. Adhering to this standard tips the balance between an employee’s right to speak and an employer’s province to manage its employees too sharply in favor of the employer. Employer actions that may have a significant negative effect on an employee’s situation in the workplace, but are not “ultimate,” could be rendered inactionable by courts under this interpretation of adverse employment action.

C. The Intermediate Approach

Representing the middle ground, the Second and Third Circuits require some material affectation of a term or condition of employment in order to make an adequate showing under the adverse employment action element. 53 In Torres v. Pisano, Torres filed charges with the EEOC alleging her supervisor sexually harassed her and created a hostile work environment. 54 Later, Torres was asked by different supervisors to drop the EEOC charges,
which Torres alleged was retaliation.\(^{55}\) The court disagreed, because in this instance, Torres suffered "no negative consequences" for refusing to drop the charges and the conditions of her employment were not altered in a material way.\(^{56}\) The court reiterated, "[w]e have held that '[r]easonable defensive measures do not violate the anti-retaliation provision of Title VII, even though such steps are adverse to the charging employee and result in differential treatment,' so long as they 'do not affect the complainant's work, working conditions, or compensation.'"\(^{57}\) In fact, the court stated that Torres' employment situation had improved.\(^{58}\)

The Third Circuit also uses the material affectation requirement. The rationale of the court is that actions that "make[ ] an employee unhappy" are simply not enough for her to claim adverse employment action.\(^{59}\) Moreover, permitting these sorts of claims would allow any "chip-on-the-shoulder employee" to bring an action based on only minor incidents.\(^{60}\)

### III. THE ANTI-RETALIATION PROVISION IN CONTEXT: WHAT DOES DISCRIMINATION MEAN?

The essential problem for courts regarding the interpretation of the term "discrimination" is that the text of § 704(a) is not dispositive.\(^{61}\) There are no pegs on which a court can hang its hat to identify concrete examples of what constitutes adverse employment action. Commentators have stated:

> Once a plaintiff establishes that she has engaged in protected activity, courts must then determine whether the employer's conduct constitutes "retaliation." Importantly, both Title VII and the ADEA contain no language regarding the type of employer conduct that will trigger a retaliation claim. The anti-retaliation provisions speak only in terms of "discrimination" in that it is "an unlawful employment practice for an

\(^{55}\) *Id.* at 629.

\(^{56}\) *Id.* at 640.

\(^{57}\) *Id.* (quoting United States v. New York City Transit Auth., 97 F.3d 672, 677 (2d Cir. 1996)).

\(^{58}\) *Id.*

\(^{59}\) See Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997) (citing Smart v. Ball State Univ., 89 F.3d 437, 441 (7th Cir. 1996)).

\(^{60}\) See Robinson, 120 F.3d at 1300.

employer to discriminate against any of his employees or applicants" because of their participation in opposition activities. Hence, the plain language of these two Acts . . . gives little guidance as to what constitutes prohibited retaliation. 62

In addition, courts struggle to ascertain the meaning of § 704(a) in the absence of any significant legislative history. 63 The legislative history that is on record supports the conclusion that virtually any employer action constituting adverse employment action is beyond the pale: "[Management] prerogatives . . . are to be left undisturbed to the greatest extent possible. Internal affairs of employers . . . must not be interfered with except to the limited extent that correction is required in discrimination practices."64 The circuit courts have been forced to glean their own interpretations of the exact scope of the language in § 704. Not surprisingly, they have reached varying and inconsistent results. By examining the approach taken by the majority and minority positions to determine the contours of the anti-retaliation provision, it becomes clear that the intermediate approach comports best with both the language of the anti-retaliation provision, in particular, and the language of the statute as a whole. Both the liberal and the conservative circuit approaches have relied on the absence of qualifying terms surrounding the term "discrimination" in § 704(a) to reach their respective conclusions that retaliatory behavior spans either a wide or a narrow spectrum. 65 The Fifth Circuit opinion in Mattern is illustrative of the most restrictive interpretation. 66 Rather than allowing a variety of behaviors to be adverse employment action based on the lack of listed behaviors in the anti-retaliation provision, it interprets the lack of enumerated behaviors to be an exclusion of all but the more extreme behavior with regard to what is an adverse employment action. 67 While this interpretation

62 Id.
64 Id. (alteration in original).
65 See discussion supra Part II. Specifically, § 704(a) states "It shall be unlawful employment practice for an employer to discriminate against an employee after an employee has opposed an allegedly unlawful employment action or participated in an EEOC proceeding. 42 U.S.C. § 2000e-3(a) (1994).
66 See Mattern v. Eastman Kodak Co., 104 F.3d 702 (5th Cir. 1997).
67 Mattern allows only hiring and firing, or "ultimate employment decisions," to qualify as retaliatory behavior by an employer. See id. at 707.
may be closer to a bright line test and thus easier for courts to apply, its application creates an unreasonably exclusionary standard for an employer's behavior.68

The Fifth Circuit relies on § 703 to aid in its interpretation of § 704.69 The court relied solely on the first part of the statutory language in § 703 to restrict adverse employment actions only to ultimate employment decisions even though § 703 clearly enumerates that other behaviors that affect terms or conditions of employment are potentially discriminatory as well.70 Relying only on a select portion of the language does not provide an accurate interpretation of the meaning of discrimination in order to determine what constitutes adverse employment action. The bright line test adopted by the conservative circuits (only "ultimate" decisions qualify as adverse) is tempting because of its easier application, but it is inaccurate in ignoring the plain language of § 703, which details that discrimination regarding terms or conditions of employment constitutes unlawful employer action as well.71

On the other hand, the Seventh Circuit in Knox v. Indiana examined Title VII and case law addressing retaliation and reached the opposite result—almost any behavior may qualify as retaliatory.72 It does not necessarily follow that the lack of enumerated behaviors listed in the statute

68 See supra notes 44-48 and accompanying text.
69 See Mattern, 104 F.3d at 708-09.
70 See id. Section 703 provides that unlawful employment action is:
   (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... in any way which
would deprive or tend to deprive any individual of employment opportuni-
ties or otherwise adversely affect his status as an employee, because of such
individual's race, color, religion, sex or national origin.
Section 704, the anti-retaliation provision, reads in relevant part:
   It shall be an unlawful employment practice for an employer to
discriminate against any of his employees... because he has opposed any
practice made an unlawful employment practice by this subchapter, or
because he has made a charge, testified, assisted, or participated in any
manner in an investigation, proceeding, or hearing under this subchapter.
Id. § 2000e-3(a).
71 See id. § 2000e-2(a).
72 See Knox v. Indiana, 93 F.3d 1327, 1333-34 (7th Cir. 1996).
mandates that any behavior be the target of potential employer liability. Such an interpretation allows the law a free hand to characterize "office politics" as retaliatory under this provision of Title VII. Interoffice disputes wholly unconnected to an employee's preexisting objection to allegedly unlawful behavior under Title VII could now be a source of potential liability for employers. These matters would be better handled by an employer's internal policies rather than by federal law. While employees do need some protection from unfair treatment as a result of bona fide objection to employer policies, recognizing any subsequent conduct as potentially retaliatory invades the province of the employer/employee relationship. Making employers subject to a § 704(a) suit for any action that an employee may find unfair is an undue burden on employers by forcing them to police their every action once an employee has opposed one of its policies or has filed a complaint with the EEOC. Allowing employers to develop their own policies and procedures to govern relationships with employees following an objection to discriminatory behavior encourages amicable relations pending the proceeding. At the same time, the courts are available if the employer should engage in behavior beyond the scope of its policy.

Other liberal circuits have largely ignored reading other duly enacted sections of Title VII in construing the meaning of discrimination as it applies to adverse employment actions. For instance, the First Circuit opinion in Wyatt demonstrates that viewing employer actions, such as restrictions on which classes could be taught by a teacher, as adverse

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73 See supra note 70 and accompanying text.
74 See supra notes 25-43 and accompanying text.
75 See Stephanie Armour & Barbara Hansen, Flood of 'Retaliation' Cases Surfacing in U.S. Workplace, USA TODAY, Feb. 10, 1999, at 1A (stating that "[b]osses might fear they can't demote a bad performer if that worker has ever complained about harassment or discrimination. If they do, they fear a lawsuit," and also commenting that opposing an employer policy gives "job protection for life").
77 See Armour & Hansen, supra note 75.
78 Vicky Ramsey Conwell, Bosses' Retaliation Bringing Lawsuits, ATLANTA J. & CONST., Aug. 1, 1999, at 1R.
79 The liberal circuits largely rely on secondary sources to glean the meaning of discrimination in § 704(a). See, e.g., Wyatt v. City of Boston, 35 F.3d 13, 15-16 (1st Cir. 1994) (per curiam).
employment action,\textsuperscript{80} is an unwarranted expansion of the element's scope because it fails to adequately consider analysis from other areas of Title VII.\textsuperscript{81}

Some courts and the EEOC rely on the overarching purpose of Title VII as a remedial statute to allow a wide variety of behavior to qualify under the adverse employment action element.\textsuperscript{82} For example, the Tenth Circuit's opinion in \textit{Berry v. Stevinson Chevrolet} relies on the remedial nature of Title VII to establish a broad scope of retaliatory behavior.\textsuperscript{83} In \textit{Berry}, malicious prosecution charges were filed against a former employee and the court found those actions met the retaliation standard.\textsuperscript{84} Similarly, the Eleventh Circuit allows a broad range of employer action to meet the adverse employment action element based on the remedial purpose of Title VII.\textsuperscript{85} The court in \textit{Wideman v. Wal-Mart Stores, Inc.}, stated that allowing only ultimate employment actions would chill "employees' willingness to file charges of discrimination."\textsuperscript{86}

The positions in \textit{Berry} and \textit{Wideman} are directly contrary to that of the Supreme Court in \textit{Faragher v. City of Boca Raton}, which declared that the purpose of Title VII is "to influence primary" behavior, "not to provide redress."\textsuperscript{87} When viewed in this context, the liberal construction of § 704(a) is directly inconsistent with the Supreme Court statement on this issue. Therefore, the basis on which the \textit{Berry} and \textit{Wideman} courts infer wide liability—the "remedial" purpose of Title VII—is controversial. In fact, one author argues:

While providing remedies to discrimination victims represents an important goal of Title VII, the statute best serves its function when it

\textsuperscript{80} See id.

\textsuperscript{81} Part of the difficulty in defining what constitutes "discrimination" in the context of § 704(a) of Title VII lies in the fact that there is very little legislative history to guide courts regarding the types of behavior the section contemplates as retaliatory. See Cude & Steger, supra note 63, at 397. The liberal circuits tend to read the lack of enumerated prohibited behaviors in the section as leading to limitless possibilities of liability. See discussion supra Part II.A.

\textsuperscript{82} See, e.g., \textit{Berry v. Stevinson Chevrolet}, 74 F.3d 980, 986 (10th Cir. 1996); see also discussion infra Part IV.

\textsuperscript{83} See \textit{Berry}, 74 F.3d at 986.

\textsuperscript{84} Id.

\textsuperscript{85} See \textit{Wideman v. Wal-Mart Stores, Inc.}, 141 F.3d 1453, 1456 (11th Cir. 1998).

\textsuperscript{86} Id.

prevents discrimination from occurring in the first place. Courts have emphasized that Congress intended to encourage employers and employees to conciliate rather than litigate their grievances involving discrimination within the workplace.88

The Second and Third Circuits' approach incorporates all of the terms of § 704(a), truest to the language of the statute.89 The Second Circuit stated "[w]e have held that 'reasonable defensive measures do not violate the anti-retaliation provision of Title VII, even though such steps are adverse to the charging employee and result in differential treatment, so long as they 'do not affect the complainant's work, working conditions, or compensation.' "90 Requiring affectation of the terms or conditions of employment is consistent with the language of § 704(a).91 In addition, the language in § 703 supports the approach taken by the intermediate position.92 Section 703(a), which outlines behavior by an employer that constitutes discrimination, provides the guidance lacking in the anti-retaliation provision of § 704.93

The scope of unlawful employment action is identified with far more precision in § 703 of Title VII than the amorphous reference to the term in the anti-retaliation section. To aid courts in the interpretation of "discrimination" with regard to determining behavior covered under adverse employment action, § 703(a) is helpful in placing some limits on the scope of prohibited behavior. Section 703(a) connects discriminatory behavior with employer action related to ultimate employment decisions, as well as to terms or conditions of employment.94 Section 703(a) delineates that only

89 See, e.g., Robinson v. City of Pittsburgh, 120 F.3d 1286 (3d Cir. 1997); Torres v. Pisano, 116 F.3d 625 (2d Cir. 1997).
90 Torres, 116 F.3d at 640 (quoting United States v. New York City Transit Auth., 97 F.3d 672, 677 (2d Cir. 1996)).
91 See supra note 8.
92 See supra note 70.
93 See supra note 70.
94 Section 703 provides that unlawful employment action is:

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 . . . in any way which
actions affecting a person's terms or conditions of employment can constitute unlawful employer action with regard to certain claims.\textsuperscript{95} Companion cases from the Supreme Court, \textit{Burlington Industries, Inc. v. Ellerth}\textsuperscript{96} and \textit{Faragher}\textsuperscript{97} address § 703(a) of Title VII, and are instructive to courts struggling to determine what behavior "discrimination" covers under § 704(a) in the adverse employment action context. The Court determined that, "Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment and to explain the latter must be severe or pervasive."\textsuperscript{98}

The Court in \textit{Ellerth} held that an employer is vicariously liable for the sexually harassing acts of its employees when the victim suffers from a tangible employment action.\textsuperscript{99} Similarly, \textit{Faragher} held that to bring a meritorious claim of a hostile work environment under the Title VII sexual harassment provision, the conduct has to be "extreme to amount to a change in the terms and conditions of employment."\textsuperscript{100}

Considering the three positions taken by the circuits in interpreting adverse employment, the intermediate approach of the Second and Third Circuits most closely conforms to the language of Title VII as a whole. Moreover, the Second and Third Circuits' requirement of a connection between retaliatory action and a term or condition of employment conforms to Title VII's conciliatory aim as described in the \textit{Faragher} decision.\textsuperscript{101}

\begin{quote}
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.
\end{quote}


\textsuperscript{95} See id.

\textsuperscript{96} Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).

\textsuperscript{97} Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

\textsuperscript{98} Ellerth, 524 U.S. at 752. This language is similar to that used by the Second and Third Circuits in interpreting § 704. See discussion supra Part II.C.

\textsuperscript{99} Ellerth, 524 U.S. at 753-54. Drawing a parallel to adverse employment action, holding employers liable for tangible affectations of employment is consistent with the retaliatory actions for which an employer should be subject to liability.

\textsuperscript{100} Faragher, 524 U.S. at 788. The use of the word "extreme" is indicative of the fact that there are some behaviors that are simply not serious enough to merit unlimited redressability for a sexual harassment suit under Title VII. Applying similar logic to adverse employment action, there are some behaviors that are also not serious enough to affect a term or condition of employment. By adopting such a broad span of behavior as constituting adverse employment action, the liberal circuits unfairly subject employers to increased liability on claims of retaliation from which they would be protected in a § 703(a) suit.

\textsuperscript{101} Id. at 805-06.
IV. THE EEOC GUIDELINES: HELPFUL HINTS OR MISPLACED MANTRA?

In 1998, the EEOC issued new guidelines in its manual detailing what it considers to qualify as adverse employment action. "Obvious" examples of adverse employment action include "denial of promotion, refusal to hire, denial of job benefits, demotion, suspension and discharge." All of these actions are consistent with the intermediate approach that requires a connection between the employment action and a term or condition of employment. The EEOC justifies its policy regarding these actions because it prevents "a chilling effect upon the willingness of individuals to speak out against employment discrimination or to participate in the EEOC's administrative process." Ensuring that adverse employment action encompasses only those actions of an employer that actually inflict an employment related detriment on an employee makes sense on two fronts: first, employers and employees can manage other types of behavior, i.e., that of other employees, internally, and second, it keeps frivolous claims out of the courts.

The Mattern dissent, for example, examines the EEOC guidelines to outline a broad array of actions that could qualify as adverse employment action. The dissent aligns itself with the more liberal circuits in allowing a wide range of behavior to constitute adverse employment action.

The EEOC carries adverse employment action to the extreme, recognizing "threats, reprimands, negative evaluations, harassment or other adverse treatment" as behavior falling within the scope of adverse employment action. In fact, the EEOC expressly rejects the strict and intermediate approaches:

The Commission disagrees with those decisions and concludes that such constructions are unduly restrictive. The statutory retaliation clauses

103 See id.
104 See supra Part II.C.
106 See Mattern v. Eastman Kodak Co., 104 F.3d 702, 711 (5th Cir. 1997) (Dennis, J., dissenting).
107 Id.; see also discussion supra Part II.A.
108 EEOC COMPLIANCE MANUAL, supra note 102, Directives Transmittal No. 915.003, § 8.
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. Of course, petty slights and trivial annoyances are not actionable, as they are not likely to deter protected activity. More significant retaliatory treatment, however, can be challenged regardless of the level of harm.\footnote{Id.}

The amorphous reference to "more significant retaliatory treatment" only muddies the waters for courts in determining adverse employment action, particularly absent any other guidance than "reasonably likely" to deter protected activity. Presumably, almost any negative feedback an employee receives could be construed as related to her opposition of an alleged unlawful practice.\footnote{Conwell, supra note 78 (noting that "almost any adverse action against an employee who has claimed discrimination ... can be viewed as retaliatory, whether it is or not").}

A spectrum this broad is grossly unfair to employers who must handle internal office politics and have a reasonable opportunity to protect their interests from a disgruntled employee.\footnote{Jones, Walker, Waechter, Poitevent, Carrere & Denegre, LLP, supra note 76.} The consequence of such a wide array of potential liability hinders the ability of employers to effectively manage employees, inciting fear of retaliation if a manager gives a poor evaluation to an employee.\footnote{See Lewis, supra note 15.} In addition, employees receive a halo of protection after they have complained about alleged unlawful discrimination that may be unjustified, particularly since liability for these alleged practices has yet to be established.\footnote{See Higgins, supra note 13, at 26.}

In essence, without some sort of tangible connection to a detriment related to employment, employers are subject to seemingly unlimited liability for every negative experience of an employee because there is no guidance on what is "reasonably related" to the protection of an employee's right to oppose certain employer practices.\footnote{See supra notes 108-09 and accompanying text.} This forced "hands off" approach makes everyone a loser. The courts, forced to determine adverse action on a case-by-case basis because of the wide array of opinions, are already overwhelmed with litigation in this arena.\footnote{See supra notes 13-15 and accompanying text.} Following the EEOC guidelines will do little to ameliorate the volume of or confusion involved.

\footnote{109 Id.}

\footnote{110 Conwell, supra note 78 (noting that "almost any adverse action against an employee who has claimed discrimination ... can be viewed as retaliatory, whether it is or not").}

\footnote{111 Jones, Walker, Waechter, Poitevent, Carrere & Denegre, LLP, supra note 76.}

\footnote{112 See Lewis, supra note 15.}

\footnote{113 See Higgins, supra note 13, at 26.}

\footnote{114 See supra notes 108-09 and accompanying text.}

\footnote{115 See supra notes 13-15 and accompanying text.}
with these cases. Limiting adverse employment action to denial of promotion, refusal to hire, denial of job benefits, demotion, suspension, and discharge allows for litigation of meritorious cases as well as appropriate internal management of affairs by employers. The position of the Second and Third Circuits best comports with this approach—recognizing actions as adverse which have a tangible effect on the essence of the employment relationship—the employee's job.

V. CONCLUSION

The conflict among the circuits over the adverse employment action element of a retaliation claim is one ripe for Supreme Court resolution. The application of disparate standards to individual cases "has left employers to guess what employment actions might be considered unlawful retaliation." The best standard to determine behavior prohibited by the Title VII's anti-retaliation provision is the intermediate position adopted by the Second and Third Circuits requiring a material effect on a term or condition of employment. This position both eliminates the harsh consequences to employees of the bright line ultimate employment action test and protects employers from a wide scope of liability under the most liberal interpretation of the element. In short, this position is an acceptable middle ground representing the most just way to provide redress without allowing suits to go forward on baseless claims. Barring employees from bringing a retaliatory suit based on trivial adverse employment actions allows employers to focus on eradicating discrimination within the workplace rather than spending their resources on defending suits that are

116 See Jones, Walker, Waechter, Poitevent, Carrere & Denegre, LLP, supra note 76. The authors' suggestions for internal policies include providing a statement on protection from retaliation in the discrimination and harassment policy, restating this policy when investigating a discrimination claim, and training managers regarding retaliation and its consequences. Id.

117 See Wolf, supra note 16 (quoting Eric Athey who stated, "retaliation is a legal 'battleground' that needs to be clarified by the courts. Judges must decide what constitutes retaliation—'is it being fired, being demoted, being transferred or even being given a smaller office?' He further commented, '[t]here needs to be one standard.')


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

120 See discussion supra Part II.
essentially internal problems among employees best handled by their own adjudicatory procedures.  

In addition, the Second and Third Circuit’s approach is more consistent with the language of § 703(a) regarding prohibited discriminatory behavior by an employer in other contexts. The overall purpose of Title VII, promoting employer/employee conciliation, rather than remedy, supports raising the bar on adverse employment action to require some nexus to a condition of employment. Holding employers liable for retaliatory actions parallel to the liability for actions under § 703(a) is a logical inference to draw. By refusing to recognize behavior too remote from any connection to the employee’s job as retaliatory, the intermediate standard best helps courts to draw the line on liability for adverse employment action by protecting both employers and employees.

121 Conwell, supra note 78 (noting that “companies spend an average of $100,000” on these lawsuits, and litigation ranges from weeks to years).Clearly, internal procedures are inadequate to handle employer behavior meant to exact vengeance on an employee for protesting an allegedly unlawful practice. An action taken to jeopardize an employee’s career is unquestionably handled best by redress to the judiciary. The most appropriate time for the application of Title VII is in this circumstance. When terms or conditions of employment are affected, it is clear that deference to reconciliation of problems via internal procedures is no longer effective. In this context, the employer can likely no longer be an objective arbiter of the employee’s interests. When the very nexus of the employer/employee relationship—the employee’s job—is threatened, even short of discharge, employees are certainly within the purview of adverse employment action. This means, however, that the employee must point to more than petty office disputes and derogatory comments to establish the right to a remedy.

122 See discussion supra Part III arguing that incorporating the behaviors enumerated as discriminatory in this section are helpful guidelines to determine the parameters of discriminatory behavior in the anti-retaliation section.

123 See discussion supra Part III.

124 See Wolf, supra note 16 (quoting Eric Athey that “employers need to be ‘more affirmative’ in tackling harassment complaints, checking regularly with employees after resolving the issue to make sure the solution is working”).