

# Overcoming Adversity: Distinguishing Retaliation from General Prohibitions Under Federal Employment Discrimination Law

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## INTRODUCTION

In Japan, a rubber company demanded a senior researcher enter early retirement at fifty-three years of age.<sup>1</sup> He refused, and in response, the company moved him out of his office into the corner of the factory with only a bare desk for furniture.<sup>2</sup> His new job, according to the company, was to turn in a report on the same topic every two weeks entitled “My Second Life.”<sup>3</sup> Meanwhile, in the United States, Jean Mattern, a mechanic-apprentice, suffered sexual harassment by two senior mechanics on the job.<sup>4</sup> As a result, she filed a charge of discrimination with the Equal Employment Opportunity Commission (“EEOC” or “Commission”)<sup>5</sup> and ultimately settled with the company.<sup>6</sup> Mattern returned to work with her new crew but began encountering problems.<sup>7</sup> One day she went home ill, and two supervisors showed up at her home demanding she report to the company’s medical department.<sup>8</sup> Days later, Mattern was reprimanded for not being at her work station when, in actuality, she was in a human resource department meeting.<sup>9</sup> Coworkers became hostile to her, muttering “accidents happen,” and none of them even acknowledged her with a simple “hello.”<sup>10</sup> Supervisors, who previously praised her work, now gave her poor evaluations and one even threatened termination.<sup>11</sup> Finally, Mattern’s locker at work was broken into, and her tools were stolen.<sup>12</sup> The workplace strain overwhelmed Mattern, causing her to see

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1. *Smart v. Ball State Univ.*, 89 F.3d 437, 441 n.1 (7th Cir. 1996) (citing Sheryl WuDunn, *When Lifetime Jobs Die Prematurely*, N.Y. TIMES, June 12, 1996, at D1).

2. *Id.*

3. *Id.*

4. *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 703-04 (5th Cir. 1997).

5. The EEOC is the federal agency charged with investigating and enforcing equal employment opportunity laws, including the federal law which prohibits sexual harassment in the workplace. See MARK A. PLAYER, *EMPLOYMENT DISCRIMINATION LAW* § 5.02 (1988).

6. *Mattern*, 104 F.3d at 704. As part of the settlement, the company requested one of the harassers retire early and did not discipline the other, instead transferring Mattern to another crew under the same departmental supervisors. *Id.*

7. *Id.*

8. *Id.* at 705.

9. *Id.*

10. *Id.*

11. *Id.* at 705-06.

12. *Id.* at 705.

a doctor and resign.<sup>13</sup>

In the aforementioned cases, each employee was subjected to retaliation for objecting to an employer's practice. However, in the second case the employee, Mattern, pursued a civil action against her employer alleging unlawful employment practices<sup>14</sup> under Title VII of the Civil Rights Act of 1964 ("Title VII"),<sup>15</sup> which prohibits sexual harassment in the workplace<sup>16</sup> and entitles an employee to protection from retaliation for engaging in what is deemed "protected activity."<sup>17</sup> Mattern brought her action in a Texas federal district court alleging both sexual harassment and retaliation, receiving a judgment in her favor on her claim of retaliation.<sup>18</sup> The company won on appeal because the Fifth Circuit Court of Appeals determined that the actions taken by the company did not constitute retaliation within the meaning of Title VII.<sup>19</sup>

Enacted in 1964, Title VII targets discrimination in employment practices hoping to equalize the workplace for all individuals.<sup>20</sup> The statute's general provisions bar discrimination by an employer because of an individual's race, color, religion, sex, or national origin.<sup>21</sup> As with many federal statutes,<sup>22</sup> a section of Title VII contains a

13. *Id.* at 706.

14. *Id.* at 704.

15. 42 U.S.C. §§ 2000e to -17 (1994 & Supp. IV 1998).

16. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66-67 (1986).

17. Section 704(a)(1) of Title VII, 42 U.S.C. § 2000e-3(a) (1994), reads as follows:

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

*See also Robinson v. Shell Oil Co.*, 519 U.S. 337, 339 (1997) (interpreting section 704(a)(1) to cover former employees within the meaning of "employees"). *See generally* PLAYER, *supra* note 5, § 5.27 (discussing Title VII's articulation provision).

18. *Mattern*, 104 F.3d at 704.

19. *Id.* at 708, 710. The Court's holding was subject to a vigorous dissent:

Because I believe that the majority's decision is contrary to the clear statutory language, the Supreme Court decisions, and all prior jurisprudence, and that it will drastically weaken § 704(a)'s protection against retaliation for those who participate in the enforcement of Title VII by immunizing employers who use hostile environment discrimination vengefully against them, I must respectfully dissent.

*Id.* at 720 (Dennis, J., dissenting). Ironically, according to the Seventh Circuit, the plight of the Japanese senior researcher in his corner desk would have been a sufficient adverse action had it occurred in the United States. *Smart v. Ball State Univ.*, 89 F.3d 437, 441 n.1 (7th Cir. 1996).

20. *Meritor Sav. Bank*, 477 U.S. at 64; H.R. REP. NO. 88-914, at 26 (1963) ("The purpose of this title is to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based upon race, color, religion, or national origin."); *see also* *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971) ("The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.").

21. 42 U.S.C. § 2000e-2(a); *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 78

provision barring retaliation by an employer if an employee opposes unlawful employment practices or utilizes the enforcement mechanisms under the statute.<sup>23</sup> Section 704(a) of Title VII protects employees who engage in protected activity, thus “[m]aintain[ing] unfettered access to statutory remedial mechanisms.”<sup>24</sup> Charges of retaliation, such as the one brought by Mattern, are being brought in increasing numbers under equal employment opportunity statutes, thus creating a need for judicial interpretation of the retaliation provisions.<sup>25</sup> Unfortunately, section 704(a) lacks any substantial legislative history to provide guidance to the courts.<sup>26</sup>

The Supreme Court recently tackled section 704(a) in *Robinson v. Shell Oil Co.*<sup>27</sup> Reversing a decision of the Fourth Circuit Court of Appeals, the Supreme Court interpreted the section to include former employees within the meaning of “employees.”<sup>28</sup> Justice Thomas, speaking for a unanimous Court, declared that the Fourth Circuit’s definition limiting section 704(a) to current employees would be “destructive of [the] purpose of the antiretaliation provision.”<sup>29</sup> However, a recent split among the circuits creates a new issue under section 704(a) ripe for review by the Supreme Court.<sup>30</sup> The Fifth Circuit Court of Appeals, among others, limited the term “discriminate” in section 704(a) to “ultimate employment decisions,” such as hiring and firing.<sup>31</sup> In Mattern’s case, the company did not retaliate against her within the meaning of section 704(a), because she did not suffer a sufficiently adverse action by

(1998).

22. See National Labor Relations Act (NLRA) § 8(a)(4), 29 U.S.C. § 158(a)(4) (1994); Fair Labor Standards Act (FLSA) of 1938 § 15(a)(3), 29 U.S.C. § 215(a)(3) (1994).

23. 42 U.S.C. § 2000e-3(a)(1).

24. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997).

25. The past several years have seen a consistent rise in the percentage of retaliation charges filed with the EEOC. See Equal Employment Opportunity Commission, Charge Statistics for FY 1992 Through FY 1998 (Oct. 14, 1999), at <http://www.eeoc.gov/stats/charges.html> (last modified Jan. 12, 2000); see also Teresa L. Butler & A. Michael Weber, *Retaliation Lawsuits Are Increasing Rapidly*, NAT’L L.J., Jan. 11, 1999, at B5 (noting significant increase and predicting that retaliation claims “will undoubtedly climb and may eventually constitute the single largest percentage of charges processed by the EEOC and parallel state agencies”).

26. See *McDonnell v. Cisneros*, 84 F.3d 256, 262 (7th Cir. 1996) (noting in regards to section 704(a) that “there is no pertinent legislative history”); Donna P. Fenn, Note, *Robinson v. Shell Oil Co.: Providing Former Employees with Protection from Retaliation*, 15 HOFSTRA LAB. & EMP. L.J. 539, 539 (1998) (“[T]here is a lack of legislative history regarding this portion of Title VII.”).

27. 519 U.S. 337 (1997).

28. *Id.* at 346.

29. *Id.*

30. *Ray v. Henderson*, 217 F.3d 1234, 1240-42 (9th Cir. 2000) (noting circuit split on issue and citing cases); *Burger v. Cent. Apartment Mgmt., Inc.*, 168 F.3d 875, 878 n.3 (5th Cir. 1999); *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998); see also Melissa A. Essary & Terence D. Friedman, *Retaliation Claims Under Title VII, the ADEA, and the ADA: Untouchable Employees, Uncertain Employers, Unresolved Courts*, 63 MO. L. REV. 115, 152 (1998) (“The most pressing issue is the question of what constitutes ‘adverse employment action.’”).

31. *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 708 (5th Cir. 1997).

the company on an ultimate employment decision.<sup>32</sup> However, the majority of circuits do not restrict section 704(a)'s language to such a reading but instead include lesser adverse actions with some minimum level of substantiality.<sup>33</sup>

The importance of the Supreme Court's decision on this issue is immense. A broad interpretation of section 704(a) would require employers to keep careful records of the management of employees previously or currently involved in statutorily protected activity.<sup>34</sup> Indeed, such a reading places severe restrictions on the ability of an employer to discipline an employee who has engaged in protected activity.<sup>35</sup> However, a narrow interpretation of the provision would seriously defeat the effectiveness of the section by deterring employee cooperation in enforcement.<sup>36</sup> Although an employer may not take adverse action on an ultimate employment decision, discrimination based on retaliatory motives may come in the form of various workplace slights not covered by a narrow interpretation.<sup>37</sup> The issue balances the ability of an employer to manage his or her employees with the remedial purposes of antidiscrimination laws.<sup>38</sup> Considering the recent decision in *Robinson*, the Supreme Court will most likely give section 704(a) a broad reading and agree with the majority of circuits, an interpretation consistent with the antiretaliation provision's goals and language.

This Note addresses the current circuit split on the issue, specifically, whether section 704(a) should be read broadly. Part I explores the limited legislative history and distinguishes section 704(a) from the general provisions to provide a background for the discussion. Part II addresses the viewpoint held by the majority of circuits regarding section 704(a) and the reasoning of those courts. Next, Part III provides an analysis of the minority view held by several circuits. Finally, in light of recent Supreme Court decisions, Part IV concludes with the probable interpretation the Court will give section 704(a) and why this is the appropriate definition. Although the reasoning of this Note targets primarily section 704(a) of Title VII, the reasoning may apply with equal persuasion to the similar antiretaliation provision under the Age Discrimination in Employment Act of 1967 ("ADEA").<sup>39</sup>

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32. *Id.*

33. *Wideman*, 141 F.3d at 1456 ("We join the majority of circuits which have addressed the issue and hold that Title VII's protection against retaliatory discrimination extends to adverse actions which fall short of ultimate employment decisions. . . . [W]e do not doubt that there is some threshold level of substantiality . . .").

34. *See Butler & Weber*, *supra* note 25, at B10 (emphasizing the importance of training supervisors in company complaint mechanisms to "identify and document when original complaints occurred").

35. *See infra* notes 161-62 and accompanying text.

36. *Wideman*, 141 F.3d at 1456 ("Permitting employers to discriminate against an employee who files a charge of discrimination so long as the retaliatory discrimination does not constitute an ultimate employment action, could stifle employees' willingness to file charges of discrimination.")

37. *See infra* notes 131-36 and accompanying text.

38. *See Laughlin v. Metro. Wash. Airports Auth.*, 149 F.3d 253, 259 (4th Cir. 1998).

39. 29 U.S.C. § 623 (1994). Under the ADEA:

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment . . . because such individual . . . has opposed any practice made unlawful by this section, or because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation,

## I. BACKGROUND

A general understanding of section 704(a)'s history and usage provides a backdrop to consider the viewpoints held by the majority and minority of circuits. First, the limited legislative history demonstrates that Congress intended section 704(a) to be construed broadly. Second, section 704(a) must be distinguished from the general prohibitions in its language and application to demonstrate the broad coverage of the provision.

*A. A Brief History of Section 704(a)*

During the 1950s and 1960s, prior to the enactment of the Civil Rights Act of 1964, the country suffered from constant social turmoil and racial tension.<sup>40</sup> Much of the crisis during this era stemmed from federal efforts to integrate schools and enforce minority voting rights.<sup>41</sup> The civil rights movement of these two decades initiated the passage of broad laws aimed at remedying racial discrimination.<sup>42</sup> In the midst of this tension, Congress recognized the need to eliminate the barriers to minorities in obtaining employment.<sup>43</sup> Beginning in the late 1950s and continuing up to 1964, members of Congress proposed individual and omnibus statutes containing multiple titles designed to eradicate discrimination in voting, public accommodation, education, and employment.<sup>44</sup> Two of these bills are worthy of comment in construing section 704(a).

In 1962, the Chairman of the House Committee on Education and Labor, Congressman Adam Clayton Powell, submitted a bill, House Bill 10144, entitled "Equal Employment Opportunity Act of 1962."<sup>45</sup> Powell, a Democrat from New York, introduced the legislation as "a solution for the problem of continuing arbitrary employment discrimination because of race, religion, color, national origin, ancestry, or age."<sup>46</sup> The intent of the bill was to create an EEOC and allow the EEOC to enforce

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proceeding, or litigation under this chapter.

*Id.* § 623(d); *see also* Doe v. DeKalb County Sch. Dist., 145 F.3d 1441, 1447-48 (11th Cir. 1998) (noting reliance on Title VII and ADEA cases interchangeably for guidance on adverse employment action); Hashimoto v. Dalton, 118 F.3d 671, 675 n.1 (9th Cir. 1997) (relying on ADEA case as guidance in Title VII antiretaliation claim and noting that cases interpreting the parallel provisions may serve as same).

40. Robert D. Loevy, *Introduction: The Background and Setting of the Civil Rights Act of 1964*, in *THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION* 1, 25-42 (Robert D. Loevy ed., 1997).

41. *Id.*

42. *See id.*

43. *See* H.R. REP. NO. 87-1370, at 1 (1962) (stating that "50 percent of the people of the United States in search of employment suffer some kind of job opportunity discrimination because of their race, religion, color, national origin, ancestry, or age").

44. *See* EQUAL EMPLOYMENT OPPORTUNITY COMM'N, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 3-10 (1968).

45. 108 CONG. REC. 2707 (1962); EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *supra* note 44, at 9.

46. H.R. REP. NO. 87-1370, at 1 (1962).

the law through the judicial process—strikingly similar to the modern day Title VII.<sup>47</sup> A provision in the Powell bill addressed retaliation against employees for engaging in protected activity.<sup>48</sup> The House committee report approving the Powell bill commented that the retaliation provision “makes it an unlawful employment practice for an employer . . . to discriminate *in any manner* against another person because he has [engaged in protected activity].”<sup>49</sup> The language of the report clearly states that the Powell bill had no requirement that the discrimination be an ultimate employment action such as hiring or firing—discrimination by the employer could take any form. Ultimately, the Powell bill failed to clear the House Rules Committee.<sup>50</sup>

One year later, another Democrat from New York and Chairman of the House Judiciary Committee, Congressman Emanuel Celler, introduced a bill based on President John F. Kennedy’s recommendations to Congress.<sup>51</sup> The Celler bill, designed as omnibus civil rights legislation, contained ten titles.<sup>52</sup> Title VII of the Celler bill was given the name “Equal Employment Opportunity” and actually developed as a late amendment, offered by Congressman Peter Rodino.<sup>53</sup> In section 705(a) of Title VII, the modern day section 704(a) is found.<sup>54</sup> The minority view of the committee, which opposed approval, criticized the enforcement procedures of the Celler bill because “[i]n essence, this was the approach and the provisions of a similar bill, H.R. 10144, reported in February of 1962 by the House Education and Labor Committee in the 87th Congress.”<sup>55</sup> Thus, arguably, the Powell bill of 1962 served as the origin of the language for Title VII.

Title VII developed little official legislative history in committee except for that available from the House Judiciary Committee’s report to Congress, which was attached to the omnibus bill. Unfortunately, that report contained no helpful explanation of the terms within Title VII, in particular section 704(a).<sup>56</sup> Indeed, the only commentary on the section by the report was in language nearly verbatim to the section itself.<sup>57</sup> Members of the committee who disagreed with the omnibus bill’s

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47. Compare H.R. 10144, 87th Cong. § 8 (1962), and H.R. REP. NO. 87-1370, at 11-15, with 42 U.S.C. §§ 2000e-4 to -5 (1994).

48. H.R. 10144; H.R. REP. NO. 87-1370, at 11.

49. H.R. REP. NO. 87-1370, at 11 (emphasis added).

50. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, *supra* note 44, at 9.

51. H.R. REP. NO. 88-914, at 16 (1963) (accompanying the Celler bill, H.R. 7152, 88th Cong. § 705(a) (1963)); EQUAL EMPLOYMENT OPPORTUNITY COMM’N, *supra* note 44, at 9. In regard to employment discrimination and the importance of such legislation, President Kennedy was quoted as saying: “There can be no more significant case for our democratic form of government than the achievement of equality in all our institutions and practices—and particularly in employment opportunities.” 110 CONG. REC. 2733 (1964).

52. H.R. REP. NO. 88-914, at 17-18.

53. CHARLES WHALEN & BARBARA G. WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 35 (1985).

54. Compare H.R. 7152, 88th Cong. § 705(a) (1963), with 42 U.S.C. § 2000e-3(a) (1994).

55. H.R. REP. NO. 88-914, at 57.

56. *Id.*

57. Compare H.R. 7152 (“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 title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.”), with

approval commented on the complete lack of consideration by the committee of the language used in Title VII: “The Judiciary Committee or its subcommittee held no hearings on the language of title VII. Representatives of neither industry nor labor had their day in court before the Judiciary Committee and the Judiciary Committee members had no part in producing the phraseology title VII contains.”<sup>58</sup> Congressman Dowdy, a Democrat from Texas, commented on the House floor during debate that “[n]owhere in the bill is the word ‘discrimination’ defined,” and “[t]his is one title that the Judicial Committee did not have any hearings on.”<sup>59</sup>

The Civil Rights Act of 1964 passed both houses of Congress through an expedited and unusual process, resulting in inadequate legislative history.<sup>60</sup> In the end, section 704(a) received almost no attention by Congress. On the House floor, Congressman Watson, a Republican from South Carolina, made the only attempt to amend section 704(a) of Title VII.<sup>61</sup> Proposed and rejected on the last day of debate, the Watson amendment allowed employers to retaliate against employees for bringing charges the validity of which was not confirmed by the Commission or a federal court.<sup>62</sup> Congressman Watson explained that under the amended section, “an employer would not be required to consider a chronic troublemaker or professional complaint filer either for employment or promotion.”<sup>63</sup> The logical inference from Congressman Watson’s comment is that the unamended language was broad enough to include such “problem” employees. Despite these concerns and a remarkable lack of legislative history, Title VII, including section 704(a), became the law of the land.

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H.R. REP. NO. 88-914, at 27-28 (stating that the section “makes it an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has made a charge, testified, assisted, or participated in any manner in the enforcement of the title”).

58. H.R. REP. NO. 88-914, at 57.

59. 110 CONG. REC. 1632 (1964). Later, Mr. Dowdy made an interesting historical statement regarding Title VII: “When Attorney General Robert Kennedy appeared before our committee, after this [Title VII] was placed in the bill, he advised against including it.” *Id.* However, proponents of the bill attempted to clarify the definition of discrimination: “[T]o discriminate is 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 (1999) (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 (1989) (quoting 110 CONG. REC. 7213)).

60. See Joseph L. Rauh, Jr., *The Role of the Leadership Conference on Civil Rights in the Civil Rights Struggle of 1963-1964*, in *THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION*, *supra* note 40, at 64-75.

61. See EQUAL EMPLOYMENT OPPORTUNITY COMM’N, *supra* note 44, at app.

62. 110 CONG. REC. 2729. Compare the absence of legislative history on such a small section with the nonexistent legislative history surrounding the inclusion of “sex” as a protected class under the statute. *Id.* at 2577-84. The amendment introduced by Congressman Smith to include “sex” was actually an attempt to defeat the bill. WHALEN & WHALEN, *supra* note 53, 115-18; see also PLAYER, *supra* note 5, § 5.03.

63. 110 CONG. REC. 2730. Congressman Watson continued: “Certainly the businessman should be afforded that degree of protection against the professional complaint filer or casemaker who will inevitably develop as a natural aftermath of the passage of this iniquitous bill.” *Id.*

*B. Section 704(a) Distinguished from General Prohibitions  
Under Title VII*

As interpreted today, Title VII is considered a broad remedial statute that courts interpret liberally.<sup>64</sup> As opposed to the narrowly construed general provisions prohibiting discrimination based upon a protected status such as race, the prohibition against retaliation under section 704(a) has broader language and is liberally construed by a majority of circuits.

In the general provisions, Title VII prohibits discrimination based upon an individual's protected status of "race, color, religion, sex, or national origin."<sup>65</sup> Under Title VII, it is an unlawful employment practice "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, . . . to limit, segregate, or classify his employees or applicants" in order to deprive an individual of employment opportunities because of the individual's protected status.<sup>66</sup> After the Supreme Court's decision in *McDonnell Douglas Corp. v. Green*,<sup>67</sup> a plaintiff may demonstrate discrimination by establishing a prima facie case, at which point the burden shifts to the defendant.<sup>68</sup> Under *McDonnell Douglas*, a prima facie case allows a plaintiff to create a "presumption of discrimination" through circumstantial evidence.<sup>69</sup> For example, a plaintiff meets his initial burden of proving that an employer failed to promote him because of his race by demonstrating that (1) he is a member of a protected class (e.g., African-American), (2) he sought and was denied a promotion for which he was qualified, and (3) his employer promoted another employee outside the protected class (e.g., fellow Caucasian employee).<sup>70</sup> Once the plaintiff establishes his prima facie case, the burden shifts to the defendant to demonstrate that the failure to promote was for a legitimate, nondiscriminatory business reason (e.g., fellow employee had greater academic credentials and plaintiff had disciplinary problems).<sup>71</sup> Once the defendant articulates a nondiscriminatory reason, the burden then shifts back to the plaintiff to show that the reason is pretextual.<sup>72</sup>

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64. *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986 (10th Cir. 1996).

65. 42 U.S.C. § 2000e-2(a)(1) (1994).

66. *Id.* § 2000e-2(a)(1)-(2).

67. 411 U.S. 792 (1973).

68. *Id.* at 802-03 (establishing a burden-shifting scheme for Title VII claims for relief); *see, e.g., Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379 (8th Cir. 1994) (demonstrating prima facie case of race and age discrimination requires the plaintiff to show "1) she was a member of the protected class; 2) she was meeting the legitimate expectations of her employer; 3) she suffered an adverse employment action; and 4) she was replaced by a younger, white person").

69. *See McDonnell Douglas*, 411 U.S. at 802; *see also Reeves v. Sanderson Plumbing Prod., Inc.*, 120 S. Ct. 2097, 2106 (2000).

70. *Lidge-Myrttil v. Deere & Co.*, 49 F.3d 1308, 1310 (8th Cir. 1995).

71. *McDonnell Douglas*, 411 U.S. at 802-03; *Lidge-Myrttil*, 49 F.3d at 1310.

72. *Reeves*, 530 U.S. at 2106; *Lidge-Myrttil*, 49 F.3d at 1311. "[A]lthough the presumption of discrimination 'drops out of the picture' once the defendant meets its burden of production, the trier of fact may still consider the evidence establishing the plaintiff's prima facie case 'and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation

A retaliation claim may be incorporated into the traditional *McDonnell Douglas* burden-shifting framework.<sup>73</sup> A plaintiff alleging such a claim has the initial burden of proving three essential elements under the framework.<sup>74</sup> First, the employee must engage in protected activity under Title VII. Traditionally, protected activity is separated into two categories: (1) the opposition clause and (2) the participation clause.<sup>75</sup> Under the opposition clause, an employee engages in protected activity when he or she opposes conduct made unlawful under Title VII.<sup>76</sup> When the employee utilizes the enforcement mechanisms of Title VII, such as filing a charge with the EEOC, the employee is protected in his or her activities by the participation clause.<sup>77</sup> Second, the employee must show that the employer took an adverse action against the employee.<sup>78</sup> Finally, the employee must show a causal connection between the adverse action taken by the employer and the employee's protected activity.<sup>79</sup> Once the employee establishes these three elements, the burden shifts to the employer to demonstrate a nondiscriminatory reason for the adverse action.<sup>80</sup> If the employer is successful, the employee may still attack the reason as pretextual.<sup>81</sup> Although each element has its nuances, the gravamen of this discussion will concentrate on what

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is pretextual.” *Reeves*, 530 U.S. at 2106 (omission in original) (citations omitted) (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993), and *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981), respectively).

73. *See, e.g.*, *Miller v. Am. Family Mut. Ins. Co.*, 203 F.3d 997, 1007 (7th Cir. 2000) (applying *McDonnell Douglas* burden-shifting framework to retaliation claim); *Laughlin v. Metro. Wash. Airports Auth.*, 149 F.3d 253, 258 (4th Cir. 1998); *Montandon v. Farmland Indus., Inc.*, 116 F.3d 355, 359 (8th Cir. 1997); *McKenzie v. Ill. Dep't of Trans.*, 92 F.3d 473, 483 (7th Cir. 1996); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 985 (10th Cir. 1996); *Yartsoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir. 1987).

74. *Burger v. Cent. Apartment Mgmt., Inc.*, 168 F.3d 875, 878 (5th Cir. 1999); *Knox v. Indiana*, 93 F.3d 1327, 1333-34 (7th Cir. 1996); *Berry*, 74 F.3d at 985; *Wyatt v. City of Boston*, 35 F.3d 13, 15 (1st Cir. 1994); *Yartsoff*, 809 F.2d at 1375. In some circuits, a prima facie case of retaliation is separated into four elements, the fourth being the employer's knowledge of the employee's protected activity, but most circuits encompass the knowledge requirement in the causation element. *See, e.g.*, *EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 860 (6th Cir. 1997) (requiring four elements for prima facie case of retaliation); *Essary & Friedman, supra* note 30, at 120 n.12 (noting that “courts using only three elements subsume the fourth element of knowledge into the third element of causation”).

75. 42 U.S.C. § 2000e-3(a) (1994) (showing the opposition clause to be “because he has opposed any practice made an unlawful employment practice,” and the participation clause to be “because he has made a charge, testified, assisted, or participated in any manner in an investigation”); *see also Wyatt*, 35 F.3d at 15 (distinguishing between the respective clauses).

76. *See, e.g.*, *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1085 (3d Cir. 1996) (complaining to management regarding discriminatory practices).

77. *See, e.g.*, *McKenzie*, 92 F.3d at 483 n.8 (filing of charge with EEOC and participating in investigation).

78. *Burger*, 168 F.3d at 878; *Knox*, 93 F.3d at 1333-34; *Berry*, 74 F.3d at 985; *Wyatt*, 35 F.3d at 15; *Yartsoff*, 809 F.2d at 1375.

79. *See, e.g.*, *Wyatt*, 35 F.3d at 16 (establishing causation by showing close temporal proximity between employer learning of protected activity and adverse action).

80. *Berry*, 74 F.3d at 987; *Wyatt*, 35 F.3d at 16; *Yartsoff*, 809 F.2d at 1376.

81. *Wyatt*, 35 F.3d at 16.

constitutes "adverse action" within the meaning of section 704(a) to establish the second element of a prima facie case.

The Supreme Court has provided little interpretive guidance on section 704(a). In fact, the Court has only addressed this provision on a few occasions, most recently in *Robinson v. Shell Oil Co.*<sup>82</sup> In *Robinson*, Justice Thomas, speaking for a unanimous Court, interpreted the term "employees" within the meaning of the section and enumerated a procedure for the courts to interpret ambiguous language under the section.<sup>83</sup> The issue before the Court in *Robinson* was whether the term "employees" included former employees, thus affording past employees statutory protection from retaliation.<sup>84</sup> According to the opinion, the Court first determined whether the language had a "plain and unambiguous meaning."<sup>85</sup> Justice Thomas explained that the term "employees" in section 704(a) had no qualifiers and that other sections used "employees" to have "more inclusive or different" meanings, thus finding the term ambiguous.<sup>86</sup> Considering the broader context of the statute and that a narrow reading "would effectively vitiate much of the protection afforded by § 704(a)," the Court broadened the term to include former employees.<sup>87</sup>

Today, section 704(a) plays a vital role for Title VII with allegations of retaliation on the rise.<sup>88</sup> According to EEOC statistical data, charges of retaliation are steadily increasing.<sup>89</sup> In 1992, retaliation complaints constituted 14.5% of Title VII charges of discrimination filed.<sup>90</sup> Six years later, the same charges account for over twenty-one percent of Title VII charges, and overall retaliation charges have increased by ten percent of the total charges under all statutes enforced by the EEOC.<sup>91</sup> A broad interpretation of section 704(a) by the Court will continue this increase. For employers, it would mean increased scrutiny of disciplinary actions taken against employees who have engaged in protected activity. Management of employees would be seriously limited by a broad interpretation because most personnel actions would be subject to Title VII scrutiny. However, the enforcement mechanisms of Title VII would be seriously hindered if the Court applied a narrow interpretation to section 704(a). Both Title VII plaintiffs and the EEOC critically rely on information from employees who file charges and those who provide witness testimony. The inability to assure potential witnesses and charging parties that their employer will not harass them in retaliation would diminish the agency's ability to conduct an investigation and eradicate the discrimination.

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82. 519 U.S. 337 (1997); see also Todd Mitchell, Note, *Terminate, Then Retaliate: Title VII Section 704(a) and Robinson v. Shell Oil Co.*, 75 N.C. L. REV. 376, 387 n.82 (1996).

83. *Robinson*, 519 U.S. at 340.

84. *Id.*

85. *Id.* Justice Thomas further remarked that "[t]he plainness or ambiguity of the statutory language is determined by reference to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole." *Id.* at 341.

86. *Id.* at 342.

87. *Id.* at 345.

88. See Equal Employment Opportunity Comm'n, *supra* note 25.

89. *Id.*

90. *Id.*

91. *Id.*

II. MAJORITY VIEW<sup>92</sup>

*“The law deliberately does not take a ‘laundry list’ approach to retaliation, because unfortunately its forms are as varied as the human imagination will permit.”*<sup>93</sup>

In the majority of circuits, a plaintiff may allege retaliatory conduct by the employer that does not constitute an ultimate employment decision.<sup>94</sup> A plaintiff may allege retaliation based upon an ultimate employment decision or may base such a claim on an isolated or series of lesser adverse actions of the employer. The logic of the majority is grounded in the broad language of section 704(a) and the underlying policy concern of protecting the enforcement mechanisms of Title VII.

A. *The Majority’s Definition of Adverse Action*

Adverse employment actions that give rise to a charge of retaliation may include demotions, disadvantageous transfers, failure to promote, negative job reviews, and toleration of co-worker harassment, in addition to actions deemed ultimate such as discharge or refusal to hire.<sup>95</sup> However, “not everything that makes an employee unhappy is an actionable adverse action.”<sup>96</sup> There must be some level of substantiality or materiality to the adverse action before a cognizable claim of retaliation may be made.<sup>97</sup> For example, in *Flaherty v. Gas Research Institute*,<sup>98</sup> the employer changed the employee’s job title and required the employee to report to a former subordinate after the employee alleged to a company director age discrimination in a work force reduction.<sup>99</sup> Responding to the employee’s allegation that these actions constituted retaliation, the court agreed that such actions may create a “bruised ego” but that they did not rise to the level of adverse employment actions.<sup>100</sup> In *Blalock v. Dale County*

92. The members of the majority clearly include the First, Seventh, Ninth, Tenth, Eleventh, and District of Columbia Circuits. *Ray v. Henderson*, 217 F.3d 1234, 1241 (9th Cir. 2000); *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998); *Knox v. Indiana*, 93 F.3d 1327, 1334 (7th Cir. 1996); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 984-86 (10th Cir. 1996); *Wyatt v. City of Boston*, 35 F.3d 13, 15-16 (1st Cir. 1994). The Fourth Circuit may be leaning in that direction. See *infra* note 214 and accompanying text.

93. *Knox*, 93 F.3d at 1334 (emphasis added).

94. *Wideman*, 141 F.3d at 1456 (citing cases in majority).

95. *Id.* (listing various actions which may be sufficient for retaliation claim).

96. *Smart v. Ball State Univ.*, 89 F.3d 437, 441 (7th Cir. 1996).

97. See, e.g., *Doe v. Dekalb County Sch. Dist.*, 145 F.3d 1441, 1452 (11th Cir. 1998) (declining to extend adverse employment action to a subjective standard of employee).

98. 31 F.3d 451 (7th Cir. 1994).

99. *Id.* at 457.

100. *Id.* at 456-57. The court noted however “that an employer does not insulate itself from liability simply by offering a transfer at the same salary and benefits . . . in the following circumstances[:]. . . moving an employee’s office to an undesirable location . . . an isolated corner . . . while forbidding her to use the firm’s stationary and support services.” *Id.* (quotations and citations omitted).

*Board of Education*,<sup>101</sup> the school board voted to involuntarily transfer a tenured teacher and athletic coach to another school with no coaching responsibilities; the board shortly thereafter rescinded the vote. The teacher had complained of sexual discrimination and brought suit alleging the initial vote was in retaliation. Granting summary judgment for the board, the court noted that the teacher “suffered no loss of pay or any benefit of employment,” and therefore “the ‘threshold level of substantiality’ [was] not met.”<sup>102</sup> The Seventh Circuit has been quite clear that purely lateral transfers or negative performance evaluations, absent any other adverse actions on the part of the employer, are not sufficient adverse employment actions under section 704(a).<sup>103</sup>

Yet, the majority’s reading of “to discriminate” is not severely restricted so long as the adverse action is related to employment. “There is nothing in the law of retaliation that restricts the type of retaliatory act that might be visited upon an employee who seeks to invoke her rights by filing a complaint. It need only be an adverse employment action.”<sup>104</sup> There is no distinct authority on how close the adverse action must be related to employment.<sup>105</sup> Even small office slights considered in the aggregate may constitute an adverse employment action.<sup>106</sup> In *Gunnell v. Utah Valley*

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101. 84 F. Supp. 2d 1291 (M.D. Ala. 1999).

102. *Id.* at 1311 (quoting *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998)).

103. *Smart v. Ball State Univ.*, 89 F.3d 437, 441 (7th Cir. 1996). In a more unusual situation, the Seventh Circuit rejected on its face an argument by one plaintiff that being *overrated* on a performance evaluation constituted an adverse employment action. *Cullom v. Brown*, 89 F.3d 1035, 1041 (7th Cir. 2000) (“[o]verrating an employee may be a misguided way of avoiding controversy, but it is not an adverse act, let alone a material one”).

104. *Knox v. Indiana*, 93 F.3d 1327, 1334 (7th Cir. 1996). A few circuits, citing the broad language of section 704(a), have construed the section to include adverse actions “not ostensibly employment related” taken by the employer in retaliation for protected activity. *Aviles v. Cornell Forge Co.*, 183 F.3d 598, 605 (7th Cir. 1999); *see also Veprinsky v. Fluor Daniel, Inc.*, 87 F.3d 881, 892 (7th Cir. 1996) (listing cases involving threats of violence and tort civil actions brought by employer as adverse actions).

105. *See Aviles*, 183 F.3d at 605 (holding “the language of the Title VII retaliation provision is broad enough to contemplate circumstances where employers might take actions that are not ostensibly employment related against a current employee”); *McKenzie v. Ill. Dept. of Transp.*, 92 F.3d 473, 485-86 (7th Cir. 1996) (indicating questionable continuing doctrine that adverse act must be employment related); *Passer v. Am. Chem. Soc’y*, 935 F.2d 322, 331 (D.C. Cir. 1991) (finding “illegal retaliation in employer conduct that could not be described strictly as an ‘employment action’”); *cf. Veprinsky*, 87 F.3d at 891 (holding that a retaliation claim by a current employee need only be based on an adverse action of the employer and not necessarily employment related while a claim by a former employee must involve an adverse action with a nexus to an employment relationship). At least one circuit requires the adverse action to be related to an employment relationship. *Nelson v. Upsala Coll.*, 51 F.3d 383, 389 (3d Cir. 1995) (concluding that adverse action must have an “impact on any employment relationship that [the employee] had, or might have in the future”), *criticized in EEOC v. Die Fliedenmaus, L.L.C.*, 77 F. Supp. 2d 460, 472 (S.D.N.Y. 1999). *See generally* Essary & Friedman, *supra* note 30, at 133 (concluding that the definition of adverse action is a three-way circuit split, the third prong being those courts which require the impact be related to employment).

106. *See, e.g., Rousselle v. GTE Directories Corp.*, 85 F. Supp. 2d 1286, 1292 (M.D. Fla.

*State College*,<sup>107</sup> the Tenth Circuit expanded the realm of adverse actions to include a claim of harassment by coworkers.<sup>108</sup> The court recognized “that co-worker hostility or retaliatory harassment, if sufficiently severe, may constitute ‘adverse employment action’ for purposes of a retaliation claim.”<sup>109</sup> However, “an employer can only be liable for co-workers’ retaliatory harassment where supervisory or management personnel either (1) orchestrate the harassment or (2) know about the harassment and acquiesce in it.”<sup>110</sup> Aside from the Tenth Circuit’s recognition of a retaliatory hostile environment claim, “‘mere ostracism’ by co-workers does not constitute an adverse employment action.”<sup>111</sup>

The majority generally limits the statute to those actions “cognizable as an adverse employment action if it is reasonably likely to deter employees from engaging in protected activity.”<sup>112</sup> “Concededly, not every unpleasant matter . . . creates a cause of action, but many things, such as constant rudeness, conspicuous discriminatory acts, etc., could have an adverse effect upon employment. . . . [A] case by case review is necessary.”<sup>113</sup> Adverse employment actions may include the bringing of criminal charges, negative performance evaluations, transfers to lesser positions, disadvantageous job assignments, denial of a lunch break, and even the cancellation of a public event in honor of the employee.<sup>114</sup> The majority requires the employer’s retaliatory acts be intended to discourage protected activity by employees, and the inquiry must be performed case by case.<sup>115</sup>

#### *B. The Reasoning of the Majority*

The majority initially argues that requiring retaliatory discrimination to reach only ultimate employment decisions is contrary to the plain language of the statute. The majority points directly to the language in the text of section 704(a): “The [minority’s] contrary position is inconsistent with the plain language of [section 704(a)], which makes it ‘unlawful to *discriminate* against any of his employees . . . because he has made a charge . . . .’ Read in the light of ordinary understanding, the term ‘discriminate’ is not limited to ‘ultimate employment decisions.’”<sup>116</sup> Unlike other sections of the statute, the term “discriminate” is not surrounded by qualifiers or

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2000) (“Several employment actions considered collectively and in the totality of the circumstances may be deemed adverse and sufficient to prohibit discrimination.”).

107. 152 F.3d 1253 (10th Cir. 1998).

108. *Id.* at 1264; *see also* *Fielder v. UAL Corp.*, 218 F.3d 973 (9th Cir. 2000) (adopting Tenth Circuit’s decision in *Gunnell*).

109. *Gunnell*, 152 F.3d at 1264.

110. *Id.* at 1265.

111. *Ray v. Henderson*, 217 F.3d 1234, 1241 (9th Cir. 2000) (quoting *Strother v. S. Cal. Permanente Med. Group*, 79 F.3d 859, 869 (9th Cir. 1996)).

112. *Id.* at 1243.

113. *Welsh v. Derwinski*, 14 F.3d 85, 86 (1st Cir. 1994).

114. *Ray*, 217 F.3d at 1243.

115. *Aviles v. Cornell Forge Co.*, 183 F.3d 598, 605 (7th Cir. 1999).

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

limitations.<sup>117</sup>

Consider the prohibitions contained in section 703 of Title VII.<sup>118</sup> The general prohibitions defining unlawful employment practices under Title VII define “discriminate” with the qualification that it be “with respect to his compensation, terms, conditions, or privileges of employment”<sup>119</sup> or utilize other language such as the prohibition “to limit, segregate, or classify his employees . . . which would deprive or tend to deprive any individual of employment opportunities.”<sup>120</sup> Section 703 stands in stark contrast to the limitless language of section 704(a), which utilizes broad language that seems to set no substantive or temporal limitations.<sup>121</sup>

The liberal construction given by courts is based upon a concern for the chilling effect retaliation has on reporting and enforcement. The majority view emphasizes the importance of the employee in the statutory scheme. As previously recognized by the Supreme Court:

Individual grievants usually initiate the [EEOC’s] investigatory and conciliatory procedures. And although the 1972 amendment to Title VII empowers the Commission to bring its own actions, the private right of action remains an essential means of obtaining judicial enforcement of Title VII. In such cases, the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices.<sup>122</sup>

In keeping with this policy, the antiretaliation provision is crucial in assuring that the vital role of the employee is protected. Given the broad remedial purpose of Title VII in eradicating invidious employment discrimination throughout the nation, section 704(a) ensures open lines of communication between the individual, either as witness or victim, and the federal government via the EEOC or the courts.<sup>123</sup> As a result of section 704(a)’s importance in the statutory scheme, courts willingly define the terms with a liberal perspective.<sup>124</sup>

117. Essary & Feldman, *supra* note 30, at 140-41.

118. 42 U.S.C. § 2000e-2 (1994).

119. *Id.*

120. *Id.* § 2000e-2(a)(2).

121. *See, e.g.,* Veprinsky v. Fluor Daniel, Inc., 87 F.3d 881, 891-92 (7th Cir. 1996) (comparing section 704(a) with section 703(a)(1)). This argument has been put forward not only by the courts, but also is the official position of the EEOC:

The anti-retaliation provisions are exceptionally broad. They make it unlawful “to discriminate” against an individual because of his or her protected activity. This is in contrast to the general anti-discrimination provisions which make it unlawful to discriminate with respect to an individual’s “terms, conditions, or privileges of employment.” The retaliation provisions set no qualifiers on the term “to discriminate,” and therefore prohibit any discrimination that is reasonably likely to deter protected activity.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, EEOC COMPLIANCE MANUAL (NEW) § 8-I (1998), available at <http://www.eeoc.gov/docs/retal.html> (last modified July 6, 2000).

122. *Veprinsky*, 87 F.3d at 889 (alteration in original) (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1974) (citations omitted)).

123. *Id.*

124. *E.g., id.* at 888-89 (“It has long been recognized that Title VII is a remedial statute with a broad sweep. . . . We have thus construed Title VII liberally, in keeping with its remedial

The majority of courts are further concerned with the numerous forms of retaliation:

“[T]his provision regarding retaliation may intentionally be broader, since it is obvious that effective retaliation against employment discrimination need not take the form of a job action. Shooting a person for filing a complaint of discrimination would be an effective method of retaliation,” although the victim would have other, more powerful remedies than a suit under Title VII.<sup>125</sup>

Thus, when considering section 704(a), courts construe the language liberally to ensure adequate coverage and not discourage reporting by employees.<sup>126</sup> Retaliation “is likely to cause irreparable harm to the public interest in enforcing the law by deterring others from filing charges.”<sup>127</sup> A narrow interpretation of section 704(a) would allow employers to retaliate with impunity so long as it does not rise to the level of an ultimate employment decision.<sup>128</sup>

### III. MINORITY VIEW<sup>129</sup>

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purpose.”); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986 (10th Cir. 1996) (Title VII “which is remedial in nature should be liberally construed.” (quoting *Rutherford v. Am. Bank of Commerce*, 565 F.2d 1162, 1165 (10th Cir. 1977))).

125. *Aviles v. Cornell Forge Co.*, 183 F.3d 598, 605 (7th Cir. 1999) (quoting *McDonnell v. Cisneros*, 84 F.3d 256, 259 (7th Cir. 1996)).

126. *See, e.g., Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998) (“Permitting employers to discriminate against an employee who files a charge . . . so long as [it] does not constitute an ultimate employment action, could stifle employees’ willingness to file charges of discrimination.”); *McKnight v. Gen. Motors Corp.*, 908 F.2d 104, 111 (7th Cir. 1990) (discussing in context of a § 1981 claim that a “threat to retaliate is a common method of deterrence”); *Holt v. Cont’l Group, Inc.*, 708 F.2d 87, 91 (2d Cir. 1983) (noting retaliation “carries with it the distinct risk that other employees may be deterred from . . . providing testimony”).

127. *Garcia v. Lawn*, 805 F.2d 1400, 1405 (9th Cir. 1986).

128. In *Fielder v. UAL Corp.*, 218 F.3d 973 (9th Cir. 2000), the Ninth Circuit commented: As the [Eleventh Circuit explained], “the term ‘discriminate’ is not limited to ‘ultimate employment decisions.’” If the statute were to be interpreted in a strict manner, employers could retaliate at will so long as the retaliation does not constitute an ultimate employment decision or rise to the level of a constructive discharge.

*Id.* at (quoting *Wideman*, 141 F.3d at 1456).

129. The members of the minority include the Fifth and Eighth Circuits. *Burger v. Cent. Apartment Mgmt., Inc.*, 168 F.3d 875, 878 (5th Cir. 1999); *Ledergerber v. Stangler*, 122 F.3d 1142 (8th Cir. 1997). The Ninth Circuit in *Ray v. Henderson*, 217 F.3d 1234 (9th Cir. 2000), suggests that a three way split exists. *Id.* at 1242. The court argues that the Second and Third Circuits take a middle of the road approach, namely, that the adverse action “materially affects the terms and conditions of employment.” *Id.* However, this language appears very similar to that used by the Eighth Circuit, which is in the minority. *See infra* note 134. Indeed, the Third Circuit appears ready to join the minority. *See Robinson v. City of Pittsburgh*, 120 F.3d 1286,

*“The federal courts cannot be wheeled into action for every workplace slight, even one that was possibly based on protected conduct.”*<sup>130</sup>

In several circuits, courts have construed “discriminate” to encompass only employment decisions that are deemed to be “ultimate.”<sup>131</sup> Although no clear rule is set, these employer decisions usually require serious economic effects on the employee.<sup>132</sup> A few courts in the minority argue that the language of section 704(a) itself requires the restriction, while other courts seek support from an original statutory understanding. In addition, the intrusiveness of a lower standard on management decisionmaking accentuates the position of the minority.

*A. The Minority’s Rule of “Ultimate Employment Decisions”*

“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>133</sup> The decisions under this doctrine require an economically adverse implication to an employee’s position.<sup>134</sup> Thus, obvious personnel actions falling within this gambit include “hiring, granting leave, discharging, promoting, and compensating.”<sup>135</sup> However, lesser personnel actions, such as reassignments or transfers, are not sufficient to support retaliation claims because these actions do not materially affect an employee’s terms or conditions of employment.<sup>136</sup> Essentially, as part of the prima facie case of retaliation, the plaintiff must allege that the action taken by his employer *materially* affected his or her terms or conditions of employment.<sup>137</sup>

For example, in *Ledergerber v. Stangler*,<sup>138</sup> the plaintiff, Diane Ledergerber, served as a maintenance supervisor for the defendant employer and had made allegations

1300 (3d Cir. 1997).

130. Taylor v. Fed. Deposit Ins. Corp., 132 F.3d 753, 765 (D.C. Cir. 1997) (emphasis added).

131. See, e.g., *Burger*, 168 F.3d at 878 (“ultimate employment decisions”); *Ledergerber*, 122 F.3d at 1144 (“materially significant disadvantage”).

132. *Burger*, 168 F.3d at 878.

133. *Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir. 1995).

134. *Ledergerber*, 122 F.3d at 1144-45 (stating that evidence must show that an employer “materially altered the terms or conditions of her employment”).

135. *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997) (quoting *Dollis*, 77 F.3d at 782).

136. See *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379 (8th Cir. 1994). In *Harlston*, the plaintiff was reassigned to a different position which did not effect changes in compensation or title, but the plaintiff argued she had less of her normal secretarial duties and more stress. *Id.* at 381-82. The court affirmed summary judgment for the employer, noting that “[c]hanges 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.” *Id.* at 382.

137. *Id.*

138. 122 F.3d 1142 (8th Cir. 1997).

towards the management of racial favoritism.<sup>139</sup> After the employer changed Ledergerber's entire staff without changing her compensation, benefits, title or location, Ledergerber brought suit alleging race discrimination and retaliation.<sup>140</sup> The Eighth Circuit Court of Appeals affirmed summary judgment in favor of the employer, noting Ledergerber's failure to show that the exchange of staff "somehow materially altered the terms or conditions of her employment."<sup>141</sup> The court commented:

In order to overcome her initial burden of establishing a prima facie case of discrimination or retaliation, appellant was required to show, among other things, that she suffered an adverse employment action that affected the terms or conditions of her employment . . . . The district court believed that appellant satisfied this burden by a loss of status and prestige with the reassignment of her staff. We conclude, however, that appellant failed to establish how such consequences effectuated a material change in the terms or conditions of her employment. While 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.<sup>142</sup>

This heightened standard of requiring materiality in the minority of circuits for section 704(a) is based on several reasons.

*B. The Minority's Reasoning for a Heightened Standard*

At least one court in the minority claims that the plain language of section 704(a) itself demands such a narrow interpretation.<sup>143</sup> In *Mattern v. Eastman Kodak Co.*,<sup>144</sup> a case discussed in the Introduction, the Fifth Circuit Court of Appeals examined the language of section 704(a) to determine the level of adverse action required for retaliation.<sup>145</sup> In concluding that the retaliation provision refers only to ultimate employment decisions, the Fifth Circuit stated that, "[o]bviously, this reading is grounded in the language of Title VII."<sup>146</sup> The court then set out to define "discriminate" in section 704(a), and stated "we look, of course, to other Title VII sections for guidance; in this case, the preceding section is helpful."<sup>147</sup> The previous section, section 703, sets out the general prohibitions against discrimination. Under section 703(a)(1), it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment," while in section 703(a)(2) it is unlawful "to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's

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139. *Id.* at 1143.

140. *Id.*

141. *Id.* at 1144-45.

142. *Id.* at 1144.

143. See *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 708 (5th Cir. 1997).

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

145. *Id.* at 708-09.

146. *Id.* at 708.

147. *Id.*

race, color, religion, sex or nation origin.”<sup>148</sup> The Fifth Circuit noted that in section 704(a) “there is no mention of the vague harms contemplated in [section 703(a)(2)]. Therefore, this provision can only be read to exclude such vague harms, and to include only ultimate employment decisions.”<sup>149</sup> The Fifth Circuit reiterated its conclusion two years later, explaining that the language of section 704(a) was more analogous to section 703(a)(1) than section 703(a)(2) and therefore should be interpreted in the same manner as the former.<sup>150</sup>

The Third Circuit Court of Appeals seems to be following the Fifth Circuit’s lead. In *Robinson v. City of Pittsburgh*,<sup>151</sup> a city police officer complained that one of her supervisors sexually harassed her. After filing a charge with the EEOC, she was subjected to “restricted job duties, reassignment and subsequent failure to transfer her out of an assignment in which she was under the direct command of the alleged harasser, and the issuance of several unsubstantiated oral reprimands against her.”<sup>152</sup> In rejecting her retaliation claim, the court noted that section 704(a) merely creates an unlawful employment practice and that the restrictions placed on unlawful employment practices under the general prohibitions of section 703 apply.<sup>153</sup>

[A]ccordingly just as we concluded that a quid pro quo plaintiff must show a “quo” that is serious enough to alter his or her “compensation, terms, conditions, or privileges” of employment, we hold that the “adverse employment action” element of a retaliation plaintiff’s prima facie case incorporates the same requirement that the retaliatory conduct rise to the level of a violation of [section 703].<sup>154</sup>

Other circuits in the minority based their conclusion on an original understanding of the general provision barring employment discrimination, stating that Title VII was intended only to cover those discriminatory actions which were deemed ultimate employment decisions or, in other words, affected the terms and conditions of employment.<sup>155</sup> Originally, instead of repeating the language of the general provisions against discriminating in “terms, conditions, or privileges of employment,”<sup>156</sup> the courts utilized “adverse employment action” as a shorthand.<sup>157</sup> Eventually, as case law diverged, the use of terms “ultimate employment decision” and “materially adverse” action developed.<sup>158</sup> When faced with claims of discrimination, courts required an action by the employer that was either materially adverse or that constituted an

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148. 42 U.S.C. § 2000e-2(a)(1)-(2) (1994).

149. *Mattern*, 104 F.3d at 709.

150. *Burger v. Cent. Apartment Mgmt. Inc.*, 168 F.3d 875, 878 (5th Cir. 1999).

151. 120 F.3d 1286 (3d Cir. 1997).

152. *Id.* at 1300.

153. *Id.*

154. *Id.* at 1300-01.

155. *See, e.g., Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir. 1995) (“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.” (citing *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981))).

156. 42 U.S.C. § 2000e-2(a)(1) (1994).

157. *Lidge*, *supra* note 59, at 347.

158. *Id.* at 346-67.

ultimate employment decision.<sup>159</sup> In construing section 704(a), courts in the minority concluded that retaliation claims were subject to the same heightened requirement of material adversity as general claims of discrimination,<sup>160</sup> a conclusion which has received heavy criticism.<sup>161</sup>

Underlying the requirement of material adversity is a concern by the courts for intrusion into the employer's ability to properly operate a business. "Perhaps in recognition of the judicial micromanagement of business practices that would result if [courts] ruled otherwise, other circuits have held that changes in assignments or work-related duties do not ordinarily constitute adverse employment decisions if unaccompanied by a decrease in salary or work hour changes."<sup>162</sup> The concern for weighing the statute's broad remedial purpose with the effective management of employees resurfaces. "We "balance the purpose of the Act to protect persons engaging reasonably in activities opposing . . . discrimination, against Congress's equally manifest desire not to tie the hands of employers in the objective selection and control of personnel."<sup>163</sup> Perhaps implicit in court commentary is the concern first

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159. See, e.g., *Burger v. Cent. Apartment Mgmt., Inc.*, 168 F.3d 875, 878 (5th Cir. 1999); *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997).

160. See, e.g., *Dollis*, 77 F.3d at 781-82. Although the claim in *Dollis* was retaliation under section 704(a), the Fifth Circuit adopted the Fourth Circuit's analysis in *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981). In *Page*, the court concluded that a disparate impact claim under section 717 of Title VII, 42 U.S.C. § 2000e-16(a)(1) (1994 & Supp. IV 1998), required the employer's action to rise to the level of an "ultimate employment decision." *Page*, 645 F.2d at 233. In *Lederberger*, the Eighth Circuit required the plaintiff to prove a "materially significant disadvantage" affecting the plaintiff's terms or conditions of employment, relying on its own precedent and citing as controlling *Harlston*. *Lederberger v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997) (citing *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994)).

161. See Lidge, *supra* note 59, at 346-403. Professor Ernest F. Lidge's article begins by noting that what originated as a shorthand designation for the adverse action element of a plaintiff's prima facie case for discrimination or retaliation became a substantive doctrine of law requiring a heightened level of adverse action. Lidge argues that no claims under Title VII should be required to meet the heightened standard of an ultimate employment decision. *Id.* at 409-12. While Lidge is supported by strong policy considerations, it appears contrary to the unique language of each section and the logic of the Supreme Court precedent. The gravamen of the argument of this Note is that the retaliation provision, section 704(a), is substantially different than the general prohibitions against discrimination contained within other sections of the statute and thus is not subject to the heightened standard given this section by the minority of circuits. Lidge's argument would give no meaning to the differing language of each section under Title VII. Compare 42 U.S.C. § 2000e-2, with 42 U.S.C. § 2000e-3. The majority of circuits have exempted the retaliation provision from such a standard based on the rationale previously discussed in Part II.

162. *Brown v. Brody*, 199 F.3d 446, 452 (D.C. Cir. 1999) (analyzing the requirement of adverse employment action in racial discrimination and retaliation claim) (alteration in original) (quoting *Mungin v. Katten, Muchin & Zavis*, 116 F.3d 1549, 1556-57 (D.C. Cir. 1997)).

163. *Laughlin v. Metro. Wash. Airports Auth.*, 149 F.3d 253, 259 (4th Cir. 1998) (quoting *Armstrong v. Index Journal Co.*, 647 F.2d 441, 448 (4th Cir. 1981) (quoting *Hochstadt v. Worcester Found. for Experimental Biology*, 545 F.2d 222, 231 (1st Cir. 1976))).

voiced by Congressman Watson for the professional complaint filer.<sup>164</sup> Based on the plain language of the statute, the extension of a controversial doctrine, and a considerable policy concern, the minority requires as part of a prima facie case of retaliation that the plaintiff show an adverse employment action or an ultimate employment decision.

#### IV. A PREDICTION IN STATUTORY INTERPRETATION

*"[L]ike beauty, ambiguity is in the eye of the beholder."*<sup>165</sup>

An attempt to discern the true meaning of "to discriminate" under section 704(a) must begin with the final authority on federal law, the Supreme Court. Several recent Supreme Court decisions provide guidance and support for broadly construing section 704(a)'s coverage. In addition, numerous arguments support the conclusion that section 704(a) requires a lower threshold of adverse action than the general prohibitions.

##### *A. The Supreme Court's Statutory Construction of "Employees" in Robinson*

The unanimous decision by the Court in *Robinson* caught many off-guard.<sup>166</sup> The

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164. See *supra* Part I. A quote by Chief Judge Posner of the Seventh Circuit is often cited with approval by the minority:

[A] transfer that does not involve a demotion in form or substance, cannot rise to the level of a materially adverse employment action. A transfer involving no reduction in pay and no more than a minor change in working conditions will not do, either. Otherwise every trivial personnel action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit. The Equal Employment Opportunity Commission, already staggering under an avalanche of filings too heavy for it to cope with, would be crushed, and serious complaints would be lost among the trivial.

*Burger*, 168 F.3d at 879 (quoting *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996)); see also *Ledergerber*, 122 F.3d at 1144 (quoting a similar portion of Posner's quotation).

165. Philip P. Frickey, *Revisiting the Revival of Theory in Statutory Interpretation: A Lecture in Honor of Irving Younger*, 84 MINN. L. REV. 199, 214 (1999) (discussing the decision by the Supreme Court in *Robinson*) (emphasis added).

166. See Fenn, *supra* note 26, at 561 ("Although the fact that the Court ruled in favor of a broad interpretation is not surprising, the fact that it was a unanimous decision is."); Frickey, *supra* note 165, at 214 ("I was quite surprised when the Supreme Court reversed unanimously—in an opinion by Justice Thomas!").

Court tackled the problem of interpreting the term “employees” within the meaning of section 704(a).<sup>167</sup> On appeal from the Fourth Circuit Court of Appeals, which had narrowly construed the term to mean only current employees, Justice Thomas, speaking for the Court, first assessed whether the term suffered from ambiguity within the statute.<sup>168</sup> “Our first step . . . is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.”<sup>169</sup> The Court utilized three factors in its determination of whether “employees” was ambiguous: (1) examining the actual language of the section, (2) “the specific context in which that language is used,” and (3) construing the language within the broader context of the statute.<sup>170</sup>

The Court first examined the use of the term “employees” and deemed it “at first blush” to mean those employees presently employed.<sup>171</sup> “This initial impression, however, does not withstand scrutiny in the context of § 704(a).”<sup>172</sup> The Court noted there is no indication in the language that would set temporal qualifications on “employees.”<sup>173</sup> Since the term is not limited by such qualifiers, it could just as easily be construed to include former employees.<sup>174</sup> Moreover, other sections use “‘employees’ to mean something more inclusive or different than ‘current employees.’”<sup>175</sup> Justice Thomas concluded that the term was ambiguous as to its meaning.<sup>176</sup>

For the next step in determining the meaning of an ambiguous term, “each section must be analyzed to determine whether the context gives the term a further meaning that would resolve the issue in dispute.”<sup>177</sup> Justice Thomas explained that “[t]he broader context provided by other sections of the statute provides considerable assistance in this regard.”<sup>178</sup> Several sections of Title VII plainly intended to include former employees within the meaning of “employees,” while other sections, such as the jurisdictional requirement of fifteen or more employees, did not.<sup>179</sup> Most important to Justice Thomas was the fact that filing a charge of discrimination for an unlawful discharge was conduct protected by section 704(a), yet former employees would not be able to invoke the section’s protection against retaliation under the Fourth Circuit’s interpretation.<sup>180</sup> The Fourth Circuit’s interpretation “would effectively vitiate much of the protection afforded by § 704(a).”<sup>181</sup> Noting the section’s concern for the chilling effect on reporting and the primary purpose of section 704(a) in protecting the

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167. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 339 (1997).

168. *Id.* at 340.

169. *Id.*

170. *Id.* at 341.

171. *Id.*

172. *Id.*

173. *Id.* at 342.

174. *Id.*

175. *Id.*

176. *Id.* at 341.

177. *Id.* at 343-44.

178. *Id.* at 345.

179. *Id.* at 341 n.2.

180. *Id.* at 345.

181. *Id.*

statute's remedial mechanisms, Thomas declared "it would be destructive of this purpose of the antiretaliation provision for an employer to be able to retaliate with impunity against an entire class of acts under Title VII."<sup>182</sup> Justice Thomas concluded that Congress intended for section 704(a)'s protection to include former employees.<sup>183</sup>

*B. Robinson Applied to "Discriminate"*

Applying the principles set out by Justice Thomas in *Robinson* demands the same result in interpreting "discriminate" within the meaning of section 704(a): a broad reading. At first glance, "discriminate" is ambiguous as to its meaning. There is no indication of a certain level of substantiality required by the term—indeed, it could mean the slightest of differences. Taken in the specific context of the section, there are no temporal or substantive qualifiers. While other sections bar discrimination as to "terms, conditions, or privileges of employment," section 704(a) speaks only of discrimination. The only true requirement is that the employer discriminate because the employee engaged in protected activity, but this sets no restrictions on the type of discrimination necessary to constitute retaliation. Finally, other sections use other qualifiers to limit the prohibited discrimination, while section 704(a) does not entail such limitations. Understanding the three factors as delineated by Justice Thomas in *Robinson*, it is clear that the language "to discriminate" is ambiguous.

Moving to the next step in the process requires considering the broad context of Title VII, other sections of the statute, and the important purpose of the antiretaliation provision—all of these shed light on the appropriate interpretation of section 704(a). The primary or general antidiscrimination provision of Title VII, section 703, speaks of many qualifications of discrimination. Aside from requiring the discrimination to be "because of such individual's race, color, religion, sex, or national origin," the provision limits the discrimination prohibited to that which affects "his compensation, terms, conditions, or privileges of employment."<sup>184</sup> Moreover, section 703(a)(2) provides that an employer may not "limit, segregate, or classify employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee."<sup>185</sup> As for employment agencies, Title VII makes it unlawful for an agency "to fail or refuse to refer for employment, or otherwise to discriminate against" an individual in a protected class.<sup>186</sup> Labor organizations are not to exclude or expel from membership "or otherwise to discriminate against" such an individual.<sup>187</sup> In addition, a labor organization may not engage in discriminatory segregation or classification of its members.<sup>188</sup> Perhaps most demonstrative is the final prohibition imposed on labor organizations: "to cause or attempt to cause an employer to discriminate against an

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182. *Id.* at 346.

183. *Id.*

184. 42 U.S.C. § 2000e-2(a)(1) (1994).

185. *Id.* § 2000e-2(a)(2).

186. *Id.* § 2000e-2(b).

187. *Id.* § 2000e-2(c)(1).

188. *Id.* § 2000e-2(c)(2).

individual in violation of this section.”<sup>189</sup> This provision most closely resembles section 704(a), yet still qualifies discrimination to that which causes or attempts to cause an employer to violate Title VII. Admittedly, section 703(a)(2) has the broadest language, but the section does not utilize the term “discriminate” and is limited to that which “adversely affect[s]” the employee’s status. None of the provisions in section 703 seem to have the boundless language of section 704(a).

As the Court noted in *Robinson*, section 704(a) in particular demands a broad interpretation. A narrow reading would “undermine the effectiveness of Title VII”<sup>190</sup> by allowing lesser office slights to chill protected activity. Eventually, retaliatory slights not ultimate in nature may drive an employee to leave the employer. Given that claims of constructive discharge or retaliatory harassment have had little success in the appellate courts,<sup>191</sup> an employer, by making an example out of one employee through poor workplace treatment, will be successful in deterring “victims of discrimination from complaining to the EEOC.”<sup>192</sup> The destructive nature of an employer being able to retain an employee and subject him to adverse conditions, such as condoning fellow employee harassment, is an obvious statutory concern. More importantly, while section 703(a)(1) has been interpreted to include racial or sexual harassment based on an aggregate of harassing events, this broad understanding of that particular section was, for some unknown reason, not extended to section 704(a) by the courts in the minority.<sup>193</sup>

### C. The Supreme Court Suggests a Standard in *Ellerth*

In 1998, the Supreme Court handed down a Title VII case that had a serious impact on federal employment discrimination law. The Court, in *Burlington Industries, Inc. v. Ellerth*,<sup>194</sup> attempted to clarify the law surrounding claims of sexual harassment. In *Ellerth*, the Court established when an employer would be vicariously liable for the acts of supervisors and when the employer would have an available affirmative defense.<sup>195</sup>

According to the Court, when the supervisor subjects the employee to a “tangible employment action,” the employer is vicariously liable for the actions of the supervisor.<sup>196</sup> The Court stated that a “tangible employment action” exists when the “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. . . . A tangible employment action

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189. *Id.* § 2000e-2(c)(3).

190. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997).

191. *See, e.g.*, *Munday v. Waste Mgmt. Inc.*, 126 F.3d 239, 244 (4th Cir. 1997) (holding plaintiff failed to prove that “working conditions were intolerable”).

192. *Robinson*, 519 U.S. at 346; *accord Hashimoto v. Dalton*, 118 F.3d 671, 676 (9th Cir. 1997) (noting the “chilling effect” that adopting a narrow interpretation would have on other employees).

193. *See infra* note 224 and accompanying text.

194. 524 U.S. 742 (1998).

195. *Id.* at 761-63.

196. *Id.* at 760-61.

in most cases inflicts a direct economic harm.”<sup>197</sup> All the actions listed result in an adverse economic impact upon the employee and are therefore arguably ultimate decisions.

However, in a situation where the supervisor’s harassment does not “[culminate] in a tangible employment action,” the employer is entitled to raise a two-part affirmative defense.<sup>198</sup> The key limitation to this portion of the opinion is that the affirmative defense is available in situations of harassment—that is, harassment which results in “either explicit or constructive alterations in the terms or conditions of employment.”<sup>199</sup> Again, this did not recognize a new area of adverse actions because hostile working environments were already considered to be a sufficiently adverse employment action by all circuits.<sup>200</sup> Therefore, contrary to the suggestions of some,<sup>201</sup> the Court did not recognize lesser employment actions in the context of the general prohibitions.<sup>202</sup>

This decision would not appear to answer the question now under discussion. However, the Court’s opinion has put an explicit limitation on this discussion. According to the Court, the concept of a tangible employment action was limited to “claims involving race, age, and national origin discrimination, as well as sex discrimination.”<sup>203</sup> Noticeably absent from this list are retaliation claims. Although the discussion of tangible employment actions was entirely dicta,<sup>204</sup> the Court’s noticeable exclusion of retaliation claims may indicate its willingness to set the standard lower in that context.

#### *D. Section 704(a): A Critical Cog in the Statutory Wheel*

The Court in *Robinson* was brief in its analysis, but there exists additional support for a broad construction of “discriminate” under the antiretaliation provision as opposed to other sections. In *Mattern*, the actions of fellow employees and the employer in retaliation for protected activity ultimately led to the victim’s resignation.<sup>205</sup> Perhaps the most successful method to ensure other employees do not follow in a “complaining” employee’s footsteps is to keep that employee and ostracize him in front of the other employees. If a crucial purpose of the antiretaliation provision is to prevent employers from deterring protected activity, then the interpretation cannot be limited to traditional forms of discrimination but should encompass the range of possible retaliatory actions thought of by the human mind. To

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197. *Id.* at 761-62.

198. *Id.* at 765.

199. *Id.* at 752.

200. *Id.*

201. *E.g.*, Lidge, *supra* note 59, at 383-84 (arguing that since the Court divided sexual harassment cases into two categories—those with tangible employment actions and those without—then the Court must recognize employment actions less than ultimate decisions).

202. *Ellerth*, 524 U.S. at 752.

203. *Id.* at 761.

204. “Without endorsing the specific results of [circuit-court tangible employment action] decisions, we think it prudent to import the concept of a tangible employment action for resolution of the vicarious liability issue we consider here.” *Id.*

205. *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 703-04 (5th Cir. 1997).

suggest that a narrower definition under section 704(a) leads to less litigation is not empirically supported, especially considering the recent trend of increased litigation on retaliation claims.

This rule does admittedly increase the potential liability of a business, yet a narrower rule would stifle the enforcement mechanisms of Title VII.<sup>206</sup> Businesses will need to consider specialized training programs designed to aid supervisors in dealing with retaliation situations, not just discrimination. A line drawn at the majority's level of substantiality only requires what a well-operated business maintains in the first place: records. Although liability for fellow employee harassment ordered by a supervisor cannot be curbed by proper documentation, properly maintained records regarding everyday business decisions will effectively immunize an employer from liability by providing a non-pretextual reason for the action.<sup>207</sup> A clear example is available in *Montandon v. Farmland Industries, Inc.*,<sup>208</sup> where an employee alleged sexual harassment and retaliation for complaints he made to management.<sup>209</sup> The adverse actions claimed by the employee included a negative evaluation and the employer's requiring him to move.<sup>210</sup> Affirming the district court, the Eighth Circuit held that the employer "established legitimate nonretaliatory reasons [for] both" adverse actions.<sup>211</sup> In the case of each adverse action, the employee's "document" history in the personnel file revealed and established the legitimate reasons.<sup>212</sup>

Moreover, the minority's position sits upon questionable doctrinal underpinnings. The plain-language argument does not follow the *Robinson* framework and is unconvincing. Assuming that section 704(a) utilizes language more similar to section 703(a)(1) than 703(a)(2) does not support the contention it should be interpreted as such. Unlike section 704(a), section 703(a)(1) clearly sets qualifications on "discriminate" which are not in the antiretaliation provision. The language of section 704(a) directly contradicts the plain-text argument put forth by the Fifth Circuit in *Mattern*. In addition, the circuits relying on the previous understanding that Title VII coverage only extends to ultimate employment decisions places a misguided reliance primarily on the Fourth Circuit's discussion of section 717 in *Page*.<sup>213</sup> The Fourth Circuit in that case addressed the addition of section 717, as an amendment to Title VII, which expanded coverage to federal employees.<sup>214</sup> Yet the language of *Page*

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206. Essary & Friedman, *supra* note 30, at 152 ("Despite the 'ultimate employment decision' courts' zeal to protect employers from being unduly restricted in disciplining their employees, the courts' harsh, unyielding standard practically encourages employers to retaliate against protected employees in numerous intangible manners which, in their totality, may in fact be as tangible.").

207. *See, e.g.*, Harris v. King, No. 98-5826, 2000 WL 353676, at \*4 (6th Cir. Mar. 29, 2000) (unpublished table opinion) (finding submitted documents sufficient to support defendant's legitimate nondiscriminatory reason).

208. 116 F.3d 355 (8th Cir. 1997).

209. *Id.* at 357.

210. *Id.* at 359-60.

211. *Id.*

212. *Id.* at 360.

213. *See, e.g.*, Dollis v. Rubin, 77 F.3d 777, 781-82 (5th Cir. 1995) (discussing adverse actions under retaliation claim and citing *Page* as authoritative).

214. *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 716 (5th Cir. 1997) (Dennis, J.,

made clear that it was not intended as a rule set in stone, but only for that singular case.<sup>215</sup> As the dissent in *Mattern* pointed out, there is little logic in limiting section 704(a)'s reach by an interpretation of an amendment intending to expand Title VII's coverage.<sup>216</sup> Even recent cases question whether the Fourth Circuit's opinion in *Page*, relied on by the minority, will be applied to a retaliation claim within that circuit.<sup>217</sup>

Retaliation provisions under federal law are traditionally broader than general provisions. Several labor statutes contain provisions prohibiting retaliation against employees.<sup>218</sup> The ADEA most closely compares with Title VII.<sup>219</sup> Under the ADEA, the primary prohibition makes it an unlawful employment practice for an employer to discriminate based on age in hiring, firing, or otherwise "with respect to his compensation, terms, conditions, or privileges of employment."<sup>220</sup> The retaliation provision contains no qualification to elements of employment, only that an employer is not "to discriminate against any of his employees."<sup>221</sup> Under the FLSA, which ensures appropriate wages for employees,<sup>222</sup> the law provides broad coverage for employees who are involved in statutory investigations.<sup>223</sup> Other federal labor statutes

dissenting) (discussing *Page v. Bolger*, 645 F.2d 227 (4th Cir. 1981)).

215. *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981) ("[W]e suggest no general test for defining those 'ultimate employment decisions' which alone should be held directly covered by § 717 and comparable antidiscrimination provisions under Title VII.").

216. *Mattern*, 104 F.3d at 716 (Dennis, J., dissenting).

217. See *McNair v. Computer Data Sys., Inc.*, No. 98-1110, 1999 WL 30959, at \*6 (4th Cir. Jan. 26, 1999) (affirming the district court "without proceeding to the contested question whether the *Page v. Bolger* standard for adverse employment actions in discrimination claims brought under section 2000e-2(a) is applicable in the context of a claim of prohibited retaliation brought under the differently worded section 2000e-3(a)").

218. Age Discrimination in Employment Act (ADEA) of 1967 § 4, 29 U.S.C. § 623(d) (1994); Fair Labor Standards Act (FLSA) of 1938 § 15, 29 U.S.C. § 215 (1994); National Labor Relations Act (NLRA) § 8(a), 29 U.S.C. § 158(a) (1994); Occupational Safety and Health Act (OSHA) of 1970 § 11(c)(1), 29 U.S.C. § 660(c)(1) (1994); Americans with Disabilities Act (ADA) of 1991 § 503, 42 U.S.C. § 12203 (1994). The Equal Pay Act of 1963 ("EPA"), which prohibits discrimination in pay between the sexes, is an amendment to the Fair Labor Standards Act ("FLSA"), and therefore the antiretaliation provision applies. See 29 U.S.C. § 206(d)(1) (1994) (providing for a general prohibition against discrimination in wages); *Brock v. Ga. Southwestern Coll.*, 765 F.2d 1026, 1032 (11th Cir. 1985) (concluding that the FLSA antiretaliation provision may be utilized within the enforcement mechanisms of the EPA).

219. *Supra* note 39 and accompanying text.

220. 29 U.S.C. § 623(a)(1).

221. *Id.* § 623(d).

222. 29 U.S.C. §§ 206-207 (1994 & Supp. IV 1998).

223. 29 U.S.C. § 215(a)(3) (1994). While the FLSA does not closely model employment discrimination statutes, the retaliation provision's language provides assistance in understanding the language used by Congress for such provisions because the language clearly does not limit itself to wages. The FLSA, in pertinent part, prohibits any person to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or cause to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry

target explicit unlawful employer practices but provide broad coverage under the respective retaliation provisions.<sup>224</sup>

Indeed, it is grossly incompatible with the statutory framework to narrowly construe the retaliation provision while allowing a broad construction of the general prohibitions. As members of legal academia have already pointed out, restricting the retaliation clause to tangible adverse actions when the Supreme Court interprets the general prohibitions to include a claim of “hostile work environment” appears entirely inconsistent with the statute.<sup>225</sup> Under the hostile work environment theory, an employee may sue under the general prohibitions for a racially or sexually hostile environment—“neither economic harm nor psychological injury are necessary.”<sup>226</sup> The equivalent claim of hostile work environment based upon retaliation should be available under the antiretaliation provision because that provision contains even less restrictive language.<sup>227</sup>

Finally, there is good reason to distinguish between the unlawful employment practices of other sections and section 704(a). The primary sections target invidious

committee.

*Id.*

224. The National Labor Relations Act (“NLRA”) and the Occupational Safety and Health Act (“OSHA”) contain identical qualifications in the retaliation provisions. Under the NLRA “[i]t shall be an unfair labor practice for an employer . . . to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter.” *Id.* § 158(a)-(a)(4). Under OSHA “[n]o person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter.” *Id.* § 660(c)(1). The Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. §§ 1001-1461 (1994 & Supp. IV 1998), governs a wide variety of employment benefit plans including pensions. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 445-46 (1999). ERISA contains an antiretaliation provision that makes it unlawful “for any person to discharge, fine, suspend, expel, discipline or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . [or] this title.” 29 U.S.C. § 1140 (1994).

225. *Essary & Friedman*, *supra* note 30, at 141-42.

226. *Id.* at 141.

227. However, *Essary & Friedman* argue:

On one hand, [the minority]’s limited definition of adverse action renders a retaliation claim far more limited than an underlying discrimination claim. On the other hand, all courts, including [the minority], recognize that a retaliation claim may exist even when no actual discrimination has occurred, implying that retaliation claims, by their very nature, have broader objectives than discrimination claims.

*Id.* at 142. This argument is somewhat misguided. The objective of the general prohibitions is to eradicate discrimination in the workplace, while the antiretaliation provision serves a functional role in protecting Title VII’s enforcement mechanisms. The antiretaliation provision may apply despite the lack of discrimination based upon protected statutes because the provision creates a separate protected class of those who oppose unlawful discrimination. Therefore, a white male who opposes discrimination against black women is entitled to statutory protection under the antiretaliation provision, even though he is not a member of the protected class that is discriminated against.

discrimination as to terms and conditions of employment within the workplace based on a person's status. These are the essential unlawful employment practices of the statute and are restricted based on legislative debate to a certain level of substantiality consistent with the aims of the statute. The individual employee is key to the enforcement of Title VII and must be provided with blanket protection in order for the statute to remain effective.<sup>228</sup> "Statutory provisions against retaliation such as those in the ADEA and Title VII protect employees' right to participate in protected activity and aid the work of the EEOC which depends upon employee cooperation."<sup>229</sup> The employer is insulated to a degree under the primary provisions because the discrimination must rise to an ascertainable level of substantiality.

When the employee has engaged in protected activity, the employer is on notice that the statute is watching. Imagine a large employer with several thousand employees and hundreds of supervisors. One shop supervisor makes sexual advances toward one of the employees. The only proactive step the employer may have taken is to properly screen, train, and monitor its supervisors.<sup>230</sup> In all likelihood, those in management will not be aware of the supervisor's actions.<sup>231</sup> The harassment at issue must meet a certain level of substantiality in order to impose liability on the employer.<sup>232</sup> The harassment must be "severe and pervasive" as to alter the terms and conditions of employment.<sup>233</sup> This requirement is consistent with the qualifiers for discrimination under section 703(a)(1).<sup>234</sup> The employer must "discriminate" as to the employee's "compensation, terms, conditions, or privileges of employment."<sup>235</sup> The qualifiers keep out petty office slights that do not affect a person's working conditions.

Now imagine that the employee files a charge of discrimination with the EEOC claiming sexual harassment by the supervisor. The EEOC promptly notifies the company that a charge of discrimination is now pending against the company. The company is on notice and now has an opportunity to retroactively correct the situation through increased training, removal of the supervisor, and settlement of the dispute with the employee. If the company decides to retaliate against an employee for utilizing Title VII's protection, it directly contravenes the statute on its face and should be subject to additional liability beyond those under section 703. To not give the retaliation section such effect is to make it a nullity, requiring the same level of liability to the employer even though the employer has been put on notice that the statute is watching.

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228. *Glover v. S.C. Law Enforcement Div.*, 170 F.3d 411, 414 (4th Cir. 1999) ("Section 704(a)'s protections ensure not only that employers cannot intimidate their employees into foregoing the Title VII grievance process, but also that investigators will have access to the unchilled testimony of witnesses.").

229. *EEOC v. Bd. of Governors*, 957 F.2d 424, 431 (7th Cir. 1992).

230. *Faragher v. City of Boca Raton*, 524 U.S. 775, 803 (1998).

231. If management is aware of the harassment, they have the opportunity to take adequate remedial measures and thus avoid liability under Title VII. *See Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 704 (5th Cir. 1997) (finding that "prompt remedial action" excused an employer from sexual harassment liability).

232. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65-66 (1986).

233. *Id.* at 67.

234. 42 U.S.C. § 2000e-2(a)(1) (1994).

235. *Id.*

Although this hypothetical is not typical, it demonstrates why the retaliation provision deserves a broader interpretation than the remainder of the statute. The employer is on notice and continuing discrimination against that employee is subject to more statutory implications. As with the FLSA, which bars unfair compensation practices yet prohibits discrimination in any manner against an employee who has engaged in protected activity,<sup>236</sup> Title VII targets unfair discrimination in the terms and conditions of employment because of invidious discrimination based on a person's status. However, if an employer without such invidious bias retaliates against the employee—the vital cog in the enforcement wheel—the statute takes on particular bite.

#### CONCLUSION

There is little support in the history, language, or purposes of section 704(a) that requires an adverse action on an ultimate employment decision. Other views taken by courts fail to account for the distinct language chosen by Congress in both the general provisions and the antiretaliation provision. Moreover, in keeping with the Supreme Court's position on section 704(a), the purposes of section 704(a) will only be adequately effectuated by broad coverage. A narrow limitation would render section 704(a) a nullity and threaten the enforcement mechanisms under Title VII.

The rule set forth in the foregoing discussion lowers the bar for imposing liability upon an employer. Yet this argument is limited only to retaliatory conduct under section 704(a), and under the *prima facie* case, the employer has knowledge or notice of potential liability. Thus, the heightened requirement of an ultimate employment decision for the general discrimination provisions is left untouched. As the Supreme Court recognized in *Robinson*, the antiretaliation provision is a special creature with broad language intended to encompass actions beyond the normal workplace decisions. The exact level at which the line should be drawn is not entirely clear, but it should include those actions by an employer which an objectively reasonable employee would construe as retaliation. The only ultimate decision which should exist under section 704(a) is the ultimate decision left to the fact finder who must determine whether the harm imposed by the employer stifles protected activity.

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236. *See supra* text accompanying note 220.