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Cover Page Footnote

The author wishes to thank Professors Cooley Howarth and Richard Perna for their insight and suggestions.

DEFINING ADVERSE EMPLOYMENT ACTION IN TITLE VII CLAIMS FOR EMPLOYER RETALIATION: DETERMINING THE MOST APPROPRIATE STANDARD

Matthew J. Wiles[*]

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I. INTRODUCTION

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin.[1] Retaliation claims arise when individuals who file a discrimination claim under Title VII or oppose an unlawful employment practice feel that an employer is retaliating against them as a result of the exercise of these statutory rights.[2] Under § 704(a) of Title VII, such individuals are entitled to bring a separate claim against the employer for retaliation.[3] To establish a prima facie claim of retaliation, a plaintiff must show that he or she engaged in a protected activity, that the employer took an adverse employment action against them as a result of his or her engagement in that protected activity, and that there is a causal connection between the adverse employment action and the protected activity.[4]

Retaliation claims, often coupled with an original discrimination claim, have increased by over ten percent in the 1990s alone.[5] Although the

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[1] 42 U.S.C. §§ 2000e -2000e-17 (1994).

[2] In the case of opposing an employment practice made unlawful by Title VII, the employer conduct that the plaintiff opposed need not be, in fact, "unlawful." A successful retaliation claim contemplates only that the plaintiff had a reasonable belief that such conduct was unlawful. *See e.g.*, *Muehlhausen v. Bath Iron Works*, 811 F.Supp. 15, 19 n. 7 (D. Me. 1993) (*citing Manoharan v. Columbia Univ. College of Phys. & Surgeons*, 842 F.2d 590, 593 (2d Cir. 1988); *Petitti v. New England Tel. & Tel. Co.*, 909 F.2d 28, 33 (1st Cir. 1990)). This good faith belief, however, must be that the employer's conduct violated a prescribed section of Title VII and not just a general company policy. *See EEOC v. Carolina Freight Carriers Corp.*, 1992 WL 486584, at *5 (N.D. Fla., December 1, 1992). As such, "an employee may fail to prove an 'unlawful employment practice' and nevertheless prevail on his claim of unlawful retaliation." *Learned v. City of Bellevue*, 860 F.2d 928, 932 (9th Cir. 1988).

[3] 42 U.S.C. § 2000e-3(a).

[4] *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997). Once the plaintiff establishes this prima facie case of retaliation, the burden then shifts to the employer to show a non-retaliatory motive for the adverse employment action. *See Sorenson v. City of Aurora*, 984 F.2d 349, 353 (10th Cir. 1993). If the employer succeeds in sustaining the burden here, the burden shifts back to the plaintiff to establish that the employer's proffered motive is merely a pretext for retaliation. *See Oliver v. Digital Equip. Corp.*, 846 F.2d 103, 109 (1st Cir. 1988). Though the motivation behind the judicially created framework will be briefly discussed, *infra*, in Part II of this Comment, it should be noted that this Comment is only concerned with what constitutes an adverse employment action under the plaintiff's prima facie case.

[5] *See* Perkins Coie LLP, *Retaliation Claims on the Rise*, 5 Alaska Empl. L. Ltr., No.10 at 4 (Oct. 2000). Perkins Coie asserts that retaliation charges have recently jumped from fifteen percent of the total charges filed in the early 1990's to twenty-five percent. *Id.*; Marisa Williams & Rhonda Rhodes, *Recent Developments in Retaliation Law and Resulting Implications for the Federal Sector*, 28 Colo. Law. 59 (1999) (arguing that private sector retaliation claims have more than doubled over past several years).

general framework under which these claims are evaluated is not in dispute, federal appellate and district courts are sharply divided as to what constitutes an adverse employment action sufficient to establish the second prong of the plaintiff's prima facie case. A minority of courts argue that only "ultimate employment decisions," such as hiring, firing or demoting, are considered "adverse employment actions."[6] A majority of courts, however, contend that the employer's alleged retaliatory action need not reach the level of an "ultimate employment decision," with some concluding that any employer action that adversely affects the terms and conditions of employment will suffice.[7] Others take an even more liberal case-by-case approach that finds an adverse employment action under circumstances that do not necessarily impact the terms and conditions of employment.[8] The Equal Employment Opportunity Commission ("EEOC")

Perkins Coie also argues that there are two major reasons why retaliation claims have increased in such alarming numbers. First, "employees have increased awareness of their rights under discrimination laws, including protection against reprisals." Perkins Coie attributes this increased awareness to employer-initiated training on equal employment opportunity and harassment policies, and media coverage about "select discrimination cases and their seven figure verdicts." The uneven media coverage, which does not usually involve stories on the cases that fail, has had the effect of "rais[ing] the public's consciousness" regarding their rights and remedies under discrimination laws. Second, the increased number of claims is a reflection of employees' increased willingness to file claims against employers, both through internal grievance procedures and through agency complaints and lawsuits. Perkins Coie argues that employees are no longer hesitant to file retaliation claims against employers and that it has become "downright fashionable to do so." Perkins Coie also asserts that this increased willingness to file claims shows that "our now savvy employees aren't just using the discrimination laws as a shield against unlawful employment practices—they are wielding them as a sword to fight off legitimate adverse employment actions."

This dual filing, of both discrimination and retaliation claims, often will lead to "compromised" jury verdicts. Thus, retaliation claims will very often survive even where the underlying discrimination claim is dismissed. *See* Edward T. Ellis & Suzanne O. Rudder, *Current Developments in the Law of Retaliation*, SF03 ALI/ABA 241, 243 (July 27, 2000) (arguing that juries tend to compromise on cases where an employee, who has received a poor evaluation or disciplinary warning, adds a retaliation claim to his or her discrimination claim by dismissing the discrimination claim and finding for the plaintiff on the retaliation claim); *see also* Jennifer Smith, *Retaliation Claims: What You Don't Know Can Hurt You*, 14 Natl. B. A. Mag. 22 (2000) (arguing that the current trend is for retaliation claims to survive, even though the underlying harassment or discrimination claim fails). Because the premise of a retaliation claim is that an employer intentionally took an adverse employment action against an employee, retaliation claims carry with them the potential for significant punitive damages. *See* Eve I. Klein & Rosemary Halligan, *A Rising Tide of Retaliation Claims Challenges Employers to Adopt Adequate Preventive Measures*, 71 N.Y. St. B. J. 51 (1999) (recognizing, however, that Title VII limits the total compensatory and punitive damages to between $50,000 and $300,000, depending upon the size of the employer).

[6] *See e.g. Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir. 1997); *See infra* nn. 22-29 and 61-70.

[7] *See e.g. Munday v. Waste Mgt. of N. Am.,Inc.*, 126 F.3d 239 (4th Cir. 1997); *infra* nn. 30-46.

[8] *See e.g. Gunnell v. Utah Valley St. College*, 152 F.3d 1253 (10th Cir. 1998); *See infra* nn. 47-52 and 81-82. It should be noted that the respective views overlap in some situations. For example, an employer action such as firing in retaliation for an individual filing a discrimination claim is viewed as

on the other hand has rejected all of these standards as "unduly restrictive," and argues that an adverse employment action is any adverse treatment based on a retaliatory motive that is reasonably likely to deter the charging party or others from engaging in protected activities.[9]

This Comment urges the adoption of a uniform standard for determining whether an employer's action constitutes an adverse employment action for the purposes of a retaliation claim under Title VII. The standard that courts should adopt is whether the employer's action "materially affects the terms and conditions" of an employee's status. This standard will ensure both consistency, by forcing courts to analyze employer actions only in the context of those actions' effect on an individual's employment status, and flexibility, by allowing courts room to define what is "material" and what the "terms and conditions" of employment are. Part II outlines the statutory provisions involved, the general framework for dealing with retaliation claims under Title VII, and the split in views on what constitutes an adverse employment action for the purposes of that framework.[10] Part III examines the pros and cons of the various views and makes an argument for the adoption of the "materially affects the terms and conditions of employment" status as the uniform view for courts to apply in retaliation cases.[11]

II. BACKGROUND

A. Retaliation Claims Under Title VII of The Civil Rights Act of 1964

Title VII prohibits employers from taking discriminatory measures against employees or prospective employees by making it an unlawful

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an ultimate employment decision, but will also always be viewed a decision affecting the terms and conditions of employment. The gray area arises where respective views differ. For example, while the advocates of the ultimate employment decision view will not recognize the creation of a hostile work environment as an adverse employment action, the other two views probably would, depending on all the circumstances. As a result, the federal circuits, for the most part, have not adopted a uniform standard for determining adverse employment actions. In fact, one decision from Circuit A may utilize the ultimate employment decision view when faced with a retaliatory firing, while another decision from the same circuit may use a "materially affects the terms and conditions of employment" view when faced with the retaliatory creation of a hostile work environment. *See Von Gunten v. Maryland*, 243 F.3d 858, 864 (4th Cir. 2001) (explaining that the "practical differences" among the standards "are difficult to discern" because of the wide range of possible factual scenarios). This Comment, therefore, focuses on which view is the best to adopt as a uniform standard and not on which circuits are correct and which are incorrect.

[9] *Retaliation*, EEOC Compl. Man., Section 8-11, 8008 (1998); *see infra* nn. 53-59.

[10] *See infra* nn. 12-59.

[11] *See infra* nn. 60-101.

employment practice for an employer to "fail or refuse to hire or to discharge any individual, or to otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment."[12] But before an individual may bring a Title VII discrimination claim against an employer in a court of law, he or she must first file a complaint with the EEOC and await the results of an administrative investigation.[13] It is during this waiting period that individuals may experience what they perceive to be retaliation from the employer for filing the discrimination complaint with the EEOC.[14] The drafters of Title VII recognized that such retaliation might occur. Thus, they provided, in Title VII, a provision prohibiting employers from retaliating against employees who were exercising statutory rights.[15] The retaliation provision provides that:

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[12] 42 U.S.C. § 2000e-2(a)(1)-(2).

[13] 42 U.S.C. § 2000e-5. The process is adequately summarized by Michael J. Zimmer, et al., *Cases and Materials on Employment Discrimination* 929 (5th ed., Little, Brown 2000). The authors outline the statutory procedures as follows:

> A person claiming to be aggrieved by an alleged act of discrimination may file a charge with the Equal Employment Opportunity Commission (EEOC) within a specified time from the occurrence of the unfair employment practice. A charge must also be filed with any existing state anti-discrimination agency.
>
> The EEOC is directed by Title VII to serve notice of the charge to the respondent within ten days and then to conduct an investigation, culminating in a determination of whether there is reasonable cause to believe that the charge is true. If the EEOC finds no reasonable cause, it must dismiss the charge and notify the charging party, who may then bring a private action within 90 days. If, however, the EEOC does find reasonable cause, it is directed first to attempt conciliation. If that fails to eliminate the alleged unlawful employment practice, the EEOC may bring a civil suit against the respondent in district court.
>
> If the EEOC does not sue within 180 days from the filing of the charge, the charging party may request a right-to-sue letter, after receipt of which he or she has ninety days to bring an action; or the charging party may permit EEOC processes to proceed to their conclusion and bring suit within ninety days of that point. The EEOC may intervene in any private suit at the discretion of the court. If the EEOC does commence suit, the charging party loses the right to bring suit, but has a statutory right to intervene to protect his or her interests against governmental delay or inadequate representation (recognizing, however, that the only preconditions for private suit are timely resort to the EEOC and seasonable filing of a court suit thereafter).

[14] *See generally* Joel L. Finger, *The Retaliation Case: Litigation Strategies* (PLI Litig. & Admin. Prac. Course Handbook Series No. 604, 1999). It is true that the retaliation provision of Title VII provides protection for two different groups of activities, that is, "oppos[ing] any practice made unlawful by this subchapter" and "charg[ing], testify[ing], assist[ing] or participat[ing] in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). However, the only issue on which this Comment focuses is the appropriate standard for what constitutes an adverse employment action. Hypotheticals and examples of the application of various standards in Part III of this Comment will deal exclusively with the situation where the plaintiff is an employee who has filed a claim with the EEOC and is thereafter perceiving retaliation for the filing of such claim.

[15] 42 U.S.C. § 2000e-3(a).

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted or participated in an investigation, proceeding, or hearing under this subchapter.[16]

This statutory provision provides individuals with a separate and distinct cause of action under Title VII that can survive even where the underlying discrimination claim is dismissed.[17]

Under this statutory framework,[18] a plaintiff must first establish a prima facie case of retaliation by showing that the plaintiff engaged in a protected activity under the retaliation clause, that an adverse employment action was taken against the plaintiff engaged in the protected activity, and that a causal connection exists between the protected activity and the adverse employment action.[19] If the plaintiff succeeds in showing the existence of a

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[16] *Id. See* Ellis & Rudder, *supra* n. 5, at 243 (stating that the purpose of a retaliation provision is "to protect the access of the statutory enforcement machinery to sources of information about unfair employment practices. Without complainants to file complaints and witnesses to support them, the eradication of discrimination from the workplace would be a difficult goal.")

[17] For insight into the reasons behind and effect of the increase in retaliation claims, consult *supra* note 5.

[18] This burden-shifting litigation framework was first utilized by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973), a case involving Title VII's general discrimination provision, and was later modified by *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). *See* Donna Smith Cude & Brian M. Steger, *Does Justice Need Glasses? Unlawful Retaliation Under Title VII Following* Mattern*: Will Courts Know it When They See it?*, 14 Lab. Law. 373, 413 n.15 (1998) (stating, "[i]n *McDonnell Douglas*, the Supreme Court held that, in Title VII disparate treatment cases, the plaintiff bears the initial burden of establishing a prima facie case of discrimination. The burden then shifts to the employer to articulate some legitimate, non-discriminatory reason for taking the action it did. The burden then shifts back to the plaintiff to prove that the employer's legitimate, non-discriminatory justification is mere pretext for unlawful discrimination. Even though the burden of production shifts, the burden of persuasion remains continuously with the plaintiff. In cases involving direct evidence of retaliation, courts usually apply the analysis set forth in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989)." (internal citations omitted)).

Courts have now universally adopted and applied the *McDonnell Douglas* and *Burdine* standard to retaliation claims under Title VII. *See e.g. EEOC v. Avery Dennison Corp.*, 104 F.3d 858 (6th Cir. 1997) (reversing a district court decision that failed to use *McDonnell Douglas*' burden-shifting framework); *Sumner v. U. S. Postal Serv.*, 899 F.2d 203, 209 (2d Cir. 1990).

[19] *Shirley v. Chrysler First, Inc.*, 970 F.2d 39, 42 (5th Cir. 1992).

prima facie case of retaliation, the burden shifts to the employer to show a legitimate, non-discriminatory reason for taking the employment action.[20] If the employer can satisfy this burden, the burden then shifts back to the plaintiff to show that the employer's stated reason was a mere pretext to retaliation.[21]

B. Defining an Adverse Employment Action in the Context of a Plaintiff's Prima Facie Case—the Split Among Authorities

While the overall framework for evaluating retaliation claims is not in material dispute, there is a significant disagreement as to what constitutes an adverse employment action for purposes of a plaintiff's prima facie case.

1. Actions That Are Ultimate Employment Decisions

A small number of courts, primarily in the Fifth Circuit, have held that employer actions reach the level of an adverse employment action only when those actions constitute "ultimate employment decisions."[22] For example, in *Mattern v. Eastman Kodak*,[23] the Fifth Circuit interpreted Title VII's retaliation provision as only covering "ultimate employment decisions" such as "hiring, granting leave, discharging, promoting and

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[20] *Sorenson*, 984 F.2d at 353.

[21] *Id.*

[22] The Fifth Circuit is the only federal circuit that seems to wholeheartedly embrace this view, with the leading case being *Mattern*, 104 F.3d 702, although it can be argued that the Eighth Circuit is in accord with *Mattern*. *See Ledergerber*, 122 F.3d at 144 (holding that a transfer only involving minor changes in working conditions and no corresponding reduction in pay is not adverse employment action). A number of recent cases have enlisted an analysis similar to that of *Mattern*. *See e.g. Burger v. C. Apartment Mgt., Inc.*, 168 F.3d 875 (5th Cir. 1999) (stating that a denial of a transfer request did not amount to an ultimate employment decision); *Benningfield v. City of Houston*, 157 F.3d 369 (5th Cir. 1998) (holding that changes in work schedule and hours, or increased workloads are administrative decisions and are thus not ultimate employment decisions); *Martin v. Kroger Co.*, 65 F.Supp.2d 516 (S.D. Tex. 1999); *Robinson v. Rubin*, 77 F.Supp.2d 784 (S.D. Tex. 1999) (holding that substandard evaluations and being forced to work in an environment with allegedly hostile co-employees are not ultimate employment decisions); *Wayne v. Dallas Morning News*, 78 F.Supp.2d 571 (N.D. Tex. 1999) (holding that assignment, or lack of assignment, of accounts is not an ultimate employment decision); *Brackens v. Ennis St. Bank*, 2000 U.S. Dist. LEXIS 3672 (N.D. Tex. March 24, 2000) (holding that job assignments, training, transfers, work tools and materials, and threats of termination are not ultimate employment decisions); *Moore v. FT Mortgage Cos.*, 1999 U.S. Dist. LEXIS 15962 (N.D. Tex. 1999) (written warnings placed in file are not ultimate employment decisions).

[23] 104 F.3d 702 (5th Cir. 1997).

compensating."[24] Events such as a visit to an employee's home to tell her to come back to work if her illness was work-related, verbal threats of termination, a reprimand for not being at an assigned work station, a missed pay increase, and being placed on final warning do not constitute "adverse employment actions because of their lack of consequence."[25]

The court justified its narrow reading of Title VII's retaliation provision on Supreme Court precedent and statutory language.[26] Thus, Title VII's retaliation provision did not extend to employer actions that have only "tangential effects" on conditions of employment or to employer decisions

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[24] *Id.* at 707 (citing *Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir. 1995)) (internal quotations omitted).

The relevant facts of *Mattern* can be summarized as follows: the plaintiff was an employee enrolled in the defendant employer's "mechanic's apprenticeship program" for a span of approximately four years. The program was made up of two components, on the job training and classroom instruction. The program required successful completion of fourteen "review cycles" that evaluate both components of the program. In addition to the review cycles, there was also a periodic skills test. Satisfactory performance in the program resulted in a guaranteed pay raise. If an employee received either three unsatisfactory review cycles or fails a skills test three times, he or she was subject to removal from the program.

In March of 1993, the plaintiff filed a Title VII charge with the EEOC, alleging sexual harassment by members of her on-the-job training crew and further alleging that her supervisors knew about it. The employer allowed one of the two senior mechanics accused to retire early, but took no action against the other. The employer also transferred plaintiff to another crew that had a different immediate supervisor but the same departmental supervisors. Four months later, after experiencing what she perceived to be retaliation for the filing of the charge, plaintiff resigned. Four months after that, plaintiff filed a lawsuit against the employer, alleging, among other things, retaliation for the sexual harassment filing.

The plaintiff alleged that five incidents of retaliation occurred following the filing of her charge and before her resignation. On the day she brought disciplinary proceedings against the mechanic that retired early, plaintiff told her supervisor she was ill and that it was work-related. The supervisor instructed her to report to the medical department of the employer, but plaintiff did not do that, instead going home on a vacation day. The employer then sent two supervisors, one of whom was named in the sexual harassment charge, to plaintiff's house to tell her to come back if her illness was work-related. The employer admitted this practice was "highly unusual if not unprecedented." *Id.* at 705.

While plaintiff was at the employer's human resources department discussing the perceived hostility, she was reprimanded for not being at her workstation. The plaintiff's co-workers became hostile to her after the mechanic retired early. One supervisor told her she would be fired. Her locker was broken into and her tools were stolen. The plaintiff claimed management knew, but did nothing. Plaintiff became ill as a result of her anxiety over the situation. Her doctor felt the anxiety was attributable to the perceived hostility at the plaintiff's workplace. Her doctor tried to phone the employer, but was not called back.

Plaintiff's work was reviewed more negatively after the filing of the sexual harassment charge, causing a missed pay increase and placement on "final warning of discharge from the apprenticeship program." The evaluations were being completed and approved by supervisors who had previously praised her work. *Id.* at 713.

[25] *Id.* at 708 (stating that "[t]o hold otherwise would be to expand the definition of 'adverse employment action' to include events such as disciplinary filings, supervisor's reprimands, and even poor performance by the employee").

[26] *Id.* at 708-09.

that are "interlocutory or mediate" in nature.[27] In reaching this conclusion, the court looked to 42 U.S.C. § 2000e-2(a), Title VII's general discrimination provision, for help in defining the word "discrimination" found in the retaliation provision, 42 U.S.C. § 2000e-3(a).[28] The court concluded that because the general discrimination provision makes specific reference to unlawful discrimination with respect to both "compensation, terms, conditions or privileges or employment" and of an employee's "status," while the retaliation provision does not speak to harms relating to employee status, the retaliation provision "can only be read to exclude such vague harms, and to include only ultimate employment decisions, such as the ones described in the general discrimination provision."[29] In sum, the court's somewhat high threshold of what constitutes an adverse employment action was based on the more definitive language of the general discrimination provision, the need not to allow every employment action to be actionable retaliation, and a perceived view of relevant case law.

2. Actions That Materially Affect the Terms and Conditions of Employment

Some courts will find an employer's action to be an adverse employment action if the action materially or adversely affects the plaintiff's terms and conditions of either present or future employment even if that action is not an ultimate employment decision.[30] In *Von Gunten v. Maryland*,[31] the

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[27] *Id.* Specifically, the court relies heavily upon *Dollis*, 77 F.3d at 781-82. The court also cited two other Fifth Circuit cases, *Hill v. Miss. St. Empl. Serv.*, 918 F.2d 1233, 1241 (5th Cir. 1990), and *DeAngelis v. El Paso Mun. Police Officers' Assn.*, 51 F.3d 591 (5th Cir. 1994). *Hill* held that co-worker unfriendliness and harassment, including prolonging the time an employee had to wait for disbursement of checks, relegating an employee's file to a less desirable classification, deleting experience from an employee's reference form, and criticizing an employee's EEOC complaint, did not constitute retaliation. *DeAngelis* held that an office newsletter ridiculing a female plaintiff based on her gender and her having filed an EEOC complaint was not an adverse employment action.

[28] *Mattern*, 104 F.3d at 708-09.

[29] *Id.* at 709 (citing 42 U.S.C. § 2000e-3(a)).

[30] The trend in the case law is that "almost anything that negatively affects an employee in his or her employment relationship can be the subject of a retaliation claim." Ellis & Rudder, *supra* n. 5, at 6. *See also* Hinkle, Hensley, Shanor & Martin LLP., *Negative Job Evaluations Support Retaliation Claims, Tenth Circuit Rules*, 6 No. 12 N. M. Empl. L. Ltr. 4 (2000) (noting that the Tenth Circuit "liberally construed what constitutes an adverse employment action for purposes of retaliation claims to include basically any action having a negative impact on future employment opportunities"). Recent case law has stayed consistent with this trend. *See e.g. Bell v. E.P.A.*, 232 F.3d 546, 555 (7th Cir. 2000) (employer action must constitute a "significant change in employment status") (quoting *Burlington Indus. v. Ellerth*, 524 U.S. 724, 761 (1998)); *Heno v. Sprint/ United Mgt. Co.*, 208 F.3d 847, 857 (10th Cir. 2000) (stating that an adverse employment action is one that "alters employee's

Fourth Circuit Court of Appeals explicitly disagreed with *Mattern*, holding that any employer actions that materially affect the terms and conditions of employment are actionable under Title VII's retaliation provision.[32] The court first admitted that an employer action needed to at least meet "some threshold level of substantiality . . . for unlawful discrimination to be cognizable under the anti-retaliation clause."[33] The court pointed out,

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compensation, terms, conditions or privileges of employment, or adversely affects his or her status as an employee") (quoting *Sanchez v. Denver Pub. Schs.*, 164 F.3d 527, 533 (10th Cir. 1998)); *Nguyen v. Cleveland*, 229 F.3d 559, 566 (6th Cir. 2000) (concluding that to prove an adverse employment action, the employee must show materially adverse change in the terms or conditions of employment caused by an employer's action); *Munday*, 126 F.3d 239; *Robinson v. Pittsburgh*, 120 F.3d 1286 (3d Cir. 1997); *Torres v. Pisano*, 116 F.3d 625, 640 (2d Cir. 1997) (stating that an adverse employment action is one in which the employee suffers "a materially adverse change in the terms and conditions of employment," and that an employer's preventive measures do not constitute adverse employment actions unless such measures affect the employee's "work, working conditions, or compensation") (quoting *McKenny v. N. Y. City Off-Track Betting Corp.*, 903 F. Supp. 619, 623 (S.D.N.Y. 1995)); *Nelson v. Upsala College*, 51 F.3d 383, 388 (3d Cir. 1995) (stating that it does not further the purpose of Title VII to apply the retaliation provision to conduct unrelated to the employment relationship).

[31] 243 F.3d 858 (2001).

The facts of *Von Gunten* may be summarized as follows. Plaintiff was employed as an environmental health aide at an environmental state department. After receiving favorable evaluations halfway into the winter period reserved for conducting shoreline sanitary surveys, one of her department heads began the "warm-weather" period of the year collecting water samples from a boat, a position that required her to work in a physically confined space alongside her male supervisor. Problems with the situation on the boat began almost immediately, as the supervisor began "urinat[ing] from the boat, ma[king] crude and sexually suggestive comments toward [the plaintiff], and star[ing] at and touch[ing] various parts of her body against her will." Shortly thereafter, the plaintiff contacted the department head and complained of the sexual harassment. The department head contacted his superior, who in turn had a meeting with the plaintiff, the supervisor, and the department head. After an unproductive meeting, the plaintiff asserted that the harassment worsened. A few months later, the department head observed the plaintiff and supervisor working and allegedly saw the plaintiff "screaming and acting in an unprofessional manner." The next day, the supervisor struck the plaintiff on the buttocks with an oar on the boat. The plaintiff telephoned the department head and asked to be taken off the supervisor's boat, a request that was met with some suspicion by the department head. Regardless, the department head agreed to take her off the boat. The following day, the plaintiff informed the department head's superior that she intended to contact the fair practices office to discuss her concerns. The superior went ahead and contacted the office himself and informed personnel there that the requisite evidence was lacking to substantiate the plaintiff's claims. Shortly thereafter, the plaintiff sent a letter to the office asking for help. An investigation concluded there was not enough evidence to prove an abusive work environment.

The plaintiff claimed that, after her letter to the office seeking help, her employer took a number of retaliatory actions against her, including: withdrawal of the state car that had been issued to her since her employment began, forcing her to use her personal car for work purposes; a downgrade in her year-end evaluation; removing her from boat work and reassigning her to shoreline survey work; improperly handling "various administrative matters"; and subjecting her to an abusive work environment.

The plaintiff also rejected a proposed reassignment that would have required her to work more in a field office in proximity with the department head and the superior. After more discussions with the office were unproductive, the plaintiff quit and eventually brought suit against the employer for sexual harassment, constructive discharge, and retaliation.

[32] 243 F.3d at 866.

[33] *Id.* at 864 (quoting *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998)).

however, that even the Eighth Circuit has "consistently applied" a standard broader than that representing the ultimate employment decision standard.[34]

Though the court was quick to concede that use of the ultimate employment decision would render resolution of cases under Title VII's retaliation provision more consistent,[35] and that if the court were to apply the standard in this case, the plaintiff would be unable to establish her prima facie case, the court still refused, however, to adopt the standard on the basis of a number of perceived flaws. First, the court pointed out that in *Ross v. Communications Satellite Corp.*,[36] it had explicitly refused to draw distinctions between the general discrimination and retaliation provisions of Title VII.[37] Second, in *Munday*, the court had held that employer conduct was not recognized as actionable Title VII retaliation because the plaintiff had failed to offer evidence that such conduct "adversely affected" the "terms, conditions, or benefits" of her employment, and not because such conduct fell short of ultimate employment decisions.[38] Together, these two cases "teach that conduct short of 'ultimate employment decisions' can constitute adverse employment action for purposes of § 2000e-3,"[39] and that "[w]hat is necessary [instead] in all . . . retaliation cases is evidence that the challenged discriminatory acts or harassment adversely effected the terms, conditions, or benefits of the plaintiff's employment."[40]

The court then went on, albeit in a footnote, to distinguish *Page v. Bolger*,[41] which the Fifth Circuit heavily relied upon in *Mattern*, as support for the ultimate employment decision standard.[42] In *Page*, a federal postal worker sued the Postmaster General for racial discrimination under § 2000e-16, an anti-discrimination provision applicable only to federal government employees.[43] While admitting that Page mandated that

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[34] 243 F.3d at 864

[35] *Id.* (stating, "if strictly applied, use of the ultimate employment decision standard can be outcome determinative, as is crystallized in *Mattern* ").

[36] 759 F.2d 355, 366 (4th Cir. 1985).

[37] *Von Gunten*, 243 F.3d at 865. In note one of the opinion, the court points out its endorsement of the view that "'Congress has not expressed a stronger preference for preventing retaliation under § 2000e-3 than for preventing actual discrimination under § 2000e-2' and '[i]n the absence of strong contrary policy considerations, conformity between the provisions of Title VII is to be preferred'." (quoting *Ross*, 759 F.2d at 366).

[38] 126 F.3d at 242.

[39] *Von Gunten*, 243 F.3d at 865.

[40] *Id.*

[41] 645 F.2d 227 (4th Cir. 1981).

[42] *Mattern*, 104 F.3d at 707-08.

[43] *Page*, 645 F.2d at 228-29.

ultimate employment decisions are actionable as "personnel actions" under § 2000e-16, the court concluded that the language of the retaliation provision does not confine its scope in the same manner; it is a broader provision.[44] Page did not hold that ultimate employment decisions were the only conduct that could be sued upon under the retaliation provision.[45]

3. The Case-By-Case Approach to Adverse Employment Actions

Some courts have been even more lenient in defining adverse employment action under Title VII's retaliation provision, utilizing a case-by-case approach that takes into account all relevant circumstances in a given case,[46] because "retaliatory adverse actions can come in many shapes and sizes" and can be "as varied as the human imagination will permit."[47] In *Jeffries v. Kansas*,[48] for example, the Tenth Circuit gave the retaliation

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[44] *Von Gunten*, 243 F.3d at 866 n. 3 (stating that "[the] fundamental concern in *Page* was that the pretext inquiry must focus on the employment decision itself, not the racial composition of a selection committee; if discrimination drove the employment decision, a Title VII action might lie, but discrimination that only effected the makeup of a selection committee could not be the basis for a Title VII action").

[45] *Id.*

[46] *See e.g. Gunnell*, 152 F.3d 1253; *Jeffries v. Kansas*, 147 F.3d 1220, 1232 (10th Cir. 1998) (explicitly stating that the Tenth Circuit takes a case-by-case approach to what constitutes adverse employment action and that, here, verbal interrogation and reprimand and threats to withdraw supervision and not to renew an employee's contract were adverse employment actions); *Wideman*, 141 F.3d at 1455-56 (stating that scheduling conflicts, reprimands, a one day suspension, the solicitation of negative evaluations, and unjustified delay of medical treatment authorization were sufficient to constitute adverse employment actions); *Corneveaux v. CUNA Mut. Ins. Group*, 76 F.3d 1498, 1507-08 (10th Cir. 1997) (holding an adverse employment action to be present where an employee was required to "go through several hoops" in order to obtain severance benefits); *Knox v. Indiana*, 93 F.3d 1327, 1335-36 (7th Cir. 1996) (stating that the creation of an unfriendly work environment was clearly retaliatory in nature and was sufficient to constitute an adverse employment action).

[47] *Williams & Rhodes, supra* n. 5, at 60 (citing *Knox*, 93 F.3d at 1344).

[48] 147 F.3d 1220. The facts of *Jeffries* can be adequately summarized as follows: for nearly a year, the plaintiff was employed as a resident chaplain and student in a government-regulated hospital. She was under a one-year contract to be enrolled in a pastorial educational program, with an extension being allowed at the mutual agreement of the parties. Testimony showed that it was extremely rare, if not non-existent, for a student's application to continue another year to be rejected. The supervisor of the program assigned the plaintiff to a substance abuse program and asked another resident to assist her. The plaintiff, while alone in her office, was approached by the resident assisting her and hugged without her consent. The plaintiff reported the incident to her supervisor just over two months later. The incident was a frequent topic of discussion at the program's "interpersonal relations group," a group consisting of the plaintiff, her male supervisor, the alleged hugger and one other male. Upset that the situation had not been resolved in a manner she deemed appropriate, the plaintiff, after making her ability to bring a charge known to the supervisor, was subjected to tape-recorded meetings and she was told that her contract would not be renewed. In the meantime, the plaintiff had delivered a letter to the hospital superintendent revealing the hugging and the plaintiff's perception of the supervisor's reaction to the situation. The superintendent treated the letter as a formal complaint.

provision's requirement of an adverse employment action an admittedly liberal construction.[49] The court expressly rejected any requirement that an employer's action be "material" to the terms and conditions of employment in order to be actionable. Rather, the court adopted a "case-by-case approach to determin[e] whether a given employment action is 'adverse'."[50] The court held that threats to not supervise or threats of contract non-renewal could constitute actionable employer action in the circumstances of a particular case.[51]

4. The EEOC Approach to Adverse Employment Actions[52]

The EEOC has taken an even more liberal approach, stating that all of the judicially crafted tests for determining what constitutes adverse employment action under the retaliation provision of Title VII are "unduly restrictive."[53] Instead, the EEOC says that any adverse treatment reasonably likely to deter protected activity warrants protection under the retaliation provision.[54] The EEOC concedes that "petty slights and trivial annoyances are not actionable, as they are not likely to deter protected activity,"[55] but that more significant retaliatory treatment can be actionable, regardless of the level of harm imposed on the plaintiff.[56]

The EEOC based its view on "statutory language and policy considerations," namely the breadth of the retaliation provision when compared to the general discrimination provision, and the notion that adopting a broad, employee-friendly standard recognizes that "retaliation

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The plaintiff alleged retaliatory conduct, including: (1) angry interrogations and reprimands in a tape recorded conversation following the filing of the complaint; (2) her supervisor informing her he would no longer supervise her as a student and refusing thereafter to supervise her; and (3) repeatedly informing her that her contract would not be renewed for a second year. *Id.*

[49] *Id.* at 1232.

[50] *Id.*

[51] *Jeffries*, 147 F.3d at 1233. Thorough legal analysis was not completed because the court chose such a liberal view.

[52] EEOC guidelines and interpretations are not binding on courts of law, but do "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986).

[53] EEOC Interpretive Guidelines, Vol. 8, § 614:0005.

[54] Jean P. Kamp, *U.S. Equal Employment Opportunity Commission Compliance Manual, Section 8: Retaliation* (PLI/Litig. & Admin. Prac. Course Handbook Series No. 591, Oct./Nov. 1998); *see Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir. 2000) (adopting EEOC view).

[55] Kamp, PLI/ Litig. Series 591 at 750; *See Ray*, 217 F.3d at 1243 (stating that the EEOC test "does not cover every offensive utterance by co-workers, because offensive statements by co-workers do not reasonably deter employees from engaging in protected activity").

[56] Kamp, PLI/Litig. Series 591 at 750.

harms the public interest by deterring others from filing a charge."[57] Concluding, the EEOC noted, "[a]n interpretation of Title VII that permits some forms of retaliation to go unpunished would undermine the effectiveness of the EEOC statutes and conflict with the language and purpose of the anti-retaliation provisions."[58]

III. DISCUSSION

This split concerning what constitutes an adverse employment action under the retaliation provision of Title VII is causing an uneven application of the law in the federal circuits.[59] Only a uniform standard will protect both employees and employers. The ultimate employment decision standard , though providing a bright-line rule and ensuring a decrease in the ever-rising tide of retaliation claims, fails to effectuate Title VII's purpose, and poses practical problems in application. The "case-by-case" standard is far too flexible and amorphous to cure the problem of inconsistency. The most appropriate standard for determining what constitutes an adverse employment action under Title VII's retaliation provision is whether such action materially affects the terms and conditions of employment. This standard is consistent with Title VII's language and purpose, is flexible enough to handle the myriad of cases that a court will face, and has the ability for uniform application across the federal courts.

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[57] *Id.* at 751-52.

[58] *Id.* at 752.

[59] *See* Barbara Lindemann & Paul Grossman, *Employment Discrimination Law* 650-68 (3d ed., BNA Books 1996). Lindemann and Grossman, showing the widespread inconsistency, listed, among others, numerous examples of what courts have concluded to be actionable retaliation under Title VII: *Cosgrove v. Sears, Roebuck & Co.*, 9 F.3d 1033, 1040 (2d Cir. 1993) (deviation from in-house procedures); *Hudson v. Moore Bus. Forms, Inc.*, 836 F.2d 1156, 1161-62 (9th Cir. 1987), *amended*, 898 F.2d 684 (9th Cir. 1990) (the filing of a counterclaim in a lawsuit); *Pantchenko v. C.B. Dodge Co.*, 581 F.2d 1052, 1055 (2d Cir. 1978) (denial of customary commendation letter); *Howze v. Va. Polytechnic Univ.*, 901 F.Supp. 1091, 1097-98 (W.D. Va. 1995) (negative statements about employee's participation in protected activity that might affect reputation); Minor v. Califiano, 452 F.Supp. 36, 43 (D. D.C. 1978) (loss of normal work assignments).

On the other hand, Lindemann and Grossman also list, among others, the following employer actions that courts have concluded to be actionable retaliation under Title VII. *See Employment Discrimination Law* at 669-671: *McKenzie v. Ill. Dept. of Transp.*, 92 F.3d 473, 486 (7th Cir. 1996) (instructing other employees not to provide affidavits to assist plaintiff); *Cole v. Ruidoso Mun. Schools*, 43 F.3d 1373, 1382 (10th Cir. 1994) (changing reason for employment decision); *Yates v. Avco Corp.*, 819 F.2d 630, 637 (6th Cir. 1987) (temporary transfer to lower grade position where employee retained all pay and benefits); *Longworth v. Natl Supermarkets, Inc.*, 41 F.E.P. 30, 38 (E.D. Mo. 1986) (refusal to rehire because of refusal to accept a settlement offer); *Burrows v. Chemed Corp.*, 567 F.Supp. 978, 987 (E.D. Mo. 1983) (mere questioning in investigation in surveillance).

A. The Ultimate Employment Decision View Is Overly Restrictive and At Odds with Title VII's Purpose.

Proponents of the ultimate employment decision standard argue that Title VII's language supports their view.[60] The general discrimination provision states that it is unlawful to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment.[61] This general provision language specifically prohibits certain discriminatory conduct. The retaliation provision, on the other hand, is more vague, prohibiting action that would deprive or tend to deprive an employee of opportunities or adversely affect his status.[62] Courts may read the broad language of the retaliation provision in two ways: either a retaliation plaintiff must make an even greater showing to invoke the protection of the retaliation clause or, reading the clauses in pari materia,[63] the retaliation provision is meant to encompass only the kinds of decisions laid out in the general discrimination provision. Under the latter reading, only hiring, firing, or decisions on promotions or demotions, would be considered adverse employment decisions. Proponents argue that a reasonable reading of the language of the statute supports their conclusion that Title VII's retaliation covers only ultimate employment decisions.[64]

Moreover, many practical considerations exist for adopting the ultimate employment decision standard. First, it avoids forcing courts to become

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[60] *See Mattern*, 104 F.3d at 708-709.

[61] 42 U.S.C. § 2000e-2(a).

[62] 42 U.S.C. § 2000e-2(a)(2).

[63] Statutory provisions which can be read in *pari materia* are ones "which relate to the same thing or to the same subject or object . . . although they were enacted at different times and it is a fundamental rule of statutory construction that such statutes should be construed together for the purpose of learning and giving effect to legislative intention." *Ballantine's Law Dictionary* 632 (William S. Anderson, ed., 3rd ed., Lawyers' Coop. Publg. Co. 1969).

[64] Even if one cannot reach that conclusion from a reading of the statute's language, proponents point out that Title VII's admittedly sparse legislative history clears up any ambiguity raised by the statute and necessitates the adoption of the ultimate employment decision as the standard for determining what constitutes an adverse employment action. *See* Cude & Steger, *supra* n. 18, at 397 (stating, "[t]he only expression of legislative intent is found in the statements that [management] prerogatives . . . are to be left undisturbed to the greatest extent possible. Internal affairs of employers . . . must not be interfered with except to the limited extent that correction is required in discrimination practices"). Cude and Steger indicate that the only meaningful piece of legislative history to be found is H.R. Rpt. 7152, (reprinted in 1964 U.S.C.C.A.N. 2487, 2516) (citing Edward C. Walterscheid, *A Question of Retaliation: Opposition Conduct as Protected Expression Under Title VII of the Civil Rights Act of 1964*, B. C. L. Rev. 391, 393 (1988)).

the supervisors of employers.[65] Title VII was not enacted to address every single employment decision made.[66] While Title VII was designed to protect employees against unfair employment practices and discrimination, this does not mean that an employee should be able to use the statute as a shield against every type of employment decision that may affect him or her at work, regardless of the decision's gravity.[67] Indeed, the adoption of a broad standard would prevent employers from taking legitimate actions such as disciplinary filings and reprimands for poor performance for fear that such action would subject them to a Title VII retaliation claim.[68]

Imposing a more restrictive standard for analyzing what constitutes an adverse employment decision will also relieve courts of the growing number of retaliation claims.[69] With retaliation claims on a seemingly endless increase, courts must be able to restrict their focus to the claims that have merit. By utilizing the ultimate employment decision view, courts will be able to ferret out claims that have little or no merit procedurally by such mechanisms as summary judgment motions. For example, co-worker hostility is not an employer action that amounts to an ultimate employment decision; it is not equivalent to a firing or demotion, and it does not affect an employee's compensation or privileges of employment in any way. This hostility may indeed be the result of an employee's exercise of his or her statutory rights, but it may also just be that the hostile co-worker does not get along with the employee. Either way, a court cannot be expected to intervene and offer relief when two employees do not get along. Use of the ultimate employment decision approach will eliminate many retaliation claims that do not have the requisite impact on an employee.

But the ultimate employment decision standard poses significant problems that counsel against its adoption. First, the language of the retaliation provision, on its face, provides broader protection than that of the general discrimination provision. The language employed in the two provisions is quite different.[70] The general discrimination provision is more specific and provides, in relevant part, that it is unlawful to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions

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[65] Cude & Steger, *supra* n. 18, at 408.

[66] *Dollis*, 77 F.3d at 781-82.

[67] *Mattern*, 104 F.3d at 707 (*citing Dollis*, 77 F.3d at 781-82); *Ledergerber*, 122 F.3d at 1144.

[68] *Mattern*, 104 F.3d at 708; Cude & Steger, *supra* n. 18, at 398. (arguing that a liberal interpretation of how to apply the retaliation clause "opens the door to a myriad of claims for trivial acts, and gives courts free reign to second guess an employer's business decisions").

[69] *See supra* n. 5.

[70] *See U.S. v. Fisher*, 6 U.S. 358 (1805); *Chishom v. Roemer*, 501 U.S. 380 (1991).

or privileges of employment."[71] The retaliation provision, on the other hand, is more vague, providing that it is unlawful for an employer to "discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice under this subchapter, or because he has made a charge, testified, assisted or participated in an investigation, proceeding, or hearing under this subchapter."[72]

In short, the retaliation provision contains no words of limitation as to which aspects of employment cannot be retaliated against, unlike the general discrimination provision, which bars discrimination with respect to terms, conditions or privileges of employment. The retaliation provision says only that discrimination is prohibited for an employee's opposition of unlawful employment practices and for an employee's participation in statutorily protected activities. Had the drafters of Title VII wanted to make the retaliation provision specific to the type of employer actions enumerated in the discrimination provision, they could easily have done so. The failure to do so implies that the drafters wanted courts to interpret the retaliation clause broadly. Because the retaliation clause is not limited to specific acts like the discrimination clause, it follows that courts should read its terms broadly to include more than just ultimate employment decisions.[73]

Second, the ultimate employment decision standard contradicts Supreme Court precedent.[74] Under Supreme Court precedent, Title VII is violated

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[71] 42 U.S.C. § 2000e-2(a)(1).

[72] 42 U.S.C. § 2000e-3.

[73] *See* Cude & Steger, *supra* n. 18, at 394 (outlining recurring criticisms of standard); *but see* Patricia A. Moore, Student Author, *Parting Is Such Sweet Sorrow: The Application of Title VII to Post-Employment Retaliation*, 62 Fordham L. Rev. 205, 210 (1993) (arguing that one should not necessarily read the two clauses together because the Congressional debate surrounding the legislation was too extensive and contradictory and too many contradictory amendments to the different sections were proposed).

[74] *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993). In *Harris*, the plaintiff was a manager at an equipment rental company for approximately two and a half years. She alleged that during the course of her employment, she was subjected to gender-based insults and unwanted "sexual innuendos" from the company president. Specifically, the president told the plaintiff, in the presence of others, "you're a woman, what do you know," and "[w]e need a man as the rental manager" and, on at least one occasion, called her a "dumbass woman." He also made sexual remarks to her, such as suggesting the two go to a local motel to "negotiate Harris' raise," commonly asked her to remove coins from his pants pocket, threw objects on the ground in front of her and asked her to pick them up, and made sexual references to her clothing. A few months before she quit, the plaintiff complained to the president about his behavior. He acted surprised, but promised to quit the behavior, prompting the plaintiff to remain on the job. Not one month later, "[w]hile [plaintiff] was arranging a deal with one of [the equipment rental company's] customers, [the president] asked her, again in front of other employees, 'what did you do, promise the guy . . . some [sex] Saturday night?'" The plaintiff then quit and filed suit against the company, alleging the president created an abusive work environment because of her gender.

whenever an employee is unlawfully subject to a severe and pervasive hostile or abusive work environment.[75] This does not mean that the severe and pervasive environment is necessarily discrimination within the language of the general discrimination provision. Such an environment has little to do with hiring, firing, promoting, or compensation. It is simply an uncomfortable environment that an employee must work in.

Nonetheless, the Supreme Court has held that creation of such a hostile working environment does indeed violate Title VII.[76] Therefore, though the creation of a hostile work environment may not fit within the exact language of the discrimination provision, it may still be actionable under the retaliation provision. For example, suppose an employee has filed a claim against an employer alleging discrimination and, while the EEOC is investigating the charge, the complaining employee is suddenly subject to a hostile work environment. As a direct result of the filing of the discrimination claim, the ultimate employment decision standard would deny the employee any relief under Title VII's retaliation provision even though a clear retaliatory motive is present. Yet, the Supreme Court has recognized such an environment as actionable under the more specific discrimination provision of Title VII. That same hostile environment should also be actionable under the retaliation provision of Title VII. If Supreme Court precedent recognizes that something less than ultimate employment decisions may be actionable under the general discrimination provision of Title VII, the same conduct should be actionable under the retaliation provision as well.[77]

Third, adoption of the ultimate employment decision standard has the potential to encourage employers to retaliate against individuals exercising their Title VII rights, so long as no retaliatory act amounts to an "ultimate employment decision."[78] This interpretation of the statute would permit employers to use more subtle forms of retaliation without fear of legal punishment.[79] For example, an employer could move the employee to

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[75] *Id.* at 22 (stating, "a discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers."). The Court did, however, recognize that the offensiveness of the environment to the employee must be reasonable. *Id.*

[76] *Harris*, 510 U.S. at 22.

[77] *Richards v. U.S.*, 369 U.S. 1, 11 (1962) (stating, "a section of a statute should not be read in isolation from the context of the whole [a]ct").

[78] *See* Himkle, Hensley, Shanor & Martin, L.L.P., *supra* n.30, at 4.

[79] Hinkle, Hensley, Shanor & Martin, L.L.P., *supra* n.30, at 4.noting that, with too stringent of a standard, employer retaliatory actions do not have to necessarily reach the level of terminations, demotions, or pay cuts, but instead actually encourages employers to utilize more subtle activities, such as negative performance evaluations, to retaliate against an employee who has exercised his or her statutory rights).

another department for no reason, so long as the employee maintained the same pay and rank. Likewise, the employer could place the employee under the supervision of a supervisor that the employee, or could change the employee's hours or schedule for no reason other than retaliation. The aggregate effect of these minor retaliatory acts, while not sufficient to maintain an action under the ultimate employment decision view, can amount to continuous exposure to conduct retaliatory in motive. Therefore, the practical effect of adopting the ultimate employment decision standard could be that retaliatory acts will actually increase, so long as the employer does not fire or demote an employee.

The disadvantages of adopting the ultimate employment decision standard for adjudicating what constitutes an adverse employment action outweigh its benefits and run counter to the language of Title VII, Supreme Court precedent, and the need to discourage retaliation against employees who exercise their statutory rights. Therefore, courts should not adopt this standard.

B. The Case-By-Case and EEOC Standards Are Flexible But Too Broad and Unfair to Employers[80]

Proponents of the more liberal standards for what constitutes an adverse employment action under Title VII's retaliation provision, the case-by-case approach and the EEOC approach, point to the need for flexibility in effectuating Title VII's purpose of protecting employees. Retaliatory actions can take many different forms and a more liberal and flexible standard will allow courts to take all retaliatory acts into consideration, regardless of how minor they may appear in isolation. A flexible and broader standard will allow courts to take into account the entire factual scheme when determining what constitutes an adverse employment action. Courts could find smaller, less recognizable employment actions, such as spontaneous transfers or continual threats of discharge, to be adverse employment actions.

In addition, a liberal, more flexible standard will allow a court to meet creative manipulations of the statute by employers and protect the employee accordingly. For example, noting the increasing use of technology in the workplace, an employer may decide to suddenly incorporate many unfamiliar technological devices into a complaining employee's required equipment. The employer could cite the immediate

[80] As noted before, these standards are discussed together because they have similar advantages and disadvantages and, as such, an analysis combining the standards into one avoids repetition.

need for use of such equipment, but not provide the employee with training or, perhaps even worse, provide the employee with inadequate training and reprimand them for misuse or incorrect use of the technology. Under the more liberal standard, a court would recognize this conduct as an adverse employment action because it is not confined to any bright-line test in making the determination.

Second, the use of a more liberal standard ensures promotion of Title VII's purpose with respect to retaliation claims. Generally, Title VII strives to provide employees with a fair workplace.[81] A "fair" workplace, however, is an abstract idea, not capable of easy definition. What is fair in a steel factory may not necessarily coincide with what is fair in a shopping mall store, or a grocery store. Jobs with different duties, working conditions, and types of people cannot be treated in a uniform way. In certain situations, a transfer may be entirely reasonable and justified as a business decision that will maximize production. That same decision in a different atmosphere, while made under the guise of the same justifications, may not result in a fair workplace. The only method whereby a court can account for these inevitable differences is by adopting a standard capable of easy expansion for varying fact patterns.

The liberal standard will also ensure that employees are not afraid to use Title VII's statutory mechanisms when it is proper to do so.[82] If the employee knows that courts will closely scrutinize employer reprisal for the exercise of statutory rights, that employee will be less likely to suffer the retaliation silently. The employee who can only file a Title VII retaliation claim in a court that takes a restrictive view of what constitutes an adverse employment action may fear that filing a charge will only result in a hostile work environment because both parties know that the court will not recognize such an environment as actionable retaliation. The employee, despite having a valid claim, will be deterred from bringing the sexual harassment claim for fear of inactionable reprisal from the employer. A flexible standard that gives the judge or jury latitude in defining adverse employment action can take this into account and hold the employer liable for the retaliatory hostile environment.

On the other hand, just as the liberal standard captures the wide range of flexibility needed to adapt to different factual patterns, the uniform use of such a standard will inevitably yield inconsistent results. Different judges

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[81] Moore, *supra* n. 73, at 211. Moore also argues that Title VII was enacted as a "national policy of non-discrimination," intended to keep in check those who control employment and promotion decisions. Moore, *supra* n. 73, at 210 (*quoting* 110 Cong. Rec. 13169 (1964)).

[82] *See* Ellis & Rudder, *supra* n. 5, at 243 (arguing that a primary goal of a retaliation provision is ensuring employees have access to statutory enforcement schemes that are in place to protect their rights).

or juries will have different ideas of what constitutes an adverse employment action and the statute will suffer uneven application.[83] For example, one court may find that a transfer to another department and subsequent co-worker hostility is an adverse employment action while another court, faced with identical facts and circumstances, may find that such employer action is not actionable under the retaliation provision. The adoption of a bright-line test, such as that provided by the ultimate employment decision standard, avoids such problems. Under the ultimate employment decision test, the employer's action would have to satisfy a certain threshold before it became actionable. This excess flexibility inherent in the liberal standard promotes an inconsistent application of the law. In addition, the liberal standard is simply impractical and unnecessary.[84] The courts are already bogged down with retaliation claims, those with merit and otherwise. If the liberal standard is used in every circuit, employees will be more likely to file a claim on the hope of getting a sympathetic judge or jury.[85]

Finally, imposition of a more liberal standard will impermissibly harm employers that are attempting to eliminate retaliatory conduct from the workplace.[86] Under such a standard, employers will have no idea what can and cannot be done after an employee has exercised his or her Title VII rights. Consequently, courts may subject such employers to a retaliation claim for activities that, as far as the employer knew, were permissible.

Employers may also suffer economic consequences as well as a result of the liberal standard. Employers may have to pay legal fees, judgments, and settlements for potentially non-retaliatory conduct. With the number of cases already high, the imposition of a uniform liberal standard will only serve to increase that number, resulting in a corresponding increase in employer expense.

In addition, any increased willingness of an employee to file a retaliation claim in a court using the liberal standard will result in loss of production for employers. Employees and employers will have to spend more time

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[83] *See* Lindemann & Grossman, *supra* n. 60.

[84] For a discussion on sympathetic juries and how they will often dismiss a plaintiff's discrimination claim, but reward the retaliation claim, consult *supra* note 5.

[85] *See* Ellis & Rudder, *supra* n. 5 (arguing that juries tend to compromise on cases where an employee who has received a poor evaluation or disciplinary warning adds a retaliation claim to his or her discrimination claim by dismissing the discrimination claim and finding for the plaintiff on the retaliation claim).

[86] *See Wu v. Thomas*, 996 F.2d 271, 274 (11th Cir. 1993) (noting that "[a]lthough [the Eleventh Circuit has] interpreted Title VII to mean that an employer cannot retaliate by taking an 'adverse employment action' against an employee . . . we have never defined what this general phrase means. [As a result], a reasonable employer [has no way of knowing] for certain whether acts short of firing, demoting, or refusing to hire an employee could violate Title VII").

and money in court, and less time will be available for running the business. Employers who consistently have to pay to defend and settle these cases may find it more economical, or even necessary, to retain fewer employees or employ more technology to avoid having the human element in their workforce.

In sum, the uncertainty of consistent judicial resolution, encouragement of frivolous claims, and the impermissible burden placed on employers outweigh the reasons for adopting a liberal standard for determining what constitutes an adverse employment action.

C. The Materially Affects the Terms and Conditions Of Employment Standard Is Consistent with Precedent, Flexible and Fair to Employers and Employees

The most appropriate standard for what constitutes an adverse employment action under Title VII's retaliation provision is the "middle road" view, i.e., those actions which materially affect the terms and conditions of employment ("MATCE").[87] The standard is consistent with the most relevant Supreme Court precedent and the textual mandates of the retaliation provision. In addition, courts can apply the standard and have flexibility to adapt to different factual situations. Finally, the MATCE standard is fair to both employers and employees and avoids concerns about undue judicial intervention in the workplace.

1. The MATCE Standard Is Consistent with the Statutory Text of Title VII's Retaliation Provision and Relevant Supreme Court Decisions

While Title VII's retaliation provision does not contain the words "materially affects the terms and conditions of employment," a review of a Supreme Court decision and a reasonable reading of the statute indicate that such an interpretation of the provision is warranted. The Supreme Court has indicated that Title VII is violated when the terms and conditions of employment are changed.[88] This indication is an express recognition

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[87] For case law generally supporting this view, consult *supra* note 30. It should be noted, however, that this is not necessarily the same view as was endorsed by the Fourth Circuit in *Von Gunten*, 243 F.3d 858. The court in that case used the term "adversely" instead of "materially." Though it is conceded that the two standards, using practical definitions, may be different in certain situations, many of the same arguments for the two views are similar, and "materially" and "adversely" have been used interchangeably by authorities. *See e.g.* Kamp, *supra* n. 54; *Henderson*, 217 F.3d at 1242 (citing cases that use both terms).

[88] *See Harris*, 510 U.S. 17. The Court found the creation of an abusive work environment to be actionable under Title VII's discrimination provision. *Id.*

that Title VII, at least in general, is not limited to covering only ultimate employment decisions. In addition, the provision found to be violated in *Harris v. Forklift Sys.*, the discrimination provision, contains a list of things an employer cannot discriminate on the basis of, such as hiring, firing, and promotion. Thus, it follows that an abusive work environment must be actionable under the broader retaliation provision, which provides no enumerated list. Although the Court in *Harris* was making its decision in the context of another Title VII provision, application of the standard to the retaliation provision would render the provision flexible and it would restrict adverse employment actions to only those events that "materially" affect the terms and conditions of employment.

This conclusion is reinforced when reading the retaliation provision together with the general discrimination provision.[89] The general discrimination provision does, indeed, encompass actions like failing to hire, promoting, and firing, but it also contains the phrase "or otherwise discriminating against."[90] The insertion of the phrase, if intended to have any meaning, compels the conclusion that "discriminating" can involve things other than just hiring, firing, or promoting;[91] otherwise, the "or otherwise discriminates" language holds no weight. Thus, when the general discrimination provision is used as guidance as to what "discrimination" means in the retaliation provision, the conclusion is inevitable that it must mean more than just ultimate employment decisions such as hiring, firing, promoting, or the like. In addition, the limitation "with respect to terms, conditions or privileges of employment" found in the general discrimination provision are entirely absent from the retaliation provision.[92] It follows that the retaliation provision has a broader scope.

2. The MATCE Standard Is Flexible Enough to Handle Various Factual Situations But Determinative Enough for Consistent Application

Courts may argue that the MATCE standard is no more definitive than the more liberal standards because of the flexibility retained by judges to determine what exactly materially affects the terms and conditions of employment. A closer analysis of the standard, however, effectively allays these fears. The standard effectively captures the flexibility of a more

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[89] *See Wideman*, 141 F.3d at 1456.

[90] *Id.*

[91] *Deavenport v. MCI Telecommunications Corp.*, 973 F. Supp. 1221, 1226 (D. Colo. 1997); *Wideman*, 141 F.3d at 1456.

[92] *Deavenport*, 973 F. Supp. at 1226.

liberal standard while maintaining the consistency possible with the more stringent ultimate employment decision standard.

While the phrase "terms and conditions" is not defined or clarified anywhere in Title VII, the Supreme Court has provided some guidance to courts on how to define it, but also leaves the court room to develop the concept on a case by case basis. In *Hishon v. King & Spalding*,[93] the Court was faced with whether the implied promise of a partnership was a term, condition, or privilege of employment.[94] Relying upon both the legislative history of Title VII and an analogous decision interpreting the National Labor Relations Act, the Court held that even benefits that an employer provided that were merely "incidents of employment" were sufficient to "form an aspect of the relationship between the employer and employees."[95] A commentator has noted that this decision reflects recognition that "it is the employment relationship itself that activates the anti-discrimination protection of Title VII," and that when applying this logic to the retaliation provision, which uses the word "employee," and not the more general term "individual," an employment relationship is already presumed to exist.[96] This reading is further bolstered when analyzing the Supreme Court's decision in *Meritor Savings Bank, FSB v. Vinson*,[97] in which the Court "ruled that the phrase 'terms, conditions, or privileges of employment' extends beyond economic or tangible harm."[98] "Again, this interpretation squares with the concept that any retaliatory conduct—whether it be economic, tangible, or not—is prohibited if it deters access to the benefits of Title VII."[99] Thus, courts are offered the guiding principle that the employer's conduct must impact the employment relationship, and though authority interpreting the provision recognizes that the *Hishon* and *Meritor* may compel the conclusion that just about anything can form or impact an employment relationship, it is also recognized that a limitation can be advanced by use of the world "materially."[100]

Use of the word "materially" ensures that the standard will not encompass so much flexibility that it falls prey to the same types of problems posed by the liberal standard. The word "materially" can be

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[93] 467 U.S. 69, 77 (1984).

[94] *Id.*

[95] *Id.* at 75-76. In support of the proposition, the Court in *Hishon* cited Sen. Rep. No. 88-867, at 11 (1964) and *Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971).

[96] Linda M. Glover, *Title VII Section 704(a) Retaliation Claims:Turning a Blind Eye Toward Justice*, 38 Hous. L. Rev. 577, 586 (2001) (discussing *Hishon*).

[97] 477 U.S. 57 (1986).

[98] Glover, *supra* n. 94, at 586 (citing *Meritor*, 477 U.S. at 64).

[99] Glover, *supra* n. 94, at 586

[100] Glover, *supra* n. 94, at 587-89 (citing Supreme Court cases that indicate materiality is a requirement for actionable conduct impacting the employment relationship).

defined as "having real importance or great consequences."[101] Common workplace problems, such as verbal arguments or disagreements among co-workers, which do not have real importance or great consequence will not constitute adverse employment actions. However, actions such as those that, in the aggregate, "materially affect . . . the terms and conditions of employment" may be actionable. Therefore, while the test's flexibility may have the potential to swallow the test itself, the materiality requirement will force courts to focus on only those actions that will have a significant impact on the employment relationship.

For example, when a court is presented with an allegation of retaliation in the form of a transfer, it will first look to see if that transfer involves any change in the employee's pay or duties. If so, the court should find the action adverse because any change in pay certainly materially affects a term of employment, i.e., the pay the employer and employee agreed upon. If not, the court should still look to see if the transfer effectuated a change in the employee's conditions of employment, i.e., if the change was such to effect a significant and adverse change in the employee's normal workday. Significant and adverse changes could include things like severe co-worker hostility or an alienation of the employee when teamwork is required to effectively complete jobs.

3. The MATCE Standard Advances the Purpose of Title VII Because It Is Fair to Both Employees and Employers

The MATCE standard is also the most equitable standard for both employees and employers. For employees, the standard allows them to exercise their rights unfettered. Employees should not fear unwarranted reprisal from employers because the test is more clearly defined, making it harder for an employer to retaliate in any significant and harmful way. The test will also ensure that an employee files only meritorious retaliation claims. The employee is fully entitled to Title VII's protections, but only for those employer actions that are within the statute's contemplation.

For example, an employee would most likely succeed in a claim alleging retaliatory conduct in the form of a transfer that changes the employee's duties in a significant way. On the other hand, mere unfriendliness that does not significantly impact the employment relationship will not be actionable under the retaliation provision. In effect, this test does not set

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[101] *See Webster's Tenth New Collegiate Dictionary* 717 (Webster 1993); *see also Ballantine's Law Dictionnary* 781 (William S. Anderson, ed., 3d ed., The Lawyers' Cooperative Publishing Co. 1969) (defining "material" as "[i]mportant; relating to the substance rather than the form; going to the merits and the essence").

the bar so low that employees will be encouraged to file retaliation claims over non-retaliatory conduct, but nor does it leave the employees without a legal remedy for significant employer retaliation short of an ultimate employment decision.

The MATCE standard is also equitable to employers. With a MATCE test, employers' legal costs and liability will decrease as frivolous claims are dismissed. Further, the MATCE test, encourages the employer to take preventive measures, ensure a fairer workplace, and to respect the exercise of an employee's statutory rights. Because the MATCE test has reasonably defined parameters, finding employer conduct actionable only if it materially affects the terms and conditions of employment, employers will have greater awareness for the types of actions that will constitute retaliatory conduct under Title VII and can develop preventive measures accordingly.

4. Imposition of the MATCE Standard Will Substantially Prevent Courts from Interfering with the Business of Employers

Rather than result in undue judicial intervention in employers' businesses, the MATCE test will actually decrease judicial activism. The reduction in claims accompanied by its adoption in all jurisdictions should actually leave employers freer from the judicial oversight that has been imposed under the more liberal standards. The standard will constrain judges and juries and prevent them from allowing sympathies and prejudices to influence their decisions. An instruction to the jury that adverse employment actions are ones that "materially affect the terms and conditions of employment will force jurors to make decisions based on facts and not on feelings."[102] Therefore, based on its flexibility and consistency, its logical extension from Supreme Court precedent, and its fairness to all parties concerned, the MATCE standard should define what constitutes an adverse employment action under Title VII's retaliation provision.

IV. CONCLUSION

The number of retaliation claims under Title VII is growing at an alarming rate. A real problem for employers, employees, and courts has been the absence of a uniform standard for evaluating what constitutes an

[102] If the jurors fail to follow the legal standard and hand down a verdict for the plaintiff when no significant change has occurred with respect to that plaintiff's employment relationship, a defendant employer can seek a judgment notwithstanding the verdict. *See* Fed. R. Civ. P. 50 (1999).

adverse employment action for the purposes of establishing a prima facie case of retaliation within the burden-shifting framework used to evaluate these claims. The Supreme Court has issued no controlling interpretation of the term, and courts have consequently struggled to approach a consensus. A minority of courts have urged that only ultimate employment decisions such as firing, hiring, promoting, or refusing to hire represent adverse employment actions, but this approach has more than its share of problems. This test lacks flexibility and assumes that retaliatory conduct short of these ultimate decisions does not warrant protection under Title VII. The statute's language and purpose, as well as relevant Supreme Court decisions, dictate otherwise.

Other courts, recognizing the difficulties presented by the ultimate employment decision standard, have held that lesser retaliatory acts may represent adverse employment actions. Some of these courts have gone to an extreme, making the determination on a case-by-case basis, or as the EEOC would have it, practically anything an employer does that negatively affects a protected employee will constitute an adverse employment action. This approach alleviates some fears posed by the ultimate employment decision test, namely, allowing for more flexibility, but the flexibility allowed for produces too much uncertainty for the approach to have practical efficacy. With no reasonably clear definition of adverse employment action, this approach fails for lack of consistent application.

The one remaining middle ground standard alluded to by some courts employs balancing that is needed to give flexibility and consistency to courts' determinations. This approach stresses that courts will find employer actions adverse when that action materially affects the terms and conditions of the employee's status. This test allows flexibility in developing what constitutes employment "terms and conditions," and it also ensures consistency by requiring that any affects on the employee must be "material." Thus, courts will only consider actions that have a significant and adverse effect on the employee's status as adverse employment actions. This approach also furthers Title VII's purpose by encouraging only those employees with valid claims to file suit to protect their rights. This, in turn, results in fairness to employers, who will only be subjected to a retaliation claim when it is warranted.