DETERRENCE V. MATERIAL HARM: FINDING THE APPROPRIATE STANDARD TO DEFINE AN “ADVERSE ACTION” IN RETALIATION CLAIMS BROUGHT UNDER THE APPLICABLE EQUAL EMPLOYMENT OPPORTUNITY STATUTES

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I. INTRODUCTION

As we enter a new millennium, the Equal Employment Opportunity Commission’s (EEOC or Commission) ongoing effort to eradicate both workplace discrimination and retaliation faces an uphill battle as the number of retaliation claims continues to increase.¹ A thorough analysis of circuit court decisions involving claims of workplace retaliation reveals that, since enactment of the Civil Rights Act of 1991, many circuits have narrowed the scope of the relevant anti-retaliation provisions by requiring that an adverse action following lawfully protected equal employment opportunity (EEO) activity constitutes either an “ultimate employment action” or results in “material harm” to the charging party’s “terms, conditions or privileges of employment.”²

¹. Commission statistics from the private sector reveal that the total number of retaliation claims has risen steadily throughout the 1990’s. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, CHARGE STATISTICS FISCAL YEAR 1992 THROUGH FISCAL YEAR 2000 (2001), available at www.eeoc.gov/stats/charges.html (last modified Jan. 18, 2001). In Fiscal Year 1992, 15.3% of all charges included a charge of retaliation. Id. In Fiscal Year 2000, 27.1% of all charges filed included a charge of retaliation. Id.

². Civil Rights Act of 1991, 42 U.S.C. § 2000e (1994 & Supp. IV 1998). As this article will demonstrate, the majority of decisions construing the “adverse action” element of a prima facie case of retaliation narrowly have been issued since the Civil Rights Act of 1991 was enacted. See infra Part II. At least one commentator has suggested that courts never had occasion to question what constitutes an adverse action because the penalties were not substantial to the employer prior to the enactment of the Civil Rights Act of 1991. See Donna Smith Cude & Brian M. Steger, Does Justice Need Glasses? Unlawful
The EEOC has consistently argued that in assessing whether conduct constitutes an adverse action in a claim of retaliation, courts should determine whether the conduct would reasonably deter a charging party or others from engaging in EEO activity.\(^3\) Notwithstanding the EEOC's position, many circuits require the plaintiff to show that the adverse action either rose to the level of an "ultimate employment action," such as failing to hire, failing to promote, terminating, demoting or denying leave, or resulted in "material" harm to the "terms, conditions, or privileges of employment."\(^4\)

Requiring that an adverse action constitutes either an "ultimate employment action" or results in "material" harm to a term, condition, or privilege of employment in order to establish a prima facie case of retaliation is inconsistent with the plain language of the anti-retaliation provisions of Title VII of the Civil Rights Act of 1964 (Title VII)\(^5\) and related anti-discrimination statutes.\(^6\) Further, such a requirement contravenes the broad remedial goals of these statutes and is inapposite to the more liberal construction courts have given analogous anti-retaliation provisions in other federal statutes enacted to protect employee rights. The Supreme Court in Robinson v. Shell Oil Company\(^7\) interpreted the anti-retaliation provision of Title VII broadly, specifically stating that individuals who engage in EEO activity rely on the anti-retaliation provisions in order to maintain unfettered access to the EEO process.\(^8\) As this article will establish, courts should broadly interpret the threshold, or adverse action requirement in a claim of retaliation under the applicable anti-discrimination statutes. Otherwise, employers will continue to take

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\(^7\) 519 U.S. 337 (1997).

\(^8\) Id. at 346.
retaliatory actions with impunity, individuals will be deterred from filing charges of discrimination, and ultimately, the EEOC’s ability to enforce anti-discrimination laws will be hindered.\(^9\)

Part I introduces the claim of retaliation by setting forth the relevant language in Title VII and by reviewing the Supreme Court’s burden-shifting analysis under the applicable anti-discrimination statutes. Part II summarizes how each circuit has construed the adverse action element required to establish a prima facie case of retaliation. Part III argues that courts should adopt the EEOC’s deterrence standard to determine what constitutes an adverse action in a prima facie case of retaliation because it is consistent with both the plain language and the broad remedial goals of the applicable anti-retaliation provisions. Part IV argues that courts should not require that retaliation result in tangible harm or rise to the level of severe or pervasive conduct in order to state a claim because retaliatory acts which fall short of these thresholds may nonetheless effectively deter charging parties or others from engaging in EEO activity.

A. Defining a Claim of Retaliation

Title VII and the other EEO statutes prohibit both discrimination and retaliation in the private sector.\(^10\) Because courts have interpreted the anti-retaliation provisions of other anti-discrimination statutes by applying standards developed for analyzing Title VII claims, this article focuses on retaliation claims brought under section 704(a) of Title VII.\(^11\)

B. Title VII’s Relevant Language

Title VII’s general prohibition against discrimination, section 703(a)(1), provides, in relevant part:

It shall be an unlawful employment practice for an employer to

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11. The Supreme Court has applied Title VII principles to ADEA claims and noted that “the substantive provision of the ADEA ‘were derived *in haec verba* from Title VII.’” Trans World Airlines v. Thurston, 469 U.S. 111, 121 (1985) (quoting Lorillard v. Pons, 434 U.S. 575, 584 (1978)); *see also* Brown v. Brody, 199 F.3d 446, 456 n.10 (D.C. Cir. 1999) (stating that the standards used to evaluate Title VII claims are applied to claims under the ADA, ADEA and ERISA); Stewart v. Happy Herman’s Cheshire Bridge, Inc., 117 F.3d 1278, 1287 (11th Cir. 1997) (noting that anti-retaliation provision under ADA is similar to Title VII, and Title VII framework would be applied to ADA retaliation claim); Newman v. GHS Osteopathic, Inc., 60 F.3d 153, 156-57 (3d Cir. 1995) (collecting cases which have concluded that Title VII analysis should apply to ADA claims).
fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . . 12

When drafting the anti-retaliation provision of Title VII, Congress chose to use language different from the general prohibition. Section 704(a) of Title VII states that it is an unlawful employment practice for an employer "to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."13 The relevance of the phrase "terms, conditions, or privileges of employment" which is contained in the anti-discrimination provision (section 703(a)) but not the anti-retaliation provision (section 704(a)) will become evident when analyzing how the anti-retaliation provision of Title VII has been construed by the circuits.14

C. Establishing and Proving a Claim of Retaliation

To establish a prima facie case of retaliation based on circumstantial evidence,15 a plaintiff must establish that: (1) he or she engaged in protected activity,16 (2) he or she experienced an adverse employment action, and (3) there was a causal link between the protected activity and

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It shall be an unlawful employment practice for an employer . . . to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.


14. See infra Parts II.A-L.


16. EEOC COMPLIANCE MANUAL, supra note 3, at 8-4 - 8-5. Under section 704(a), a charging party engages in protected activity by either opposing a practice made unlawful by one of the employment discrimination statutes (generally referred to as the "opposition" clause), or by filing a charge, testifying, assisting, or participating in any manner in an investigation, preceding, or hearing under the applicable anti-discrimination statute (generally referred to as the "participation" clause). Id.
the adverse action.\textsuperscript{17}

When a plaintiff establishes a prima facie case of retaliation, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its action or actions.\textsuperscript{18} Ultimately, the burden remains with the plaintiff to demonstrate, by a preponderance of the evidence, that the employer’s reason was pretextual and that retaliatory animus motivated the employer’s action.\textsuperscript{19} While courts and commentators have wrestled with divergent case law concerning each of the elements of a prima facie case of retaliation,\textsuperscript{20} this article will focus on the second element of a prima facie case of retaliation, that the plaintiff establish that the employer was aware that the plaintiff engaged in EEO activity. See id. at 377 n.22 ("The Second Circuit requires a plaintiff to prove that her employer knew of her participation in the protected activity."); \textit{see also} Morris v. Oldham County Fiscal Ct., 201 F.3d 784, 792 (6th Cir. 2000) (stating that the exercise of protected rights must be known to the defendant to prove a prima facie case of retaliation). Whether or not set forth as a separate element, knowledge of the plaintiff’s EEO activity by the employer is a prerequisite in any claim of retaliation, as a plaintiff must establish a causal connection between his or her protected activity and the adverse action at issue. \textit{See} Cude & Steger, \textit{supra} note 2, at 377, 380. Moreover, there can be no causal connection if the plaintiff cannot demonstrate that the employer was aware of plaintiff’s protected activity at the time the employer took an adverse action. \textit{Id.} at 377. Where direct evidence of discrimination is present, courts may instead examine whether or not an employer has established a mixed motive by demonstrating that it also had a legitimate motive for its actions. Price Waterhouse v. Hopkins, 490 U.S. 228, 245-46 (1989). The Civil Rights Act of 1991, however, overruled the portion of \textit{Price Waterhouse} precluding employer liability if an employer establishes a mixed motive for its actions. Specifically, if an employer establishes that legitimate motives for its otherwise unlawful action also motivated its actions, then the employer is still liable, although damages will be limited. 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B). Since the Civil Rights Act of 1991 did not specifically refer to claims under section 704(a) when it overruled \textit{Price Waterhouse}, whether the act applies to section 704(a) claims of retaliation remains unanswered. See Eve I. Klein & Rosemary Halligan, \textit{A Rising Tide of Retaliation Claims Challenges Employers to Adopt Adequate Preventive Measures}, 71 N.Y. St. B.J. 51, 54-56 (1999) (discussing mixed motive retaliation claims and citing relevant cases interpreting section 704(a) in mixed motive cases); Douglas E. Ray, \textit{Title VII Retaliation Cases: Creating a New Protected Class}, 58 U. Pitt. L. Rev. 405, 425 n.153 (1997) ("Congress explicitly included section 704 retaliation in its 1991 expansion of remedies but did not mention retaliation in . . . [the] sections dealing with proof of discrimination.") (citations omitted).

\textsuperscript{17} Cude & Steger, \textit{supra} note 2, at 377. Some courts also require, as a separate element of a prima facie case of retaliation, that the plaintiff establish that the employer was aware that the plaintiff engaged in EEO activity. See id. at 377 n.22 ("The Second Circuit requires a plaintiff to prove that her employer knew of her participation in the protected activity."); \textit{see also} Morris v. Oldham County Fiscal Ct., 201 F.3d 784, 792 (6th Cir. 2000) (stating that the exercise of protected rights must be known to the defendant to prove a prima facie case of retaliation). Where direct evidence of discrimination is present, courts may instead examine whether or not an employer has established a mixed motive by demonstrating that it also had a legitimate motive for its actions. Price Waterhouse v. Hopkins, 490 U.S. 228, 245-46 (1989). The Civil Rights Act of 1991, however, overruled the portion of \textit{Price Waterhouse} precluding employer liability if an employer establishes a mixed motive for its actions. Specifically, if an employer establishes that legitimate motives for its otherwise unlawful action also motivated its actions, then the employer is still liable, although damages will be limited. 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B). Since the Civil Rights Act of 1991 did not specifically refer to claims under section 704(a) when it overruled \textit{Price Waterhouse}, whether the act applies to section 704(a) claims of retaliation remains unanswered. See Eve I. Klein & Rosemary Halligan, \textit{A Rising Tide of Retaliation Claims Challenges Employers to Adopt Adequate Preventive Measures}, 71 N.Y. St. B.J. 51, 54-56 (1999) (discussing mixed motive retaliation claims and citing relevant cases interpreting section 704(a) in mixed motive cases); Douglas E. Ray, \textit{Title VII Retaliation Cases: Creating a New Protected Class}, 58 U. Pitt. L. Rev. 405, 425 n.153 (1997) ("Congress explicitly included section 704 retaliation in its 1991 expansion of remedies but did not mention retaliation in . . . [the] sections dealing with proof of discrimination.") (citations omitted).

\textsuperscript{18} \textit{McDonnell Douglas Corp.}, 411 U.S. at 802.

\textsuperscript{19} \textit{Id.} at 804.

case of retaliation, namely, what constitutes an adverse employment action.

II. DEFINING "ADVERSE ACTION" IN SECTION 704(a) RETALIATION CLAIMS: A CIRCUIT BY CIRCUIT ANALYSIS

Title VII neither defines the term "discriminate," which is found in both Title VII's anti-discrimination and anti-retaliation provisions, nor the phrase "terms, conditions, or privileges of employment," which is found only in Title VII's anti-discrimination provision. Additionally, the Supreme Court has never addressed what constitutes "discrimination" within the meaning of Title VII's anti-retaliation provision, section 704(a), leaving the question to be addressed by the circuits. While the circuit courts agree that employment decisions involving actions such as hiring, discharge, compensation, leave, promotion and demotion constitute adverse actions under section 704(a), the courts disagree about whether less egregious employment actions (i.e., poor performance evaluations, lateral transfers, intermediate acts of discipline and harassment) constitute adverse actions under section 704(a).

A. The First Circuit

The First Circuit broadly construes the adverse action element in section 704(a) claims. In Randlett v. Shalala, the court noted that even prima facie retaliation case; Ray, supra note 17 (focusing on the developments affecting section 704(a) of Title VII).

21. 42 U.S.C. § 2000e (excluding these terms in the "Definitions" section of Title VII).

22. See, e.g., Merritt v. Dillard Paper Co., 120 F.3d 1181, 1191 (11th Cir. 1997) (finding that a plaintiff withstood summary judgment on a retaliation claim where his employer fired him for testifying in a sexual harassment case brought by another employee, even though the plaintiff was the alleged harasser in that case); Hosaini v. W. Mo. Med. Ctr., 97 F.3d 1085, 1089 (8th Cir. 1996) (holding that a terminated employee could survive summary judgment even though her case was based largely on circumstantial evidence); Alexander v. Gerhart Enters., Inc., 40 F.3d 187, 195 (7th Cir. 1994) (upholding the district court's finding of an adverse employment action despite conflicting testimony on whether or not the employee was actually fired); Wyatt v. City of Boston, 35 F.3d 13, 15 (1st Cir. 1994) (explaining that other adverse actions in addition to discharge are covered by the anti-retaliation provision of Title VII); Robinson v. S.E. Pa. Transp. Auth., 982 F.2d 892, 894-95 (3d Cir. 1993) (discharging an employee after a series of protected activities constituted an adverse employment action); Ruggles v. Cal. Polytechnic State Univ., 797 F.2d 782, 785-86 (9th Cir. 1986)(addressing the elimination of a tenure-track teaching position); Barela v. United Nuclear Corp., 462 F.2d 149, 152 (10th Cir. 1972) (holding against an employer in a failure-to-hire case).

23. See Welsh v. Derwinski, 14 F.3d 85, 86 (1st Cir. 1994) (reducing duties prior to a desk audit, thus eliminating the employee's potential for a status upgrade, constitutes adverse action); Wyatt, 35 F.3d at 15 (finding that termination, denial of promotion, negative performance evaluation, involuntary transfer, and denial of permission to allow plaintiff to select class curriculum constituted adverse actions under section 704(a)).
though section 704(a) does not limit retaliation to the “terms, conditions, or privileges of employment” like Title VII’s anti-discrimination provision (section 703(a)), the court would incorporate by reference the “terms, conditions and privileges of employment” qualifier of section 703(a) into the adverse action determination in a section 704(a) retaliation claim. Although the court in Randlett expressed concern that a broad interpretation of the adverse action element of a Title VII retaliation claim may encourage employees, “who earlier filed complaints and are now aggrieved by slights,” to file “whimsical claims,” it nonetheless concluded that an employer’s subsequent refusal to transfer an employee after the employee had filed an EEOC complaint is not automatically outside of Title VII’s protection.

B. The Second Circuit

The Second Circuit takes a case-by-case approach to analyzing retaliation claims and has stated that adverse employment actions must allege “material” harm to a term, condition, or privilege of employment in order to state a claim under section 704(a).

24. 118 F.3d 857 (1st Cir. 1997).
25. Id. at 862 (concluding that denial of a transfer to a similar position in another facility with the same pay and benefits constitutes adverse action under section 704(a)). In reaching its conclusion, the First Circuit cited to the Supreme Court’s decision in Hishon v. King & Spaulding, 467 U.S. 69, 75-76 (11th Cir. 1984), wherein the court concluded that the phrase “terms and conditions” in section 703(a) is open-ended and could include opportunities that are not strictly entitlements. Randlett, 118 F.3d at 862.
26. Randlett, 118 F.3d at 862; see also Serrano-Cruz v. DFI P.R., Inc., 109 F.3d 23, 26 (1st Cir. 1997) (“Common sense suggests that a job transfer without a reduction in salary and benefits may, under certain circumstances, be unacceptable to a reasonable person who is overqualified and humiliated by an extreme demotion, or under qualified and essentially ‘set up to fail’ in a new position.”).
27. See Weeks v. New York State, No. 00201, 2001 WL 1345057, at *4-6 (2d Cir. Oct. 31, 2001) (affirming a motion to dismiss because the alleged claims, including the filing of a grievance, receiving a notice of discipline and a counseling memo, and transferring the plaintiff to another office and relocating her files, did not comprise material adverse actions); Garber v. N.Y. City Police Dept., 159 F.3d 1346, No. 97-9191, 1998 WL 514222, at *4 (2d Cir. June 12, 1998) (transferring a police officer from the Chaplain’s unit to the recruitment section after alleging bias did not constitute material adverse action because the officer retained the same pay, benefits, hours worked, job title, and opportunities for promotion); Wanamaker v. Colombian Rope Co., 108 F.3d 462, 466-67 (2d Cir. 1997) (barring a terminated employee from using the office and phone prior to departure presented only a “minor, ministerial stumbling block toward securing future employment”); United States v. N.Y. City Transit Auth., 97 F.3d 672, 677 (2d Cir. 1996) (“Reasonable defensive measures do not violate the anti-retaliation provision of Title VII, even though such steps are adverse to the charging employee and result in differential treatment.”); Johnson v. Palma, 931 F.2d 203, 208-10 (2d Cir. 1991) (prohibiting employees from utilizing the union’s grievance arbitration mechanism after filing an EEOC charge violates relevant anti-retaliation provisions); Dominic v. Consol. Edison Co. of N.Y., Inc., 822 F.2d 1249, 1254-
In *Torres v. Pisano*, the plaintiff alleged that her employer had unlawfully retaliated against her when two management officials demanded that she drop EEOC charges she had filed against the employer. The plaintiff also contended that these demands constituted unlawful retaliation. In concluding that management’s request did not constitute an adverse action, the court stated:

It is conceivable that a demand to withdraw an EEOC charge could constitute retaliation, if it truly had so great an effect on the plaintiff as to alter the conditions of her employment in a material way. For instance, repeated and forceful demands accompanied even by veiled suggestions that failure to comply would lead to termination, discipline, unpleasant assignments or the like, might in some circumstances affect an employee’s working conditions. But here . . . [plaintiff] admits that . . . [the management officials] did not repeat their requests, that she in fact refused their requests, and that she suffered no negative consequences as a result of having turned them down. As such, . . . [plaintiff] did not experience an adverse employment action.

However, in *Preda v. Nissho Iwai American Corp.*, the plaintiff, an office assistant, argued, among other things, that after alleging bias against a corporate manager, he was: (1) excluded from departmental meetings and outings with his clients; (2) required to perform largely clerical tasks when he had previously been working on business development for his employer; (3) denied a transfer to another position specifically because he complained of bias; and (4) issued “good” or “fully satisfactory” performance ratings despite having previously been rated “outstanding.” The Second Circuit vacated the lower court’s conclusion that the plaintiff failed to establish a genuine issue of material fact that he experienced adverse employment actions based on the above allegations, and noted that Title VII’s language prohibiting discrimination in the “terms, conditions, or privileges of employment . . . is not limited to ‘pecuniary emoluments,’ but includes discriminatory-motivated diminution of duties.”

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55 (2d Cir. 1987) (concluding that the evidence supported a jury verdict of retaliation under the ADEA where an employee, who was placed under the supervision of an alleged discriminating official, received lower evaluations, and was deluged with work which was impossible to complete, thus leading to discharge). *But see* Rodriguez v. Bd. of Educ., 620 F.2d 362, 366 (2d Cir. 1980) (transferring an art teacher from junior high school to elementary school constituted an adverse employment action).

28. 116 F.3d 625 (2d Cir. 1997).
29. *Id.* at 629.
30. *Id.*
31. *Id.* at 640.
32. 128 F.3d 789 (2d Cir. 1997).
33. *Id.* at 790-91.
34. *Id.* at 791 (citation omitted) (quoting de la Cruz v. N.Y. City Human Res. Admin.
In *Richardson v. New York State Department of Correctional Service*, the Second Circuit recognized a split in the circuits as to whether an allegation of a hostile environment based on retaliation can satisfy the adverse action element and establish a prima facie case of retaliation under the ADEA. The court adopted the view that "unchecked retaliatory co-worker harassment, if sufficiently severe, may constitute [an] adverse employment action so as to satisfy the . . . [adverse action] prong of the retaliation prima facie case." In reaching this conclusion, the court recognized that "Title VII does not 'define adverse employment action solely in terms of job termination or reduced wages and benefits, and that less flagrant reprisals by employers may indeed be adverse.'" The court then reaffirmed its own prior decisions, which held that an adverse action must have a material impact on a term, condition or privilege of employment. The court also noted that if an employer knows about, but fails to correct, co-worker hostility, then the employer may be liable for a hostile environment based on retaliatory animus, like a claim of harassment based on race or sex.

C. The Third Circuit

The Third Circuit has not specifically set a threshold for what constitutes an adverse action in a retaliation claim under Title VII. It has, however, concluded that such claims are only cognizable if an adverse action impacts a term, condition, or privilege of employment. In *Robinson v. City of Pittsburgh*, the plaintiff alleged that after filing a complaint of sexual harassment, she endured a series of unsubstantiated oral reprimands and derogatory comments by the alleged harasser. The Third Circuit concluded that these unsubstantiated oral reprimands and derogatory comments did not rise to the level of an adverse employment action under section 704(a), and stated that:

Retaliatory conduct other than discharge or refusal to rehire is

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35. 180 F.3d 426 (2d Cir. 1999).
36. *Id.* at 445-46.
37. *Id.* at 446.
38. *Id.* (quoting Wanamaker v. Colombian Rope Co., 108 F.3d 462, 466 (2d Cir. 1997)).
39. *Id.*
40. *Id.*
41. 120 F.3d 1286 (3d Cir. 1997).
42. *Id.* at 1300.
thus proscribed by Title VII only if it alters the employee’s “compensation, terms, conditions, or privileges of employment,” deprives him or her of “employment opportunities,” or “adversely affect[s] his [or her] status as an employee.” It follows that ‘not everything that makes an employee unhappy’ qualifies as retaliation, for “[o]therwise, minor and even trivial employment actions that ‘an irritable, chip-on-the-shoulder employee’ did not like would form the basis of a discrimination suit.”

The court also noted that “[c]ourts have operationalized the principle that retaliatory conduct must be serious and tangible enough to alter an employee’s compensation, terms, conditions, or privileges of employment into the doctrinal requirement that the alleged retaliation constitute ‘adverse employment action.’” The court then stated 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 violation of [section 703(a)].”

In Shaner v. Synthes (USA), the plaintiff alleged that he was denied training, received negative performance reviews, endured harassment when

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43. Id. (quoting Smart v. Ball State Univ., 89 F.3d 437, 441 (7th Cir. 1996)).
44. Id. (quoting Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 273 (7th Cir. 1996)); see also Cardenas v. Massey, No. 00-5225, 2001 WL 1230325, at *10 (3d Cir. filed Oct. 16, 2001) (citing Robinson, 120 F.3d at 1300, the court assumed, arguendo, that a constructive discharge claim constituted an adverse employment action).
45. Id. at 1300-01. The Third Circuit also suggested that this standard could apply to post-employment actions.
46. 204 F.3d 494 (3d Cir. 2000)
his co-workers increased the temperature of the office on four or five occasions to exacerbate this disability, and was ultimately terminated because of his disability in violation of the ADA.\textsuperscript{47} The Third Circuit concluded that the four or five isolated instances of alleged harassment did not rise to the level of an adverse employment action necessary to maintain a claim of either discrimination or retaliation.\textsuperscript{48} Concerning the negative performance evaluations, the court concluded that the plaintiff failed to establish a causal connection between the negative evaluations and either his disability or his EEO activity.\textsuperscript{49} In reaching this conclusion, the court stated:

\textit{[W]e also make the following observations with respect to performance evaluations. While it is possible that a manager might make a poor evaluation to retaliate against an employee for making an EEOC charge, still it is important that an employer not be dissuaded from making what he believes is an appropriate evaluation by a reason of a fear that the evaluated employee will charge that the evaluation was retaliatory. In this regard, we are well aware that some employees do not recognize their deficiencies and thus erroneously may attribute negative evaluations to an employer’s prejudice. Accordingly, in a case like this in which the circumstances simply cannot support an inference that the evaluations were related to the EEOC charges, a court should not hesitate to say so.}\textsuperscript{50}

In \textit{Mondzelewski v. Pathmark Stores, Inc.},\textsuperscript{51} the plaintiff alleged that prior to engaging in EEO activity, he arrived for work between 6:00 a.m. and 8:00 a.m. and finished by 2:00 p.m., but he was assigned to a “punishment” shift from 9:30 a.m. to 6:00 p.m. in retaliation for his having engaged in EEO activity.\textsuperscript{52} The district court concluded that the minimal change in working hours did not constitute an “extreme hardship” because most of the workforce worked the same or similar hours.\textsuperscript{53} The Third Circuit disagreed, stating that the plaintiff “proffered evidence sufficient to establish for present purposes that the change in his schedule may have altered the ‘terms, conditions, or privileges’ of his employment in violation of [the ADA’s anti-retaliation provision].”\textsuperscript{54} The court stated that “[a]ssigning an employee to an undesirable schedule can be more than a

\begin{itemize}
\item \textsuperscript{47} \textit{Id.} at 499.
\item \textsuperscript{48} \textit{Id.} at 506.
\item \textsuperscript{49} \textit{Id.} at 505.
\item \textsuperscript{50} \textit{Id.}
\item \textsuperscript{51} 162 F.3d 778 (3d Cir. 1998).
\item \textsuperscript{52} \textit{Id.} at 780.
\item \textsuperscript{53} \textit{Id.} at 786-87 (quoting Mondzelewski v. Pathmark Stores, Inc. 976 F. Supp. 277, 284 (D. Del. 1997))
\item \textsuperscript{54} \textit{Id.} at 787 (quoting 42 U.S.C. § 12203(a) (1994)).
\end{itemize}
"trivial" or minor change in the employee's working conditions." The court further noted that the district court failed to analyze the ADA's broad anti-retaliation provision and stated that "[n]othing in the ADA suggests that employers are prohibited from taking only those retaliatory actions that impose an 'extreme hardship.'"

In *Dilenno v. Goodwill Industries of Mid-Eastern Pennsylvania*, the Third Circuit reversed the district court's grant of summary judgment for the defendant, concluding that the plaintiff's allegation that her transfer to a job which the employer knew she could not do may constitute an adverse action taken in retaliation for her complaints about sexual harassment. In reaching this conclusion, the Third Circuit stated:

To be clear, we hold that a transfer to a job that an employer knows an employee cannot do may constitute adverse employment action. We base our holding on the principle that what constitutes retaliation depends on what a person in the plaintiff's position would reasonably understand. It is important to take a plaintiff's job-related attributes into account when determining whether a lateral transfer was an adverse employment action. An inability to do a particular job is job-related, unlike the desire to live in a certain city.

The court found that the plaintiff had performed her prior position satisfactorily for two years, and that the decision to transfer her to a position the employer allegedly knew she could not do constituted an adverse action under section 704(a), even though her pay and benefits remained the same and the jobs were similar.

**D. The Fourth Circuit**

The Fourth Circuit requires that retaliatory acts adversely affect a term, condition, or privilege of employment in order to state a claim of retaliation. In *Von Gunten v. Maryland*, the court distinguished a prior

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55. *Id.* at 788 (quoting *Hampton v. Borough of Tinton Falls Police Dep't*, 98 F.3d 107, 116 (3d Cir. 1996)).
56. *Id.* at 788-89.
57. *Id.* at 788.
58. 162 F.3d 235 (3d Cir. 1998).
59. *Id.* at 236.
60. *Id.*
61. *Id.; see also Jones v. Sch. Dist. of Phila.*, 198 F.3d 403, 411-12 (3d Cir. 1999) (finding that transferring a teacher to a school with a poor reputation, and assigning the teacher to an undesired position after he requested and was denied the opportunity to teach physics could constitute an adverse action under section 703(a)); *Torre v. Casio, Inc.*, 42 F.3d 825, 831 n.7 (3d Cir. 1994) (finding that a transfer, even without loss of pay or benefits, may constitute an adverse employment action under section 703(a)).
decision, Page v. Bolger, by noting that in Page, the court interpreted section 717(a) of Title VII and its holding thus did not apply to claims of retaliation under section 704(a). The court also noted that its prior holdings “teach that conduct short of ‘ultimate employment decisions’ can constitute adverse employment action for the purposes of [section 704(a)]” and that “retaliatory harassment” can also comprise adverse employment action. The court affirmed the district court’s conclusions that none of the allegations by the plaintiff comprised adverse actions sufficient to state a claim of retaliation.

In Page, the Fourth Circuit rejected the plaintiff’s argument that the prima facie case in a non-selection claim should be modified, and in so holding, noted that:

[Int] It is obvious to us that there are many interlocutory or mediate decisions having no immediate effect upon employment conditions which were not intended to fall within the direct proscriptions of § 717 and comparable provisions of Title VII. We hold here merely that among latter are mediate decisions such as those concerning composition of the review committees in the instant case that are simply steps in a process for making such obvious end-decisions as those to hire, to promote, etc.
In *Munday v. Waste Management of North America, Inc.*, the Fourth Circuit reversed a finding of retaliation and concluded that the plaintiff failed to establish a prima facie case of retaliation under section 704(a). In *Munday*, the plaintiff filed a sexual harassment and sex discrimination complaint and was subsequently terminated for alleged insubordination. Thereafter, the plaintiff and employer executed a settlement agreement wherein the employer agreed to reinstate her employment and not retaliate against her. Prior to returning to work, however, the employer's general manager instructed the plaintiff's co-workers to ignore her, spy on her, and report anything to him because he wanted to fire her. In addition to being ignored and spied on, the plaintiff alleged she was assigned to a route that she did not request and was subjected to other work-related incidents of harassment. Ultimately, the plaintiff went on leave for panic-related attacks, sought and obtained another job, and left her employer. On appeal, the Fourth Circuit reversed the district court's finding of retaliation, stating that "as a matter of law, this scenario does not rise to the level of an adverse employment action for Title VII purposes." It clarified that the circuit had never held the conduct of ignoring and spying on an employee to constitute an adverse action without evidence of any harm to a term, allegations consisting of a denial of training, denial of consideration for a promotion, and adverse working conditions did not constitute ultimate employment actions under section 704(a)); see also *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997) (concluding that alleged acts of hostility by fellow employees, theft of employee's tools, and resulting anxiety were not adverse employment actions and that an alleged visit by supervisors to employee's home, a verbal threat of termination, a reprimand for not being at an assigned station, and placing employee on "final warning" were not adverse actions constituting an ultimate employment decision). The Fourth Circuit specifically concluded that *Page* provides no such authority for such a conclusion. *Von Gunten*, 243 F.3d at 866 n.3; see also *Brown v. Brody*, 199 F.3d 446, 455 (D.C. Cir. 1999) (stating that civil actions under section 717 are governed by the same principles applied in section 703(a) claims). In addition, commentators have criticized courts' application of *Page* in section 704(a) claims. See *Essary & Friedman*, supra note 20, at 135-36 (noting the courts' reliance on *Page* when assessing claims under Section 704(a) is misplaced because *Page* was not a retaliation claim); *Lidge*, supra note 20, at 360-63 (arguing that *Page*'s reliance on Supreme Court decisions for the proposition that only ultimate employment actions are proscribed under Title VII is misplaced).

69. 126 F.3d 239 (4th Cir. 1997).
70. *Id.* at 243.
71. *Id.* at 241.
72. *Id.*
73. *Id.*
74. *Id.* at 242.
75. *Id.*
76. *Id.* at 243. The Fourth Circuit affirmed the district court's conclusion that the employer breached the settlement agreement. *Id.* at 245. Subsequently, in *Von Gunten*, the court specifically noted that its holding in *Munday* did not stand for the proposition that adverse actions must be ultimate employment decisions. *Von Gunten v. Md.*, 243 F.3d 858, 865 (4th Cir. 2001).
condition, or privilege of employment.\textsuperscript{77}

Subsequently, in \textit{Boone v. Goldin},\textsuperscript{78} the Fourth Circuit addressed a plaintiff’s claim that she was retaliated against by being assigned to work a more stressful position in a wind tunnel after settling an EEO complaint.\textsuperscript{79} Citing to \textit{Page} and distinguishing the Supreme Court’s recent decision in \textit{Burlington Industries v. Ellerth}\textsuperscript{80} concerning what constitutes a “tangible employment action,” the court noted that the plaintiff’s claim of additional stress was insufficient to establish that the working conditions changed sufficiently to demonstrate that her reassignment violated Title VII’s anti-retaliation provision.\textsuperscript{81}

\textbf{E. The Fifth Circuit}

The Fifth Circuit narrowly construes the adverse action element in claims brought under section 704(a) by consistently concluding that Title VII is intended to address only ultimate employment decisions such as hiring, granting leave, discharging, promoting, and compensating, and is not intended to address every decision an employer may make which could have some tangential effect on an employee’s terms, conditions, or privileges of employment.\textsuperscript{82}

\begin{itemize}
\item \textsuperscript{77} \textit{Munday} 126 F.3d at 243. One panel member dissented and argued that the employer took an adverse action against the plaintiff by fostering a work environment so intolerable that it resulted in the plaintiff being compelled to quit. \textit{Id.} at 246 (Heaney, J., concurring and dissenting).
\item \textsuperscript{78} 178 F.3d 253 (4th Cir. 1999).
\item \textsuperscript{79} \textit{Id.} at 255.
\item \textsuperscript{80} 524 U.S. 742 (1998).
\item \textsuperscript{81} \textit{Boone}, 178 F.3d at 255-56; \textit{see also} \textit{Gilyard} v. U.S. Dep’t of Energy, 208 F.3d 209, No. 97-2362, 2000 WL 265621, at *2 (4th Cir. Mar. 10, 2000). (“Employees are not ‘guaranteed a working environment free of stress, … [d]issatisfaction with work assignments, a feeling of being unfairly criticized, or difficult or unpleasant working conditions.’”) (quoting \textit{Carter} v. Ball, 33 F.3d 450, 459 (4th Cir. 1994). The court acknowledged that while \textit{Carter} involved a discharge claim in violation of section 703(a), its conclusion applied equally to retaliation claims brought under section 704(a). \textit{Gilyard}, 2000 WL 265621, at *2.
\item \textsuperscript{82} \textit{See} \textit{Watts} v. Kroger Co., 170 F.3d 505, 511-12 (5th Cir. 1999) (assigning additional job duties did not impact salary, and thus did not comprise an ultimate employment decision); \textit{Burger} v. Cent. Apt. Mgmt., Inc., 168 F.3d 875, 879 (5th Cir. 1999) (denying a lateral transfer, which would have no impact on compensation or benefits, is not an ultimate employment action under section 704(a)); \textit{Webb} v. Cardiothoracic Surgery Assocs. of N. Tex., 139 F.3d 532, 540 (5th Cir. 1998) (concluding that rude treatment by an employer following a complaint of sexual harassment did not constitute ultimate employment action); \textit{Dollis} v. Rubin, 77 F.3d 777, 781-82 (5th Cir. 1995) (finding that denial of training or consideration for promotion, and adverse working conditions do not constitute ultimate employment actions under section 704(a)); \textit{DeAngelis} v. El Paso Mun. Police Officer’s Assoc., 51 F.3d 591, 597 (5th Cir. 1995) (noting that three printed references in an employer newsletter stating that plaintiff had filed EEOC charge did not constitute retaliation). \textit{But}
In *Mattern v. Eastman Kodak Co.*, the plaintiff alleged that after complaining about sexual harassment, she experienced retaliation by her supervisor and co-workers when, among other things: (1) after she went home sick, her supervisors went to her home to instruct her to return to work and report to the medical department if her illness was work-related; (2) she was reprimanded for not being at her work station when at the time, she was reporting workplace hostilities to the employer's human resources department; (3) her supervisors and co-workers were hostile, ignored her, made verbal slights toward her, and broke into her locker and stole her tools; (4) her supervisor threatened to terminate her; (5) her work was reviewed more critically and, as a result, she was denied a pay increase; and (6) she was threatened with discipline for alleged work deficiencies when her performance had previously been praised by the same individuals. In district court, the plaintiff prevailed in her retaliation claim and was awarded compensatory damages totaling $50,000.

On appeal, the Fifth Circuit reversed, holding that the above-cited actions do not constitute ultimate employment decisions because they "lack consequence," and therefore concluding that the plaintiff failed to establish that she experienced an adverse employment action. The court stated that "[t]o hold otherwise would be... [an unwarranted expansion of] the definition of 'adverse employment action' to include events such as disciplinary filings, supervisor's reprimands, and even poor performance by the employee—anything which might jeopardize employment in the future." The court also stated:

Doubtless, some of these actions may have had a tangential effect on conditions of employment; but, as in... [plaintiff's] case, an ultimate employment decision had not occurred. The employee could only prove examples of the "many interlocutory or mediate decisions having no immediate effect upon employment conditions" which therefore were "not intended to fall within the direct proscriptions... of Title VII."

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*see* Walsdorf *v.* Bd. of Comm'rs, 857 F.2d 1047, 1053 (5th Cir. 1988) (reassigning a police officer from street duties to a desk job with same pay and benefits, but reporting to a secretary, removing special radio from vehicle, excluding officer from a meeting, preventing officer from attending a seminar, and ordering officer from the scene of an accident supported a finding of retaliation).

83. 104 F.3d 702 (5th Cir. 1997)
84. *Id.* at 705-06.
85. *Id.* at 704.
86. *Id.* at 708.
87. *Id.*
88. *Id.* (quoting *Page v. Bolger*, 645 F.2d 227, 233 (9th Cir. 1981)). But *see* Capaci *v.* Katz & Besthoff, Inc., 711 F.2d 647, 665 (5th Cir. 1983) (documenting "unusual" occurrences amounting to multiple instances of discipline in plaintiff's personnel file, which supported a finding of retaliatory harassment).
The court compared the text of section 704(a) to sections 703(a)(1) and (a)(2), and reasoned that while section 703(a)(1) limited unlawful discrimination to negative employment actions related to the terms, conditions, or privileges of employment, section 703(a)(2) was more broad because it precluded discrimination that "would deprive" or "tend to deprive" an employee. Noting that section 704(a) only referred to "discrimination" and did not mention any of the "vague harms" listed in section 703(a)(2), the court concluded that the plain language of section 704(a) should be read to exclude vague harms, and only include "ultimate employment decisions" set forth in section 703(a)(1).

F. The Sixth Circuit

The Sixth Circuit requires that a negative employment action must constitute material harm in order to establish a prima facie case of retaliation. In Richmond-Hopes v. City of Cleveland, the plaintiff

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89. Mattern, 104 F.3d at 708-09; see supra notes 12-13 and accompanying text.
90. Mattern, 104 F.3d at 709. One panel member vigorously dissented, stating that "[c]orrectly interpreted, § 704(a) affords an employee an independent hostile work environment retaliatory discrimination cause of action upon which she may recover in a proper case regardless of the outcome of her § 703 sex discrimination and constructive discharge claims." Id. at 710 (Dennis, J., dissenting). The dissenting panel member also stated that:

The majority's holding that an employee's failure to convince a trier of fact that she is entitled to relief under § 703 because of sex discrimination and constructive discharge limits the scope of her cause of action based on retaliation under § 704(a) is contrary to Congressional intent and departs from the settled precedents of this court. Moreover it strikes a grievous blow to the entire enforcement mechanism of Title VII. As this court stated in Pettway v. Am. Cast Iron Pipe Company... "[t]here can be no doubt about the purpose of § 704(a). In unmistakable language it is to protect the employee who utilizes the tools provided by Congress to protect his rights. The Act will be frustrated if the employer may unilaterally determine the truth or falsity of charges and take independent action."

Id. at 715 (citation omitted) (quoting Pettway v. Am. Cast Iron Pipe Co., 411 F.2d 998, 1005 (5th Cir. 1969)). The dissenting panel member concluded by noting that the panel majority's reliance on Page was misplaced. Id. at 717. He stated that, while the Fourth Circuit may have stated that mediate decisions are not actionable in Page, this statement does not preclude an action based on retaliatory harassment when the Supreme Court has held that harassment which is sufficiently severe or pervasive so as to alter the conditions of employment is actionable under Title VII. Id.

91. See Jeffries v. Wal-Mart Stores, Inc., No. 99-4151, 2001 WL 845486, at *7 (6th Cir. July 20, 2001) (upholding a jury finding of retaliation and noting that the failure to promote constitutes adverse action under the circuit's materiality standard); Byrd v. Stone, 202 F.3d 267, No. 97-1841, 2000 WL 32042, at *3 (6th Cir. Jan. 6, 2000) (receiving a lower performance evaluation, which affected potential inclusion on the list of employees eligible for promotion, constituted material harm to a term, condition, or privilege of employment and stated a claim of retaliation); Hollins v. Atlantic Co., Inc., 188 F.3d 652, 662 (6th Cir.
alleged that after accusing her supervisor of sexual harassment, the supervisor altered the plaintiff's job responsibilities by: (1) denying her overtime; (2) reassigning her to a more dangerous assignment for which she was not qualified; (3) isolating her from the department by ignoring her; (4) referring to her as a "bitch" behind her back; and (5) encouraging her co-workers to ostracize her. The Sixth Circuit noted:

[An] "adverse employment action" must typically constitute a "materially adverse change in the terms of... employment," such as "termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation."

Citing Kocsis, the court stated that diminished employment responsibilities could constitute a material adverse job action; however, the plaintiff's responsibilities in this case did not materially change because she was immediately pulled off the more dangerous assignment and was granted overtime. Concerning plaintiff's allegations of workplace
hostility and isolation, the Sixth Circuit stated: “Retaliatory harassment may be actionable as long as the adverse employment action suffered is material. Therefore, as with hostile environment sexual harassment, retaliatory harassment by a supervisor that occurs prior to any tangible employment decision must be severe or pervasive to be actionable.” The court, though, did not address whether the plaintiff endured actionable retaliatory harassment, and instead, concluded that the employer established the affirmative defense set forth by the Supreme Court in its decisions in Burlington Industries v. Ellerth and Faragher v. City of Boca Raton.

Subsequently, in Morris v. Oldham County Fiscal Court, the Sixth Circuit analyzed a section 704(a) claim of retaliatory harassment by applying the harassment analysis applied to section 703(a) claims, including principles of vicarious liability and the affirmative defense addressed in Ellerth and Faragher. In Morris, the plaintiff alleged that her supervisor, a county road engineer, subjected her to retaliatory harassment after she notified a county judge of harassment. The plaintiff alleged that her supervisor: (1) visited and called her on numerous occasions, even after being warned not to by the judge; (2) sat in his truck staring and making faces at her while she was at work; (3) followed her home and gave her “the finger” out of his window when she arrived home; (4) destroyed the television set she watched while at work; and (5) threw roofing nails onto her driveway on several occasions. The Sixth Circuit noted that while other circuits have held employers liable for co-worker retaliatory harassment, no circuit has addressed whether a supervisor can be liable for retaliatory harassment since Faragher and Ellerth were decided. Relying on common law rules of statutory construction, the court concluded that harassment is actionable not only for claims of discrimination under section 703(a), but also for claims based on section 704(a). The Sixth Circuit then stated:

change. Id. at 886-87.

96. Richmond-Hopes, 1998 WL 808222 at *9; see also Moore v. Kuka Welding Sys., 171 F.3d 1073, 1080 (6th Cir. 1999) (concluding that evidence the plaintiff was isolated from other employees, who were instructed not to talk or interact with him, supported a jury finding of retaliation).


98. 524 U.S. 775 (1998); see infra Part IV (discussing retaliatory harassment as a cause of action).

99. 201 F.3d 784 (6th Cir. 2000).

100. Id. at 792.

101. Id. at 786-87.

102. Id. at 793.

103. Id. at 791. The court noted that it was taking no position with respect to liability for retaliatory harassment by co-workers. Id. at 791 n.8.

104. Id. at 792.
Just as an employer has the opportunity to prove an affirmative defense to severe or pervasive sexual harassment by a supervisor, it follows that an employer should also have the opportunity to prove an affirmative defense to severe or pervasive retaliatory harassment by a supervisor. Under agency principles, retaliatory harassment does not, in and of itself, constitute a "tangible employment action." Therefore, an employer is entitled to the same affirmative defense for retaliatory harassment that it is entitled to for sexual harassment...105

The court further stated:

In sum, we today modify our standard for proving a prima facie case of Title VII retaliation. A plaintiff must now prove that: (1) she engaged in activity protected by Title VII; (2) this exercise of protected rights was known to defendant; (3) defendant thereafter took adverse employment action against the plaintiff, or the plaintiff was subjected to severe or pervasive retaliatory harassment by a supervisor; and (4) there was a causal connection between the protected activity and the adverse employment action or harassment.106

In applying the above standard, the Sixth Circuit remanded the case to the district court, concluding that the plaintiff established a prima facie case of retaliation based on retaliatory harassment by a supervisor which did not result in a tangible employment action.107 The court further held that the employer should be given the opportunity to establish the affirmative defense outlined in Ellerth.108

G. The Seventh Circuit

The Seventh Circuit also requires that negative employment actions allege material harm to state a cognizable claim of retaliation under the applicable anti-discrimination statutes.109 In Ribando v. United Airlines,
Inc., the Seventh Circuit articulated the standard by stating:

Although we have defined the term broadly, the adverse job action must be "materially" adverse, meaning more than "mere inconvenience or an alteration in job responsibilities." We have explained, "a materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation."\(^{110}\)

The court also affirmed the dismissal of the plaintiff's hostile environment claim, noting that while retaliatory harassment was actionable if sufficiently severe or pervasive so as to alter the conditions of the working environment and create an abusive work atmosphere, the employer's action in investigating a charge of harassment against her was proper and fell "far short" of creating a severe or pervasive working environment.\(^{111}\)

However, in *Aviles v. Cornell Forge Co.*,\(^{112}\) the plaintiff alleged, among other things, that shortly after filing an EEO complaint alleging harassment based on national origin, his employer retaliated against him by: (1) suspending him for five days; (2) falsely informing the police that he had threatened his supervisor with a gun, which resulted in his being physically and emotionally harmed by the police; and (3) denying him overtime after returning from his suspension.\(^{113}\) On summary judgment, allegations (1) and (3) above were addressed by the court without discussing the adverse action element, and the false police report allegation was dismissed because it was not employment related.\(^{114}\) On appeal, the Seventh Circuit reversed the district court and, regarding allegation (2), concluded:

Although it is true that... [the plaintiff] may have some state law cause of action against his employer for making a false police report against him, the availability of a state law claim

manager's office, and ordering the plaintiff to spend more time with one of the discriminating officials did not constitute material adverse actions); *Bell v. EPA*, 232 F.3d 546, 554-55 (7th Cir. 2000) (concluding that bare allegations of demeaning assignments, verbal abuse, surveillance, diminished responsibilities and being assigned tasks which are doomed to failure do not comprise material adverse actions sufficient to survive summary judgment); *Ribando v. United Airlines, Inc.*, 200 F.3d 507, 511 (7th Cir. 1999) (receiving a "letter of concern" following an investigation of an allegation of harassment against the plaintiff did not constitute a material adverse action under section 704(a)).

110. *Ribando*, 200 F.3d at 510-11 (citations omitted) (quoting *Crady v. Liberty Nat’l Bank & Trust Co. of Ind.*, 993 F.2d 132, 136 (7th Cir. 1993)).

111. *Id.* at 511.

112. 183 F.3d 598 (7th Cir. 1999).

113. *Id.* at 600-601.

114. *Id.* at 604.
does not eliminate... [the plaintiff's] Title VII retaliation claim. *McDonnell* and *Veprinski* make clear that 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 in retaliation for that employee asserting his title VII rights... [The plaintiff] has presented enough evidence that... [the employer] took such an action only moments after... [he] informed his supervisors that he had filed charge of discrimination ten days earlier. Although not quite as dramatic as the example we gave in *McDonnell* of the employer shooting the employee, a false report to the police that [the plaintiff] was armed and laying in wait outside the plant could certainly be construed as a retaliatory action meant to discourage... [the plaintiff] from pursuing his claim.115

In *Sweeney v. West*,116 the plaintiff alleged that she was unfairly reprimanded, given two letters of counseling, and forced to endure a hostile environment in retaliation for her prior EEO activity.117 The Seventh Circuit found that these actions did not constitute “materially adverse actions.”118 In reaching this conclusion, the Seventh Circuit stated that:

Title VII’s “retaliation provision,”... does not say exactly what constitutes retaliation and what doesn’t, but obviously there are limits. The undoubted purpose of Title VII’s prohibition against retaliation is to prevent employers from discouraging complaints or otherwise chilling the exercise of an employee’s rights. A dirty look or the silent treatment might be as effective at discouraging complaints as demoting an employee,... but the question remains whether each is enough to prompt a federal case. The demotion certainly is; the other examples clearly not. The difference is not complicated—Title VII’s retaliation provisions make it unlawful to “discriminate” against an employee because he has made a charge of discrimination. Common sense and the examples used in the statutes principal section [section 703 (a)]... exclude instances of different treatment that have little or no effect on an employee’s job.... At most,... [the plaintiff] has demonstrated instances in which she was unfairly reprimanded for conduct she either did not engage in or should

115. *Id.* at 606. In a successive appeal, the Seventh Circuit clarified its prior decision and noted that a truthful, non-discriminatory report to the police should not subject an employer to liability, as it would deter employers from taking “prudent action to protect themselves and others in the workplace.” *Aviles v. Cornell Forge Co.*, 241 F.3d 589, 593 (7th Cir. 2001).

116. 149 F.3d 550 (7th Cir. 1998).

117. *Id.* at 553.

118. *Id.* at 556.
not have been responsible for. Absent some tangible job consequence accompanying those reprimands, we decline to broaden the definition of adverse employment action to include them. If we interpreted these simple personal actions as materially adverse, we would be sending a message to employers that even the slightest nudge or admonition (however well-intentioned) given to an employee can be the subject of a federal lawsuit; a simple statutory prohibition against retaliation would be turned into a bizarre measure of extra protection for employees who—though they might genuinely need counseling—at one point complained about their employer. We also would be deterring employers from documenting performance difficulties, for fear that they would be sued for doing so. Employees would be left in the dark as to how they could improve their work performance, and employers would be less able to establish the fact that poor performance, rather than some unlawful motivation, prompted a decision to fire, demote, etc.\

In *McKenzie v. Illinois Department of Transportation*, the plaintiff alleged that following protected EEO activity, she was retaliated against when: (1) her supervisor required her to go to the accounting department to sign for invoices when, prior to her EEO activity, the invoices were delivered to her office; (2) her supervisor instructed a vendor not to enter the building where she worked; and (3) her employer instructed her co-workers not to provide affidavits or assist in her litigation. The Seventh Circuit found that when the invoices were no longer delivered to the plaintiff, her job became more difficult, and this was sufficient to establish a prima facie case of retaliation. However, the Seventh Circuit also noted that in certain circumstances, if an employer ordered other employees to not talk to a plaintiff, such action could constitute a retaliatory adverse action. In addition, the court determined that the employer articulated a legitimate, nondiscriminatory reason for its action, so the court did not address whether the plaintiff’s allegation constituted an adverse action. Finally, the court noted that while the term “adverse action,” in claims of retaliation, has been defined broadly, allegation (3) above did not constitute

119. *Id.* at 556-57 (citations omitted).
120. 92 F.3d 473 (7th Cir. 1996).
121. *Id.* at 477-78.
122. *Id.* at 484.
123. *Id.*
124. *Id.*; see also *Collins v. Illinois*, 830 F.2d 692, 706 (7th Cir. 1987) (concluding that the plaintiff stated a claim of retaliation when she was removed from her office, placed at a desk in front of her supervisor’s office, had her phone, business cards, and listing in professional directories and publications removed, and was laterally transferred to a department that was unsure what to do with her).
an adverse action under section 704(a), and this allegation was better left to resolution by court rules and not Title VII.\textsuperscript{125}

In \textit{Rabinovitz v. Pena},\textsuperscript{126} the plaintiff alleged that after engaging in EEO activity, his subsequent performance evaluation was downgraded from “exceptional” to “fully successful,” and he experienced a number of workplace restrictions, namely: (1) he was allowed to discuss only business with his co-workers; (2) he had to report to his supervisor every time he entered and left the department; (3) his breaks were limited; (4) he could no longer utilize a secretary for typing; (5) he was denied permission to utilize the office flex-time policy; and (6) he was told to resign if he did not like such treatment.\textsuperscript{127} The Seventh Circuit noted that “a materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities.”\textsuperscript{128} The court concluded that a lowered performance evaluation was not materially adverse because it did not alter his job responsibilities or his compensation.\textsuperscript{129} The court then concluded that even if the lower evaluation score may have cost the plaintiff a $600 bonus, the bonus was not an entitlement, and its loss therefore did not constitute a material adverse action.\textsuperscript{130} Finally, the Seventh Circuit concluded that the job

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  \item [\textsuperscript{125}] \textit{McKenzie}, 92 F.3d at 485-86.
  \item [\textsuperscript{126}] 89 F.3d 482 (7th Cir. 1996).
  \item [\textsuperscript{127}] \textit{Id.} at 486.
  \item [\textsuperscript{128}] \textit{Id.} at 488 (quoting Crady v. Liberty Nat'l Bank & Trust Co. of Ind., 993 F.2d 132, 136 (7th Cir. 1993)).
  \item [\textsuperscript{129}] \textit{Id.; see also} Krause v. City of La Crosse, 246 F.3d 995, 1000-01 (7th Cir. 2001) (concluding that a letter of reprimand was not an adverse action unless accompanied by some other action, and that moving the plaintiff to a back office was not adverse when the plaintiff requested to move); Silk v. City of Chicago, 194 F.3d 788, 802-03 (7th Cir. 1999) (finding that plaintiff’s retaliation claim based on the receipt of a lower performance evaluation fails absent evidence of injury due to the lower rating); Smart v. Ball State Univ., 89 F.3d 437, 442 (7th Cir. 1996) (concluding that undeserved poor evaluations, without more, does not constitute an adverse action). In \textit{Silk}, the court also concluded that the plaintiff’s allegations that he was both precluded from pursuing secondary employment and suspended five days constituted adverse actions under the ADA’s anti-retaliation provision. \textit{Silk}, 194 F.3d at 800; \textit{see also} Cullom v. Brown, 209 F.3d 1035, 1041-42 (7th Cir. 2000) (over-inflating a performance rating to prevent an employee from being placed on a performance improvement plan does not comprise adverse action).
  \item [\textsuperscript{130}] \textit{Rabinovitz}, 89 F.3d at 488-89; \textit{see also} Stutler v. Ill. Dept. of Corrs., 263 F.3d 698, 702-03 (7th Cir. 2001) (concluding that a lateral transfer of the plaintiff to the business office was not an adverse action without a loss of benefits); Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996) (concluding that a transfer to a different sales territory adversely impacting commission income, and deemed to be a lateral position with no significant changes to working conditions or terms of employment, did not constitute an adverse action). The court in \textit{Williams} noted that it did not want to broaden the definition to include such actions, as “[o]therwise every trivial personnel action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit.” \textit{Id.} at 274; \textit{see also} Place v. Abbott Labs., 215 F.3d 803, 810 (7th Cir. 2000) (transferring the plaintiff to an undesired position with arguably diminished duties comprises a “dubious”
restrictions were "mere inconveniences" which did not "relate to plaintiff's job responsibilities or job title," and thus did not constitute adverse employment actions.\(^{131}\)

In *Knox v. State of Indiana*,\(^ {132}\) the plaintiff alleged that she endured a campaign of co-worker harassment in the form of vicious gossip following protected EEO activity.\(^ {133}\) The Seventh Circuit concluded that retaliatory harassment could constitute an adverse employment action under section 704(a) if the harassment was sufficiently severe or pervasive, and if the employer knew about the co-worker's actions and failed to correct the offensive behavior.\(^ {134}\) In reaching this conclusion, the Seventh Circuit noted that:

\[A\]dverse actions come in many shapes and sizes. No one would question the retaliatory effect of many actions that put the complainant in a more unfriendly working environment: actions like moving the person from a spacious, brightly lit office to a dingy closet, depriving the person of previously available support services (like secretarial help or a desktop computer), or cutting off challenging assignments. Nothing indicates why a different form of retaliation—namely, retaliating against a complainant by permitting her fellow employees to punish her for invoking her rights under Title VII—does not fall within the statute. The law deliberately does not take a "laundry list" approach to retaliation,
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because unfortunately its forms are as varied as the human imagination will permit.\textsuperscript{135}

H. The Eighth Circuit

The Eighth Circuit requires that adverse actions following EEO activity allege either material harm to a term, condition, or privilege of employment, or constitute an ultimate employment action in order to state a claim of retaliation under section 704(a).\textsuperscript{136} In Manning v. Metropolitan Life Insurance, Inc.,\textsuperscript{137} the plaintiffs alleged that their attempts to report harassment by their supervisor were ignored, that their supervisor subsequently threatened them, and that they experienced hostility, indifference and ostracism after reporting the harassment.\textsuperscript{138} The Eighth Circuit concluded that these allegations did not comprise an adverse employment action, and in so doing, stated, “The retaliation provision . . . [of Title VII] does not itself contain language requiring a materially adverse employment action in order to state a claim. This requirement is inferred from the basic prohibition of employment discrimination set forth in . . . [section 703(a) of Title VII].”\textsuperscript{139} The court then concluded:

\footnotesize{135. Knox, 93 F.3d at 1334 (citations omitted); see also Parkins v. Civil Constr. of Ill., Inc., 163 F.3d 1027, 1039 (7th Cir. 1998) (concluding that shunning by co-workers could constitute adverse action so long as the plaintiff established material harm).

136. See, e.g., LaCroix v. Sears, Roebuck, & Co., 240 F.3d 688, 691-92 (8th Cir. 2001) (concluding that a performance rating noting the plaintiff “consistently meets expectations” does not comprise materially adverse action); Buetner v. Arch Coal Sales Co., Inc., 216 F.3d 707, 712, 715 (8th Cir. 2000) (finding that an employee who was told to “pack her bags” and “leave the building” and was later reassured she was not terminated does not comprise material adverse action); Ross v. Douglas County, 234 F.3d 391, 395 (8th Cir. 2000) (assigning a correctional officer to a “bubble” following EEO activity, when normally such duties are rotated, constituted material adverse action); Coffman v., Tracker Marine, L.P., 141 F.3d 1241, 1245-46 (8th Cir. 1998) (affirming a jury verdict of retaliation where the plaintiff was materially harmed by a reduction in duties, reduction in number of employees plaintiff supervised, an inability to take off holidays, and evidence that the alleged harasser jumped back in the hallway when the plaintiff walked by); Chock v. Northwest Airlines, 113 F.3d 861, 865 (8th Cir. 1997) (finding that neither an employer’s alleged interference in the plaintiff’s pursuit of an MBA nor forcing the plaintiff to end a living arrangement with a direct supervisor constituted material adverse actions); Kim v. Nash Finch Co., 123 F.3d 1046, 1061 (8th Cir. 1997) (concluding that discipline, reduction of duties, and negative personnel reports that required the plaintiff attend remedial training were sufficient employment actions to establish an adverse action in a retaliation claim); Davis v. City of Sioux City, 115 F.3d 1365, 1369 (8th Cir. 1997) (affirming a jury verdict of retaliation where the plaintiff was transferred to a position which, though providing more money, removed supervisory duties and presented fewer opportunities for salary increases and advancement).

137. 127 F.3d 686 (8th Cir. 1997)

138. Id. at 688-89.

139. Id. at 692 (citations omitted).}
Absent evidence of some more tangible change in duties or working conditions that constituted a material employment disadvantage, we must agree with the district court that... [the plaintiffs] did not present evidence sufficient to demonstrate any adverse employment action that constitutes the sort of ultimate employment decision intended to be actionable under Title VII.  

In *LePique v. Hove*, the Eighth Circuit affirmed its prior precedent that a decision to transfer or a refusal to transfer an employee is not an adverse action if the transfer does not result in a change in the employee's pay, benefits, or working conditions. Notably, in his concurring opinion, Judge Heaney noted that:

[T]he rule... is, in my view, simply wrong. An employer's retaliatory refusal to transfer an employee is an adverse employment action regardless whether the position sought involves the same duties, pay and benefits. After all, where a person lives and works often is more important than the salary or benefits he/she receives, and refusing the transfer results in more than "mere inconvenience."... I recognize that I am bound by our circuit's precedent, and thus I concur.  

In *Flannery v. Transworld Airlines, Inc.*, the plaintiff had alleged that: (1) she was ordered to remove a fan from her desk; (2) her work hours were changed; (3) she was reprimanded for a dress code violation; (4) her parking space was relocated further from her work station; (5) she was admonished for liberally awarding frequent flyer miles to customers; (6) she was reassigned to another work station; and (7) approximately 300

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140. *Id.*
141. 217 F.3d 1012 (8th Cir. 2000).
142. *Id.* at 1013-14; see, e.g., Spears v. Mo. Dep't of Corr. & Human Res., 210 F.3d 850, 853-54 (8th Cir. 2000) (transferring an employee to another department and issuing the employee only a "successful" rating on a performance evaluation did not allege materially adverse actions); Hoffman v. Rubin, 193 F.3d 959, 964 (8th Cir. 1999) (concluding that a proposed transfer from St. Paul to Chicago was not an adverse action where pay, rank, and benefits would remain unaltered); Lederberger v. Stangler, 122 F.3d 1142, 1144-45 (8th Cir. 1997) (reassigning the plaintiff to a different position that was more stressful and required her to supervise more "problem" employees was not the kind of "ultimate employment action" meant to be actionable under Title VII's discrimination or retaliation provisions); Montandon v. Farmland Indus., Inc., 116 F.3d 355, 359 (8th Cir. 1997) (receiving a lower score on an evaluation and requiring the plaintiff to move his residence to remain employed were insufficient adverse actions to establish claim of retaliation); Harlston v. McDonnell Douglas Co., 37 F.3d 379, 382 (8th Cir. 1994) (concluding that the involuntary reassignment to a new, more stressful position with fewer duties, but with no change to salary or benefit level, comprised a "mere inconvenience" and did not allege any material harm).
143. *LePique*, 217 F.3d at 1014.
144. 160 F.3d 425 (8th Cir. 1998).
complimentary letters were removed from her personnel file. The Eighth Circuit affirmed summary judgment, finding that while the plaintiff's working conditions changed after she filed a grievance, there was no showing that such changes amounted to a material change to her employment relationship. However, in Cross v. Cleaver, the Eighth Circuit announced that where a supervisor with the power to hire, fire, demote, transfer, and take other actions on an employee utilizes his or her authority to retaliate against an employee for filing a claim of sexual harassment, the plaintiff does not have to demonstrate that the employer knew or should have known about the retaliatory harassment to hold the employer liable for retaliation under section 704(a). In Cross, the plaintiff established that her supervisor initiated investigations, transfers, and suspensions after she filed a complaint of sexual harassment against him.

In Smith v. St. Louis University, the Eighth Circuit concluded that providing negative references to two prospective employers in retaliation for filing a complaint of harassment constituted an adverse employment action within the meaning of section 704(a). Citing the Third Circuit decision in Charlton v. Paramus Board of Education, the Eighth Circuit concluded that a negative reference given to a potential employer based on retaliatory animus could result in liability under Title VII.

I. The Ninth Circuit

In Ray v. Henderson, the Ninth Circuit broadly construed the adverse action element of a prima facie case of retaliation by adopting the EEOC’s definition of what constitutes an adverse action. In Ray, after
the plaintiff complained about the treatment of women at the postal facility, the supervisor eliminated the employee involvement program and flex-time start policies, instituted lock-down procedures, and reduced the plaintiff's workload and pay disproportionately to other co-workers. The Ninth Circuit, in reversing the district court's grant of summary judgment on the plaintiff's retaliation claim, first recognized a split among the circuits as to what comprises a cognizable adverse employment action in a claim of retaliation. The court then reviewed prior decisions in the Ninth Circuit and concluded that the adverse action element should be construed broadly. The Ninth Circuit noted that its broad interpretation of the adverse action element is in accord with decisions in the First, Seventh, Tenth, Eleventh and D.C. Circuits. The court rejected the defendant's argument that it should adopt the "ultimate employment action" requirement, as articulated in decisions from the Fifth and Eighth Circuits. The court then noted that the tangible employment actions listed in Ellerth focused on the type of actions that would subject an employer to vicarious liability for unlawful harassment, and thus rejected the defendant's contention that Ellerth established a standard for what constitutes an adverse action in a retaliation context.

working with a friend of the alleged harasser, a disputed evaluation, and difficulty securing vacation time did not constitute adverse actions); Dimitrov v. Seattle Times Co., No. 98-36156, 2000 WL 1228995, at *2-3 (9th Cir. Aug. 29, 2000) (concluding that the employer's failure to include the plaintiff in congratulatory letters and its delay in scheduling co-workers when the plaintiff called in sick did not constitute adverse actions); Ju v. Sharp Microelectronics Tech., Inc., 243 F.3d 548, No. 00-35308, 2000 WL 1801380, at *1 (9th Cir. July 28, 2000) (finding that allegations of the employer disturbing the employee's son's chess preparation, neglecting the employee's tenth anniversary, requiring supervisory approval for the employee to communicate in writing to fellow employees, and making a negative comment about the employee in a trip report did not constitute adverse actions under Ray).

157. Id. at 1240.
158. Id. at 1241; see Specht v. Dalton, 202 F.3d 279, No. 97-56744, 1999 WL 1038225, at *4-5 (9th Cir. Nov. 10, 1999) (concluding that the receipt of a letter of caution, an advanced notice of disciplinary action, a letter of reprimand, and forcing a plaintiff to take an annual leave comprised adverse employment actions); Steiner v. Showboat Operating Co., 25 F.3d 1459, 1465 n.6 (9th Cir. 1994) (characterizing a transfer from the swing shift to the day shift as "barely—if at all" an adverse action, as the plaintiff "was not demoted, or put in a worse job, or given additional responsibilities," and in fact enjoyed the day shift); Bouman v. Black, 940 F.2d 1211, 1229 (9th Cir. 1991) (losing the opportunity to compete for a transfer constituted an adverse employment action under section 704(a)); Yartzoff v. Thomas, 809 F.2d 1371, 1376 (9th Cir. 1987) (having job duties transferred and receiving undeserved performance evaluations constitute adverse actions under section 704(a)). But see Nidds v. Schindler Elevator Co., 113 F.3d 912, 919 (9th Cir. 1997) (transferring the employee to a more dangerous job site does not comprise an adverse action).

159. Ray, 217 F.3d at 1240-41.
160. Id. at 1242.
161. Id. at 1242 n.5.
also rejected the approach utilized by other circuits which requires that adverse actions materially affect the terms and conditions of employment.\textsuperscript{162}

The Ninth Circuit noted that the EEOC's Compliance Manual on Retaliation defines adverse employment action as "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity."\textsuperscript{163} Recognizing that EEOC guidelines are not "binding on courts," but that they "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance," the Ninth Circuit endorsed the EEOC's deterrence standard.\textsuperscript{164} Applying the deterrence standard, the court then concluded that the plaintiff stated a claim of retaliation.\textsuperscript{165}

In Passantino v. Johnson & Johnson Consumer Products, Inc.,\textsuperscript{166} a decision not cited in Ray, the plaintiff alleged, among other things, that after filing a complaint of sex discrimination because she was passed over for promotions to executive management positions, she endured retaliation when: (1) her subsequent performance rating was adversely affected; (2) her job responsibilities were reduced; (3) accounts were transferred out of her jurisdiction as a national accounts manager without notice; (4) she was excluded from division manager meetings and was not provided necessary information to perform successfully in her position; (5) her performance objectives were reduced; and (6) she was offered a series of demotions, the denial of which impacted future promotional opportunities.\textsuperscript{167} The jury found for the plaintiff on her allegations of sex discrimination and retaliation, and awarded her back pay, front pay, compensatory emotional distress damages, and punitive damages exceeding twelve million dollars.\textsuperscript{168} The court then reduced the punitive damage award to the $300,000 Title VII damage cap, while leaving the remainder of the award intact.\textsuperscript{169} Among the arguments raised on appeal, the employer asserted that the above actions did not constitute adverse actions.\textsuperscript{170} The Ninth Circuit disagreed, noting:

The purpose of Title VII's anti-retaliation provision is to bar employers from taking actions which could have "a deleterious effect on the exercise of these rights by others." \ldots Title VII

\textsuperscript{162} Id. at 1242.
\textsuperscript{163} Id. at 1242-43 (quoting EEOC COMPLIANCE MANUAL, supra note 3, at 8-13).
\textsuperscript{164} Id. at 1243 (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986)).
\textsuperscript{165} Id. at 1243-44.
\textsuperscript{166} 212 F.3d 493 (9th Cir. 2000).
\textsuperscript{167} Id. at 501-03.
\textsuperscript{168} Id. at 504.
\textsuperscript{169} Id.
\textsuperscript{170} Id. at 506.
allows employees to freely report actions that they reasonably believe are discriminatory, even if those actions are in fact lawful. ... Absent a judicial remedy, the type of actions [the plaintiff] asserts her employer engaged in could discourage other employees from speaking freely about discrimination. We hold that the actions ... were sufficient to constitute retaliation within the meaning of Title VII. 171

In Fielder v. UAL Corp., 172 the Ninth Circuit addressed whether an allegation of retaliatory harassment by co-workers was cognizable. 173 After analyzing decisions in the First, Seventh, and Tenth Circuits, the court concluded that such a claim was cognizable when the conduct alleged rises to the level of an adverse employment action. 174

In Hashimoto v. Dalton, 175 the plaintiff argued that a prospective employer received a negative job reference from her former employer in retaliation for engaging in EEO activity. 176 The employer argued that because the prospective employer would not have hired the plaintiff irrespective of the negative job reference, the plaintiff experienced no tangible harm. 177 The court disagreed, stating: "We reject the government's 'no harm, no foul' approach. A plaintiff may seek relief for retaliatory actions taken after her employment ends if 'the alleged discrimination is related to or arises out of the employment relationship.'" 178 The Ninth Circuit further opined:

[T]he government's argument in this case fails to recognize the distinction between a violation and the availability of remedies ... [The employer's] dissemination of the adverse job reference violated Title VII because it was a "personnel action" motivated by retaliatory animus. That this unlawful personnel action turned out to be inconsequential goes to the issue of damages, not liability ....

Further, ... adoption of the government's position would undermine both the letter and the spirit of Title VII's prohibition

171. Id. at 506-07 (citations omitted).
172. 218 F.3d 973 (9th Cir. 2000).
173. Id. at 984-85.
174. Id.
175. 118 F.3d 671 (9th Cir. 1997).
176. Id. at 673.
177. Id. at 674.
178. Id. at 675 (quoting Passer v. Am. Chem. Soc'y, 935 F.2d 322, 330 (D.C. Cir. 1991)); see also Ruggles v. Cal. Polytechnic State Univ., 797 F.2d 782, 786 (9th Cir. 1986) ("[A]n 'adverse employment decision' is the closing of the job opening ... and the loss of opportunity even to compete for the position. The plaintiff need not show that she would have obtained the job, a showing that would be nearly insurmountable at the prima facie stage and involves factors better marshaled and presented by the defendants.").
against actions in retaliation for EEO activities. We have recognized that actions taken in retaliation for the exercise of Title VII rights can have a "deleterious effect on the exercise of these rights by others." . . . Although this particular harm was not suffered by . . . [the plaintiff] in the present case because she was no longer employed by . . . [her employer], the chilling effect which . . . [her supervisor's] retaliatory conduct might have on the remaining employees under his supervision does counsel against accepting the government's narrow conception of what constitutes a "violation" of Title VII. Accordingly, we conclude that the retaliatory dissemination of a negative employment reference violates Title VII, even if the negative reference does not affect the prospective employer's decision not to hire the victim of the discriminatory action.179

J. The Tenth Circuit

The Tenth Circuit construes the adverse action element of a prima facie case of retaliation liberally, and it has rejected arguments that adverse actions should allege material harm to a term, condition, or privilege of employment in order to state a cognizable claim of retaliation.180 In

179. Hashimoto, 118 F.3d at 676 (citations omitted).
180. See Appgar v. State of Wyo. Highway Patrol, 221 F.3d 1351, No. 99-8029, 2000 WL 1059444, at *10 (10th Cir. Aug. 2, 2000) (finding that following the resignation of employment, preparation of a negative final report could impact future employment and thus comprises an adverse action); Toth v. Gates Rubber Co., 216 F.3d 1088, No. 99-1017, 2000 WL 796068, at *9 (10th Cir. June 21, 2000) (receiving negative performance evaluations is an adverse employment action); Corneveaux v. Cuna Mut. Ins. Co., 76 F.3d 1498, 1507 (10th Cir. 1996) (concluding that a former employee established an adverse action under ADEA’s anti-retaliation provision when she had to "go through several hoops in order to obtain her severance benefits"); Rutherford v. Am. Bank of Commerce, 565 F.2d 1162, 1164-65 (10th Cir. 1977) (finding that an employer’s notation on a reference form that a former employee had filed an EEO charge constituted retaliation). However, even under a liberal view, not every alleged act of retaliation has been found to comprise an adverse action. See, e.g., Deflon v. Danka Corp., Inc., 242 F.3d 312, No. 99-2239, 2001 WL 13260, at *10 (10th Cir. Jan. 5, 2001) (concluding that distasteful remarks and shunning, while unpleasant, did not amount to an adverse employment action); Welder v. Univ. of Okla. Bd. of Regents, No. 99-6430, 2000 WL 1854132, at *2 (10th Cir. Dec. 19, 2000) (finding that even under a liberal view, five different actions alleged, taken together, do not comprise an adverse employment action); Amaro v. Boeing Co., 232 F.3d 790, 798-99 (10th Cir. 2000) (concluding that a delay in the receipt of a transfer and dissatisfaction with an evaluation and the amount of a salary increase do not comprise adverse actions); Richmond v. Okla. Univ. Bd. of Regents, 162 F.3d 1174, No. 97-5181, 1998 WL 747093, at *3 n.4 (10th Cir. Oct. 20, 1998) (concluding that an employer’s failure to follow through on a gratuitous promise to assist a former employee with a job search did not constitute adverse action under section 704(a)); Cole v. Ruidoso Mun. Sch., 43 F.3d 1373, 1382 (10th Cir. 1998) (noting that a school district’s change in explanation for removing the plaintiff does not constitute adverse action under Title VII); Fortner v. Rueger, 122 F.3d 40, 41 (10th Cir.
Trujillo v. New Mexico Department of Corrections,\textsuperscript{181} the plaintiff alleged that he was retaliated against when he was denied a transfer to another position that would have provided him greater responsibility and the ability to supervise employees.\textsuperscript{182} The magistrate judge dismissed the plaintiff’s claim because the transfer did not constitute an adverse employment action.\textsuperscript{183} The Tenth Circuit reversed, noting that it liberally construes the adverse action requirement and that it does not require a loss of monetary benefits for a plaintiff to establish a claim of retaliation.\textsuperscript{184} While recognizing that in Sanchez v. Denver Public Schools,\textsuperscript{185} the court previously stated that an involuntary lateral transfer, without more, did not constitute an adverse employment action, the court found that in Trujillo the plaintiff would have supervised employees and had greater responsibilities.\textsuperscript{186} Accordingly, the denial of a transfer in Trujillo was in effect a denial of a promotion.\textsuperscript{187}

In Jeffries v. Kansas,\textsuperscript{188} the plaintiff alleged that after complaining about an incident of sexual harassment by a co-worker, her supervisor retaliated against her by: (1) informing her that he would no longer supervise her as a student; (2) threatening not to renew her contract at the end of the year; and (3) refusing to supervise her for the remainder of the current contract year.\textsuperscript{189} The district court dismissed the plaintiff’s retaliation claim concluding that the plaintiff failed to allege material harm to a term, condition, or privilege of employment.\textsuperscript{190} The Tenth Circuit reversed, stating that it never recognized that an adverse action must be material to be actionable and that it has instead taken a case-by-case approach to ascertain whether a negative employment action is adverse under the applicable statute.\textsuperscript{191} The court concluded that the plaintiff’s
allegations stated a prima facie claim of retaliation.\textsuperscript{192}

In \textit{Gunnell v. Utah Valley State College},\textsuperscript{193} the plaintiff alleged that after reporting sexual harassment, she: (1) was given inferior office equipment and fewer responsibilities and (2) endured harassment by her co-workers who treated her badly, left her out of office communications, and set her up to fail in her new position.\textsuperscript{194} The Tenth Circuit recognized that while a campaign of retaliatory harassment by co-workers does not constitute an adverse employment action under section 704(a) in the Fourth, Fifth, and Eighth Circuits, the First and Seventh Circuits have recognized such a cause of action.\textsuperscript{195} Recognizing the remedial nature of Title VII and that the adverse action element of a prima facie case of retaliation should be defined liberally on a case-by-case basis, the court concluded that "retaliatory harassment, if sufficiently severe, may constitute 'adverse employment action' for purposes of a retaliation claim."\textsuperscript{196}

In \textit{Berry v. Stevinson Chevrolet},\textsuperscript{197} the Tenth Circuit concluded that malicious prosecution against a former employee can constitute an adverse employment action.\textsuperscript{198} The Tenth Circuit disagreed with the employer's assertion that its role in encouraging a criminal forgery and theft prosecution against the plaintiff was not an adverse action because it was not linked to an employer-employee relationship.\textsuperscript{199} Further, the court stated that it would be illogical for coverage to be extended to former employees, but then limited adverse actions to an existing employer-employee relationship.\textsuperscript{200} The Tenth Circuit also stated:

\begin{quote}
[W]e do not agree with ... [the employer's] assertion that retaliatory prosecution is not connected with present or future employment. While providing a tainted employment reference may have a more direct effect on a former employee's future employment prospects, criminal prosecution will also have an
\end{quote}

\textsuperscript{improvement plan, and was required to bring in a doctor's note to verify illness failed to satisfy the court's definition of a "materially adverse employment action").}

\textsuperscript{192. \textit{Jeffries}, 147 F.3d at 1234.}
\textsuperscript{193. 152 F.3d 1253 (10th Cir. 1998).}
\textsuperscript{194. \textit{Id.} at 1257-58.}
\textsuperscript{195. \textit{Id.} at 1264. \textit{Compare} Munday \textit{v. Waste Mgmt. of N. Am.}, 126 F.3d 239, 243 (4th Cir. 1997), Mattern \textit{v. Eastman Kodak Co.}, 104 F.3d 702, 707 (5th Cir. 1997), and Manning \textit{v. Metropolitan Life Ins. Co.}, 127 F.3d 686, 693 (8th Cir. 1997), \textit{with} Knox \textit{v. Indiana}, 93 F.3d 1327, 1334 (7th Cir. 1996), and Wyatt \textit{v. City of Boston}, 35 F.3d 13, 15-16 (1st Cir. 1994).}
\textsuperscript{196. \textit{Gunnell}, 152 F.3d at 1264.}
\textsuperscript{197. 74 F.3d 980 (10th Cir. 1996).}
\textsuperscript{198. \textit{Id.} at 986.}
\textsuperscript{199. \textit{Id.}}
\textsuperscript{200. \textit{Id.; see also} Robinson \textit{v. Shell Oil Co.}, 519 U.S. 337, 346 (holding that limiting section 704 to current employees would undermine the effectiveness of the statute).}
obvious impact. A criminal trial, such as that to which...[the plaintiff] was subjected, is necessarily public and therefore carries a significant risk of humiliation, damage to reputation, and a concomitant harm to future employment prospects.201

K. The Eleventh Circuit

The Eleventh Circuit broadly construes the adverse action element of a prima facie case of retaliation.202 In Wideman v. Wal-Mart Stores, Inc.,203 the plaintiff alleged that she endured a series of negative employment actions after engaging in EEO activity.204 Specifically, the plaintiff alleged that: (1) she was improperly listed as a no-show on her off day and when she brought it to her supervisor's attention, he forced her to work without a lunch break; (2) she received two written reprimands and a one-day suspension; (3) her supervisor solicited co-workers for negative statements about her; (4) after inquiring as to why she was not listed on the work schedule, a manager threatened to shoot her in the head; and (5) after suffering an allergic reaction at work, management needlessly delayed authorization for her to seek medical treatment.205 The employer argued that none of these actions constituted an adverse employment action under section 704(a).206 The Eleventh Circuit acknowledged the split in the circuits, stating: "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."207 The court analyzed the text of section 704(a) in light of the broad, remedial goals of Title VII, and concluded that:

The Fifth and Eighth Circuits' contrary position is inconsistent with the plain language of...[section 704 (a)]...Read in the light of ordinary understanding, the term "discriminate" is not limited to "ultimate employment decisions." Moreover, our plain

201. Berry, 74 F.3d at 986.
202. See Bass v. Bd. of County Comm'rs, Orange County, Fla., 242 F.3d 946, 1015, (11th Cir. 2001) (concluding that two allegations did not comprise adverse actions, but five other allegations, taken collectively, rose to the level of an adverse action under section 704(a)); Gupta v. Bd. of Regents, 212 F.3d 571, 590 (11th Cir. 2000) (concluding that five allegations did not comprise an adverse action, but that the denial of a pay raise and an extension on tenure clock comprised adverse actions under section 704(a)); Berman v. Orkin Exterminating Co., 160 F.3d 697, 702 (11th Cir. 1998) (noting that the involuntary transfer of an employee, which has the effect of substantially reducing income, can constitute an adverse action).
203. 141 F.3d 1453 (11th Cir. 1998).
204. Id. at 1455.
205. Id.
206. Id. at 1455-56.
207. Id. at 1456.
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language interpretation of . . . [section 704(a)] is consistent with Title VII’s remedial purpose. 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.

Although we do not doubt that there is some threshold level of substantiability that must be met for unlawful discrimination to be cognizable under the anti-retaliation clause, we need not determine in this case the exact notch into which the bar should be placed. It is enough to conclude, as we do, that the actions about which . . . [the plaintiff] complains considered collectively are sufficient to constitute prohibited discrimination. We need not and do not decide whether anything less than the totality of the alleged reprisals would be sufficient. Accordingly, for judgment as a matter of law purposes, . . . [plaintiff’s] evidence satisfied the adverse employment action requirement for a prima facie case of retaliation.708

In Doe v. Dekalb County School District,209 the court concluded that an objective reasonable person standard should govern whether or not a transfer to another position constitutes an adverse action in a claim of discrimination (not retaliation) under the ADA.210 While Doe addressed a claim of discrimination and not retaliation, the court’s discussion concerning what constitutes an adverse action is noteworthy, observing:

[T]he threshold for what constitutes an adverse employment action [should] not be elevated artificially, because an employer’s action, to the extent that it is deemed not to rise to the level of an adverse employment action, is removed completely from any scrutiny for discrimination. In other words, where the cause or motivation for the employer’s action was clearly its employee’s disability, a finding that the action does not rise to the level of an adverse employment action means that the action is not scrutinized for discrimination. An artificially high threshold for what constitutes an adverse employment action would undermine the purposes of the statute by permitting discriminatory actions to

208. Id. The applicability of the court’s holding in Wideman has not been applied in a claim of harassment in the Eleventh Circuit. In a decision issued prior to Wideman, Wu v. Thomas, 996 F.2d 271, 273 (11th Cir. 1993) (per curiam), the Eleventh Circuit noted that it could not identify any case at that time where retaliatory harassment, as opposed to harassment based on race or sex under section 703(a), was actionable and would violate section 704(a)’s anti-retaliation provision. The court’s holding in Wideman suggests that a claim of retaliatory harassment may be cognizable. See infra Part IV (discussing the cause of action for retaliatory harassment).
209. 145 F.3d 1441 (11th Cir. 1998).
210. Id. at 1449.
An analysis of relevant decisions from the D.C. Circuit reveals that, historically, the court broadly construed the adverse action requirement in retaliation claims. More recent decisions, however, suggest that the D.C. Circuit now applies a material harm threshold to the adverse action element in both discrimination and retaliation claims.

In Brown v. Brody, the plaintiff alleged both discrimination and retaliation under Title VII when, after engaging in EEO activity, she: (1) received a "fully satisfactory" rating and letter of admonishment, and (2) was denied a transfer to a new position in the Project Finance Department. After surveying relevant case law concerning whether or not a lateral transfer constitutes an adverse action under section 704(a), the court noted that "the authority requiring a clear showing of adversity in employee transfer decisions is both wide and deep." The court found it significant that in Ellerth, the Supreme Court cited decisions from the Sixth, Seventh, and Eighth circuits that applied a "materiality" threshold to determine if an employment action constituted a "tangible employment action." The D.C. Circuit then stated:

These developments allow us to announce the following rule: a plaintiff who is made to undertake or who is denied a lateral

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211. Id. at 1453 n.21.
212. See, e.g., Paquin v. Fed. Nat’l Mortgage Assoc., 119 F.3d 23, 32 (D.C. Cir. 1997) (deciding that the withdrawal of a voluntary benefit, here a severance package, could constitute an adverse action); Passer v. Am. Chem. Soc’y, 955 F.2d 322, 331 (D.C. Cir. 1991) (holding that an employer’s decision to cancel a major public symposium in the plaintiff’s honor constitutes an adverse action in a claim of retaliation under the ADEA); Berger v. Iron Workers Reinforced Rodmen Local 201, 843 F.2d 1395, 1424 (D.C. Cir. 1988) (concluding that repeated threats against an individual who exercises protected rights may amount to harassment “sufficient to establish a claim of retaliation”).
213. See Cones v. Shalala, 199 F.3d 512, 515-16 (D.C. Cir. 2000) (concluding that the decision not to advertise a director’s position after the plaintiff filed an EEO complaint is tantamount to a denial of a promotion and constitutes an adverse action); Mungin v. Katten Muchin & Zavis, 116 F.3d 1549, 1556-57 (D.C. Cir. 1997) (finding that in a section 703(a) claim of discrimination, changes in work assignments do not ordinarily constitute adverse actions unless accompanied by a decrease in pay or changes in work hours); see also Taylor v. Fed. Deposit Ins. Corp. 132 F.3d 753, 765 (D.C. Cir. 1997) (concluding that a refusal to make the plaintiffs acting Section Chiefs were minor and thus insufficient to comprise adverse actions in a retaliation claim under the First Amendment and Resolution Trust Corporation Whistleblower Act).
214. 199 F.3d 446 (D.C. Cir. 1999).
215. Id. at 451.
216. Id. at 456.
217. Id. at 456-57.
transfer—that is, one in which she suffers no diminution in pay or benefits—does not suffer an actionable injury unless there are some other materially adverse consequences affecting the terms, conditions, or privileges of her employment or her future employment opportunities such that a reasonable trier of fact could conclude that the plaintiff has suffered objectively tangible harm. Mere idiosyncrasies of personal preference are not sufficient to state an injury.218

Concerning the plaintiff's allegation that she received an overall “fully satisfactory” rating on her performance evaluation, the court stated that “a similarly thick body of precedent... refutes the notion that formal criticism or poor performance evaluations are necessarily adverse actions.”219 Moreover, while the plaintiff's evaluation “may have been lower than normal, it was not adverse in an absolute sense.”220

As noted previously, the court's holding in Brown is arguably inconsistent with a prior decision in Smith v. Secretary of the Navy,221 wherein the D.C. Circuit concluded that section 704(a) of Title VII created a cause of action for a plaintiff who received a negative performance evaluation in reprisal for engaging in EEO activity, even absent a denial of a promotion or other economic harm.222 The D.C. Circuit noted that section 704(a) speaks unconditionally and without limiting harm to any particular acts such as the denial of a job or a promotion, and stated:

It is obvious, however, that a plaintiff may suffer harms from discrimination that fall short of demonstrable loss of a job or a promotion. An unfavorable employee assessment, placed in a personnel file to be reviewed in connection with future decisions concerning pay and promotion, could both prejudice the employee's superiors and materially diminish his chances for advancement.223

The court also stated:

An illegal act of discrimination—whether based on race or some other factor such as a motive of reprisal—is a wrong in itself under Title VII, regardless of whether that wrong would warrant an award of back pay or preferential hiring. The goal of the statute is to bar all employer actions based on impermissible factors.224

218. Id. at 457 (citations omitted).
219. Id. at 458.
220. Id.
222. Id. at 1120.
223. Id.
224. Id.
While noting that no financial harm had befallen the plaintiff, the D.C. Circuit noted that if retaliation was established, the remedy would be to have the improper evaluation removed from his personnel records.225

M. Overview of the Adverse Action Requirement in the Circuits

The adverse action element in a claim of retaliation varies widely in and among the various circuits.226 Even within a circuit, whether a claim is cognizable under section 704(a) may depend on the proof presented or the case law cited by the judge assigned to the matter.227 Because there lacks any uniformity regarding what constitutes an adverse action in a claim of retaliation, the result is that one’s ability to prevail in a claim of retaliation may hinge on the jurisdiction in which he or she brings the claim. For example, an individual claiming that he or she received a lower performance evaluation and found that his or her job duties had been diminished in retaliation for filing an EEO complaint would likely not prevail in the Fifth and Eighth Circuits.228 Further, unless he or she can demonstrate material harm to a term, condition, or privilege of employment, he or she will not prevail in the Second, Sixth, Seventh, and D.C. Circuits.229 Absent evidence that these acts were sufficiently adverse, this claim is also likely to fail in the Third and Fourth Circuits.230 The claim would likely survive in the First, Third, Ninth, Tenth, and Eleventh Circuits.231

Not only are the circuits split on the question of what employment actions constitute adverse action in a retaliation claim, but in the wake of the Supreme Court’s decisions in Faragher and Ellerth, a more complex question concerning harassment has arisen.232 Specifically, whether retaliatory harassment, either by co-workers or by a supervisor, is actionable under section 704(a) has not been determined.233 Further, there

225. Id. at 1122; accord Hashimoto v. Dalton, 118 F.3d 671, 675 (9th Cir. 1997) (rejecting the government’s “no harm, no foul” approach to establishing a violation of section 704(a)).
226. See Appendix A (citing examples of how the circuits have construed various adverse actions).
228. See supra Parts II.E, H.
229. See supra Parts II.B, F, G, L.
230. See supra Parts II.C, D.
231. See supra Parts II.A, C, I, J, K.
232. See discussion supra Part IV.
233. Id.
is a split in the circuits concerning what, if anything, constitutes retaliatory harassment and whether the affirmative defenses are available in a claim of retaliatory harassment. \(^{224}\)

In 1998, the EEOC issued its Compliance Manual on Retaliation, wherein it disagreed with circuits requiring material harm or an ultimate employment action in order to state a prima facie case of retaliation. \(^{225}\) The Commission established a deterrence standard to determine whether a negative employment action rises to the level of an adverse action in a claim of retaliation. \(^{226}\) Thus far, only the Ninth Circuit has endorsed the Commission's deterrence standard articulated in the EEOC Compliance Manual on Retaliation. \(^{227}\) However, some circuits have construed section 704(a) broadly and, in so doing, have advanced arguments similar to those raised by the EEOC. \(^{228}\)

III. IN A CLAIM OF RETALIATION, THE ADVERSE ACTION ELEMENT SHOULD BE CONSTRUED BY DETERMINING WHETHER IT IS REASONABLY LIKELY TO DETER THE CHARGING PARTY OR OTHERS FROM ENGAGING IN EEO ACTIVITY

The adverse action element in a claim of retaliation under section 704(a) should not be limited to ultimate employment actions or actions that result in material harm to a term, condition, or privilege of employment. Rather, courts should endorse the EEOC's deterrence standard, which requires a fact finder to consider whether a negative employment action would be reasonably likely to deter a charging party or others from engaging in protected activity. \(^{229}\) The deterrence standard is consistent with the plain meaning of Title VII's anti-retaliation provision and fosters the broad remedial goals of the applicable anti-discrimination statutes.

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224. Id.
225. See EEOC COMPLIANCE MANUAL, supra note 3, at 8-13 - 8-14; see also infra Part III.A.
226. See EEOC COMPLIANCE MANUAL, supra note 3, at 8-13; see also infra Part III.A.
227. See Ray v. Henderson, 217 F.3d 1234, 1243 (9th Cir. 2000).
228. See Aviles v. Cornell Forge Co., 183 F.3d 598, 606 (7th Cir. 1999) ("[A] false report to the police that...[the plaintiff] was armed and laying in wait outside the plant could certainly be construed as a retaliatory action meant to discourage [the plaintiff] from pursuing his claim."); Dilenno v. Goodwill Indus. of Mid-Eastern Pa., 162 F.3d 235, 236 (3d Cir. 1998) ("[W]hat constitutes retaliation depends on what a person in the plaintiff's position would reasonably understand."); see also EEOC COMPLIANCE MANUAL, supra note 3, at 8-13 n.38 (citing additional cases which have construed retaliation claims under section 704(a) broadly).
229. See EEOC COMPLIANCE MANUAL, supra note 3, at 8-13; see also Linda M. Glover, Comment, Title VII Section 704(A) Retaliation Claims: Turning a Blind Eye Toward Justice, 38 HOUS. L. REV. 577, 612-13 (2001) (concluding that the EEOC's more liberal interpretation of the adverse action element should be adopted by courts).
Additionally, the deterrence standard is consistent with the Supreme Court’s broad interpretation of analogous anti-retaliation provisions in other statutes. Moreover, a narrow interpretation of section 704(a) would allow many acts of retaliation to go undeterred. This not only undermines the anti-retaliation provisions, but also hinders the Commission’s ability to effectively enforce anti-discrimination laws. Finally, employer concerns that such a standard will turn courts into de facto personnel managers is exaggerated and inapplicable in a retaliation context.

A. The Commission’s Deterrence Approach

While “[t]he most obvious types of retaliation are denial of promotion, refusal to hire, denial of job benefits, demotion, suspension and discharge,” retaliation can take many other forms, including “threats, reprimands, negative evaluations, harassment, or other adverse treatment.” Arguing that it is improper to require either material harm or an ultimate employment action with respect to a term, condition, or privilege of employment in order to establish a prima facie case of retaliation, the Commission instead notes:

The statutory retaliation clauses prohibit any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity. Of course, petty slights and trivial annoyances are not actionable, as they are not likely to deter protected activity. More significant retaliatory treatment, however, can be challenged regardless of the level of harm. As the Ninth Circuit has stated, the degree of harm suffered by the individual “goes to the issue of damages, not liability.”

In justifying this position, the Commission also states that:

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

240. EEOC COMPLIANCE MANUAL, supra note 3, at 8-11.
241. Id. at 8-13 (quoting Hashimoto v. Dalton, 118 F.3d 671, 676 (9th Cir. 1997)). The Commission’s deterrence standard is not a “reasonable person” standard like courts utilize to analyze section 703(a) claims of harassment. Rather, a fact finder should evaluate the retaliatory conduct itself and determine whether it is reasonably likely to deter either the charging party or others.
activity.  

The Commission further notes that while many adverse actions logically relate to a term, condition, or privilege of employment because that is the easiest method for an employer to retaliate against its employee, section 704(a) specifically

[does] not restrict the actions that can be challenged to those that affect the terms and conditions of employment. Thus, a violation will be found if an employer retaliates against a worker for engaging in protected activity through threats, harassment in or out of the workplace, or any other adverse treatment reasonably likely to deter protected activity by this individual or other employees.  

The EEOC argues that legal authority for its approach is derived from both the plain language of section 704(a) and the broad remedial purpose of Title VII’s anti-retaliation provision.

B. The Plain Language of Title VII Supports a Broad Reading of Section 704(a)

The term “discriminate,” which appears in numerous sections of Title VII, and the phrase “terms, conditions, or privileges of employment,”

242. Id. at 8-14 nn. 40-42 (citing cases where retaliation was found when adverse actions did not relate to a term, condition, or privilege of employment).

243. Id. at 8-14 - 8-15. The Commission has also advanced similar arguments in amicus curiae briefs. See Brief of the Equal Opportunity Commission as Amicus Curiae in Support of the Plaintiffs-Appellees, Passantino v. Johnson & Johnson Consumer Prods., Inc., 212 F.3d 493 (9th Cir. 2000) (Nos. 97-36191, 98-35036). In its Passantino brief, the Commission argued:

[The employer’s] contrary view of the statute, if accepted, would leave an employer free to retaliate with impunity. Retaliation can take many forms. Some employers use the blunt edge approach, either firing or demoting an employee who engages in protected activity. Other employers are more sophisticated. These employers stop short of taking action that would result in some tangible diminution in an individual’s job status. Instead, they engage in a more subtle campaign of threats, reprimands, negative evaluations, and adverse treatment in job assignments and day-to-day interactions. These actions can undoubtedly deter individuals from engaging in protected activity. Yet under . . . [the employer’s] view such actions would fall outside the reach of the statute, even if engaged in for a retaliatory reason. Plainly, anti-retaliation protection must extend beyond the narrow range of conduct (e.g., “ultimate employment decisions”) invoked by . . . [the employer].

Id. at 11.

244. Section 703(c)(3) as codified states: “It shall be an unlawful employment practice for a labor organization . . . to cause or attempt to cause an employer to discriminate against an individual in violation of this section.” 42 U.S.C. § 2000e-2(c)(3) (1994) (emphasis added). Section 703(d) as codified reads: “It shall be an unlawful employment practice for
which appears only in section 703(a)(1), are not explicitly defined in Title VII. Arguably, though, the phrase "to discriminate" refers to discrimination with respect to the "terms, conditions, or privileges of employment" even though the "terms, conditions, or privileges of employment" language only appears in section 703(a)(1).245

The meaning of the term "to discriminate" in section 703, however, does not end the inquiry as to what Congress intended when it used the same term in section 704(a) without including the phrase "terms, conditions, or privileges of employment."246 The term "discrimination" is defined as "a failure to treat all equally; favoritism."247 This definition does not clarify its intended meaning in section 704(a), other than to say that Congress' use of the term suggests that it intended to ensure that those who engage in protected EEO activity are not treated differently, i.e., unfavorably or discriminatorily, because of their EEO activity.248 This conclusion is supported by relevant legislative history which states that "to discriminate is to make a distinction, to make a difference in treatment or favor."249

any employer . . . to discriminate against any individual . . . in admission to, or employment in, any program established to provide apprenticeship or other training." 42 U.S.C. § 2000e-2(d) (emphasis added). Finally, section 703(h) as codified states: "[N]or shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed test, provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race . . . ." 42 U.S.C. § 2000e-2(h) (emphasis added).

245. The Supreme Court has stated that its first step in interpreting a statute is "to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997) (quoting United States v. Ron Pair Enters., Inc., 489 U.S. 235, 240 (1989)). The inquiry "must cease if the statutory language is unambiguous and "the statutory scheme is coherent and consistent."" Id. The Supreme Court then stated that "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." Id. at 341; see also 42 U.S.C. § 2000e-2(h).

246. See supra notes 12-13 and accompanying text.


248. While section 704(a) is commonly referred to as the anti-retaliation provision of Title VII, Black's Law Dictionary defines retaliation in terms of the Latin phrase "lex talionis," which in turn is defined as "[t]he law of retaliation; which requires the infliction upon a wrongdoer of the same injury which he has caused to another." Id. at 1058. This interpretation of retaliation is not applicable to an employer-employee relationship given any lawful action by an employee is designed not to injure the employer, but to vindicate a statutorily created right. See 110 Cong. Rec. 7213 (1964), reprinted in U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLE VII AND XI OF THE CIVIL RIGHTS ACT OF 1964 3039 (1968); see also Lidge, supra note 20, at 373 (discussing the legislative history of Title VII concerning the phrase "terms, conditions, or privileges of employment" and the term "discrimination"); Zion, supra note 4, at 195-97 (discussing the legislative history of section 704(a)).

249. 110 Cong. Rec. 7213 (1964), reprinted in U.S. EQUAL EMPLOYMENT OPPORTUNITY
Unlike the general anti-discrimination provision in section 703(a), the anti-retaliation provision in section 704(a) does not specifically limit discrimination to the "terms, conditions, or privileges of employment." The legislative history of Title VII does not address the scope of section 704(a). However, because Title VII defines what actions can constitute discrimination in section 703(a) as actions which impact the terms, conditions, or privileges of employment, the majority of circuits have concluded that the terms, conditions, or privileges of employment language in section 703(a) should be read co-extensively with section 704(a). The Commission, however, argues that section 704(a) should not be limited by the terms, conditions, or privileges of employment qualifier set forth in section 703(a) because Congress would have included this phrase in section 704(a) had it so intended.

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251. The First Circuit noted that "[n]either in its wording nor legislative history does section 704(a) make plain how far Congress meant to immunize... employee activity." Hochstadt v. Worcester Found. for Experimental Biology, 545 F.2d 222, 230 (1st Cir. 1976); see also Cude & Steger, supra note 2, at 396 n.146 (citing authority which has recognized the ambiguity of section 704(a)).
252. See Richardson v. N.Y. Dep't of Corr. Serv., 180 F.3d 426, 446 (2d Cir. 1999); Brown v. Brody, 199 F.3d 446, 458 (D.C. Cir. 1999); Randlett v. Shalala, 118 F.3d 857, 862 (1st Cir. 1997); Robinson v. City of Pittsburgh, 120 F.3d 1286, 1301 (3d Cir. 1997); Munday v. Waste Mgmt. of N. Am., 126 F.3d 239, 243 (4th Cir. 1997); Mattem v. Eastman Kodak Co., 104 F.3d 702, 708 (5th Cir. 1997); Manning v. Metro. Life Ins. Co., 127 F.3d 686, 692 (8th Cir. 1997).
253. See EEOC COMPLIANCE MANUAL, supra note 3, at 8-13 - 8-15. The Commission has also advanced this argument in amicus curiae briefs. "It is presumed that 'where Congress includes particular language in one section of a statute but omits it in another section of the same Act... Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" Brief of the Equal Employment Opportunity Commission as Amicus Curiae in Support of the Plaintiffs-Appellees, at 9 n.5, Passantino v. Johnson & Johnson Consumer Prods., Inc., 212 F.3d 493 (9th Cir. 2000) (Nos. 97-36191, 98-35036) (quoting Russello v. United States, 464 U.S. 16, 23 (1983) (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972))). Two authors suggest that Congressional intent concerning the scope of section 704(a) can be gleaned by reviewing the ADA's anti-retaliation provision. See Essary & Friedman, supra note 20, at 152. The authors argue that:

[The] fact that the ADA explicitly allows for retaliation in the form of mere coercion, intimidation, threats, or interference should serve to clarify the meaning of retaliation under the ADA's predecessors. The fact that such definitive language was excluded from Title VII and the ADEA should not be considered representative of Congress' intent regarding the prior statutes because the distasteful but inescapable conclusion would be that Congress somehow intended to provide disabled victims of discrimination greater protection from workplace retaliation than victims of racial or sexual discrimination.

Id.
One article argues that the rule of *ejusdem generis* applies, and that the general term "to discriminate" in section 704(a) should be read in the context of the specific phrase "terms, conditions, or privileges of employment" contained in section 703(a).\(^{254}\) The article argues that because Title VII was enacted to address discrimination on the basis of race, color, religion, sex, and national origin with respect to the terms, conditions, or privileges of employment, the terms, conditions, and privileges of employment qualifier should also apply to claims of retaliation brought under section 704(a).\(^{255}\) The broad remedial goals of the anti-discrimination statutes, however, argue against such a conclusion.\(^{256}\) In fact, *ejusdem generis* applies unless "its application would defeat the intention of Congress or render the general statutory language meaningless."\(^{257}\)

C. The Broad Remedial Goals of Title VII Support a Broad Interpretation of Section 704(a)

The Commission's deterrence standard furthers the goals of the anti-discrimination statutes generally, and the anti-retaliation provisions specifically, by ensuring that any adverse action which would reasonably deter a charging party or others from engaging in EEO activity would be actionable under section 704(a).\(^{258}\) Considering whether a negative action deters not only the charging party but others is crucial, as allowing an employer to retaliate against an individual bringing an EEO charge also "carries with it the distinct risk that other employees may be deterred from . . . providing testimony for the plaintiff in her effort to [vindicate her rights]."\(^{259}\) As the Seventh Circuit observed in *McDonnell v. Cisneros*:\(^{260}\)

Generally one retaliates against someone because of something he did rather than because of something someone else did. Not always. There is such a thing as collective punishment. But that possibility is unlikely to have been at the forefront of

\(^{254}\) See Cude & Steger, *supra* note 2, at 397-98. Under the rule of *ejusdem generis*, "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only those objects enumerated by the preceding specific words." *Norman J. Singer, Statutes and Statutory Construction* § 47.17, at 188 (5th ed. 1992).

\(^{255}\) Cude & Steger, *supra* note 2, at 397-98.

\(^{256}\) Glover, *supra* note 239, at 610 (quoting United States v. Powell, 423 U.S. 87, 94 (1975) (Stewart, J., concurring in part and dissenting in part)).

\(^{257}\) *Id.*

\(^{258}\) See EEOC COMPLIANCE MANUAL, *supra* note 3, at 8-14 - 8-15.

\(^{259}\) Holt v. Cont'l Group, Inc., 708 F.2d 87, 91 (2d Cir. 1983).

\(^{260}\) 84 F.3d 256 (7th Cir. 1996).
congressional thinking when the retaliation provision was drafted.

There are two situations, apparently not foreseen by Congress, in which a literal interpretation of the provision would leave a gaping hole in the protection of complainants and witnesses. The first situation, related to our point about collective punishment, is where the employer either does not know who the complainant is and decides therefore to retaliate against a group of workers that he knows includes the complainant, or makes a mistake and retaliates against the wrong person. The second situation... is where the employer retaliates against an employee for having failed to prevent the filing of a complaint. Both are cases of genuine retaliation, and we cannot think of any reason... other than pure oversight, why Congress would have excluded them from the protection of... [section 704(a)]. It does no great violence to the statutory language to construe “he has made a charge” to include “he was suspected of having made a charge” and “he allowed a charge to be made.”

Limiting section 704(a) claims of retaliation to acts which either result in an ultimate employment action or in material harm to a term, condition, or privilege of employment would severely constrict section 704(a)’s reach, resulting in countless acts of retaliation not otherwise considered material or ultimate employment actions going undeterred. For example, if an individual receives an undeserved negative evaluation because he or she engaged in EEO activity, such an undeserved negative evaluation is adverse to the recipient because it may impact his or her future promotional opportunities. Fear of having one’s career opportunities jeopardized because he or she engages in EEO activity not only is reasonably likely to deter the charging party him or herself, but it also sends a powerful message to his or her co-workers that there are potentially career-threatening ramifications when one files an EEO charge or otherwise participates in the EEO process. Requiring a threshold of material harm or an ultimate employment action simply fails to include such acts of retaliation, and, thus, such retaliation would go undeterred.

Moreover, requiring that adverse actions under section 704(a) establish some threshold of material harm or rise to the level of an ultimate employment action in a term, condition, or privilege of employment will require courts to demonstrate tangential connections between adverse actions and the terms, conditions, or privileges of an employee’s

261. Id. at 262.
262. See, e.g., Spears v. Mo. Dep’t of Corr. & Human Res., 210 F.3d 850, 853-54 (8th Cir. 2000); Primes v. Reno, 190 F.3d 765, 767 (6th Cir. 1999); Silk v. City of Chicago, 194 F.3d 788, 802-03 (7th Cir. 1999).
employment. In those circuits which require that adverse actions relate to a term, condition, or privilege of employment in conjunction with requiring material harm or an ultimate employment action, an employer who files false criminal charges against an employee because he or she engaged in EEO activity may not recognize such an action as within the realm of retaliatory actions that Title VII can remedy. "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." The more sensible approach is to apply the deterrence standard advocated by the Commission.

Courts which broadly construe the anti-retaliation provisions have found retaliation where adverse actions did not relate to a term, condition, or privilege of employment, but nonetheless would deter a charging party or others from engaging in protected EEO activity. As one district court judge recently observed:

[F]ear of any type of retaliation can deter an aggrieved person from filing an EEOC charge, and since the charge must, a fortiori, relate to equality of employment opportunities, to say that retaliation not resulting in an adverse employment action is therefore unrelated to employment conditions does not necessarily follow.

263. See Berry v. Stevinson Chevrolet, 74 F.3d 980, 986 (10th Cir. 1996) (concluding that malicious prosecution of a former employee can constitute an adverse employment action).

264. Knox v. Indiana, 93 F.3d 1327, 1334 (7th Cir. 1996).

265. See, e.g., Aviles v. Cornell Forge Co., 183 F.3d 598, 606 (7th Cir. 1999) (finding that falsely informing police that the plaintiff was armed and laying in wait outside the facility could constitute adverse action in claim of retaliation); Berry, 74 F.3d at 986 (malicious prosecution of criminal forgery and theft charges against a former employee who filed an EEO charge constituted adverse action); Charlton v. Paramus Bd. of Educ., 25 F.3d 194, 200 (3d Cir. 1994) (inquiring into the progress of license revocation proceedings against a former employee constituted retaliation); Passer v. Am. Chem. Soc'y, 935 F.2d 322, 331 (D.C. Cir. 1991) (canceling a symposium in honor of a former employee because he filed a charge of age discrimination states a claim of retaliation); see also Beckham v. Grand Affair, 671 F. Supp. 415, 419 (W.D.N.C. 1987) (finding retaliation where an employer had a former employee arrested and prosecuted); Atkinson v. Oliver T. Carr Co., 40 Fair Empl. Prac. Cas. (BNA) 1041, 1043-44 (D.D.C. 1986) (finding that an employer's threat to press criminal charges unless the EEO charge was dropped states a claim of retaliation under Title VII); Czarnowski v. Desoto, Inc., 518 F. Supp. 1252, 1259 (N.D. Ill. 1981) (disclosing the record of an employee's protected EEO activity to a prospective employer constitutes adverse action); Evans v. Sheraton Park Hotel, 5 Fair Empl. Prac. Cas. (BNA) 393, 396 (D.D.C. 1972) (holding that a supervisor's threat to beat an employee because of an EEOC complaint was harassment); Pennsylvania v. Local Union No. 542, Int'l Union of Operating Eng'rs, 347 F. Supp. 268, 287 (E.D. Pa. 1972) (engaging in acts of physical violence in retaliation for filing an EEO charge violates section 704(a)).

266. EEOC v. Die Fliedermaus, L.L.C., 77 F. Supp. 2d 460, 472 (S.D.N.Y. 1999). While some courts have opined that conduct outside the scope of terms, conditions, or
Moreover, a deterrence standard is more consistent with the Supreme Court’s recognition that Congress considered its policies against discrimination to be of the “highest priority.” The Supreme Court stated that a “primary purpose of the anti-retaliation provisions” is to maintain “unfettered access to statutory remedial mechanisms.” In Alexander v. Gardner-Denver Co., the Supreme Court noted that:

Congress gave private individuals a significant role in the enforcement process of Title VII . . . [and] the private right of action remains an essential means of obtaining judicial enforcement of Title VII. In such cases, the private litigant redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices.

Some circuits have similarly recognized the importance, not only of the Commission, but of individual plaintiffs, in eradicating unlawful discrimination.

Construing Title VII's anti-retaliation provision broadly is consistent privileges of employment which are adverse to an employee or former employee are better left resolved via other statutory remedies, the court in Die Fliedermaus addressed this suggestion, noting that:

[T]here may be circumstances where retaliation not related to an adverse employment action is not actionable under a separate legal theory. While it could be possible to fashion a rule permitting a retaliation claim to lie if the violative conduct is not otherwise actionable, this would impose the unnecessary burden on courts and litigants of determining whether a given instance of non-employment related retaliation was otherwise actionable. The more logical rule is to allow the retaliation claim to be actionable if the retaliation is sufficiently alleged to flow from the filing of the EEOC charge.

_Id.; see also_ Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998) (imposing liability for acts of supervisor harassment under Title VII even when such actions are not employment related); Alexander v. Gardner-Denver Co., 415 U.S. 36, 48 n.9 (1974) (citing the legislative history of Title VII and the Equal Employment Opportunity Act of 1972, which noted that nothing in Title VII affects existing rights under other employment statutes).

269. _Alexander, 415 U.S. at 45 (citations omitted)._  
270. _See EEOC v. Bd. of Governors of State Colls. & Univs., 957 F.2d 424, 431 (7th Cir. 1992) (noting that anti-retaliation provisions in the ADEA and Title VII protect charging parties and "aid the work of the EEOC which depends on employee cooperation"); see also Brock v. Casey Truck Sales, 839 F.2d 872, 879 (2d Cir. 1988) (stating that one of the FLSA's purposes is to make whole individual employees); Garcia v. Lawn, 805 F.2d 1400, 1405 (9th Cir. 1986); Pettway v. Am. Cast Iron Pipe Co., 411 F.2d 998, 1005-06 (5th Cir. 1969) ("[P]rotection must be afforded to those who seek the benefit of statutes designed by Congress to equalize employer and employee in matters of employment.").
with Robinson v. Shell Oil Co., wherein the Supreme Court extended coverage to former employees even though Title VII did not specify that the term “employee” in Title VII included former employees. 271 Finding the plain language ambiguous, the Court in Robinson examined other relevant sections of Title VII, considered the broad remedial goals of Title VII, and noted that a reading of Title VII which excluded former employees from coverage under section 704(a) produced anomalous results. 272 Additionally, in Bill Johnson’s Restaurant, Inc. v. NLRB, 273 the Court concluded that the filing of a lawsuit by an employer in retaliation for an employee’s protected activity under section 8 of the National Labor Relations Act 274 constitutes an unlawful act of retaliation. 275 The Supreme Court stated that “[a] lawsuit... may be used by an employer as a powerful instrument of coercion or retaliation,” 276 and that such suit can be enjoined as an act of unlawful retaliation if the suit is “baseless” and brought “with the intent of retaliating against an employee for the exercise of [protected rights].” 277

Furthermore, in Rutan v. Republican Party of Illinois, 278 the Supreme Court discussed what constitutes an adverse action in a claim of retaliation based on First Amendment prohibitions against government officials from taking adverse actions against public employees who do not support the political party in power. 279 In Rutan, the Court noted that along with discharge, several patronage practices such as promotion, transfer, recall, and hiring decisions constitute adverse actions and such negative actions would violate the First Amendment unless party affiliation is an appropriate requirement for the position involved. 280 The Court rejected the employer’s argument that such decisions do not violate the First Amendment because they do not have any adverse effect on a term of

271. Robinson, 519 U.S. at 346 (1997). Most recently, in Clark County Sch. Dist. v. Breeden, 121 S. Ct. 1508 (2001), the Supreme Court addressed two claims brought under section 704(a), though its decision focused on both the first and third elements of a prima facie case of retaliation. Id. at 1512. The Court did not address the adverse action element in a section 704(a) claim.

272. Robinson, 519 U.S. at 348-49. The Supreme Court’s approach to analyzing section 704(a) in Robinson may be instructive as to how the Court may analyze and ultimately construe the term “discrimination” in section 704(a).


276. Id. at 740.


279. Id. at 74.

280. Id. at 75.
employment and do not chill protected rights, and observed that:

Employees who find themselves in dead-end positions due to their political backgrounds are adversely affected. They will feel a significant obligation to support political positions held by their superiors, and to refrain from acting on the political views they actually hold, in order to progress up the career ladder. Employees denied transfers to workplaces reasonably close to their homes until they join and work for the Republican Party will feel a daily pressure from their long commutes to do so. And employees who have been laid off may well feel compelled to engage in whatever political activity is necessary to regain regular paychecks and positions corresponding to their skill and experience. 281

The Supreme Court also noted that “the First Amendment . . . already protects state employees not only from patronage dismissals, but also from ‘even an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her free speech rights.’” 282

Of course, “petty slights and trivial annoyances are not actionable, as they are not likely to deter protected activity.” 283 Accordingly, the failure to hold a birthday party for an employee who filed an EEO charge may very well constitute the kind of adverse action which would not reasonably deter a charging party or others from engaging in EEO activity. Rutan is significant, however, because it suggests that some quantum of evidence of retaliation, arguably less than that which would constitute material harm or an ultimate employment action, can deter individuals and is thus sufficient to sustain a claim of retaliation.

The Seventh Circuit in McDonnell v. Cisneros recognized the parallels between a retaliation claim and a claim in a First Amendment cause of action, and stated:

We do not doubt that anger, irritation, dirty looks, even the silent treatment, can cause distress and by doing so discourage complaints; and in other contexts every rather petty attempts at humiliation, if sufficient to deter the exercise of a right, have

281. Id. at 73.
282. Id. at 76 n.8 (alteration in original) (quoting Rutan v. Republican Party of Illinois, 868 F.2d 943, 954 n.4. (7th Cir. 1989)). Lower courts continue to address the scope of claims of retaliation rooted in First Amendment freedoms based on the Supreme Court’s language in Rutan, and its “famous footnote 8.” See Colson v. Grohman, 174 F.3d 498, 510 (5th Cir. 1999); see also Allah v. Seiverling, 229 F.2d 220, 225 (3d Cir. 2000) (noting that in the Third Circuit, placing a candidate lower on a promotion ranking list in retaliation for exercising First Amendment rights could deter a reasonable person from exercising such rights).
283. EEOC COMPLIANCE MANUAL, supra note 3, at 8-13.
been held to be actionable as infringements of rights, for example the right of free speech.284

The court further noted:

There is, however, a tension in the cases (including the cases of this court) with respect to whether more is required in a retaliation case under Title VII (or under any of the other federal employment discrimination statutes that are modeled on Title VII, such as the Age Discrimination in Employment Act), the more being something that can be described as a "materially adverse employment action."

No limiting language appears in Title VII’s retaliation provision. . . . The language of "materially adverse employment action" that some courts employ in retaliation cases is a paraphrase of Title VII’s basic prohibition against employment discrimination, found in . . . [section 703(a)]. . . . The 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.285

Finally, anti-retaliation provisions in analogous statutes enacted to protect worker rights have also been construed broadly.286 Adopting the Commission’s deterrence standard when analyzing claims of retaliation under section 704(a) will ensure that employees are not chilled from exercising their rights under the applicable anti-discrimination laws, and will prevent many forms of retaliation from escaping scrutiny where such acts deter EEO activity but otherwise do not comprise an ultimate employment action or allege material harm to a term, condition or privilege of employment.

284. 84 F.3d 256, 258 (7th Cir. 1996).
285. Id. at 258-59 (citations omitted).
286. See EEOC v. White & Son Enters., 881 F.2d 1006, 1011 (11th Cir. 1989) (finding that a broad construction of the FLSA’s anti-retaliation provision protects employees who raise a grievance directly to his or her employer); Brock v. Richardson, 812 F.2d 121, 124 (3d Cir. 1987) (concluding that the FLSA’s anti-retaliation provision was designed to protect employees from fear of economic retaliation); see also Reich v. Hoy Shoe Co., 32 F.3d 361, 368 (8th Cir. 1994) (“The OSH Act’s requirement that employers not retaliate against complaining employees, like the Act generally, should be read broadly, ‘otherwise the Act would be gutted by employer intimidation.’”) (quoting Marshall v. Whirlpool Corp., 593 F.2d 715, 722 (6th Cir. 1979)).
D. Employers' Fears that a Broad Interpretation of Section 704(a) Will Turn Courts into De Facto Personnel Managers are Exaggerated and Inapplicable in a Retaliation Context

Courts and commentators have argued that requiring a higher threshold of harm to state a claim of retaliation promotes consistency and helps courts avoid cluttering their dockets and becoming de facto personnel managers. However, as one commentator noted, “[t]o 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.” The Commission’s deterrence standard will not open the floodgates to a litany of baseless claims of retaliation, nor will the application of a deterrence standard result in a dramatic increase in findings of retaliation. Even if an adverse action is reasonably likely to deter a charging party or others from engaging in EEO activity, the retaliation claim is not resolved. A plaintiff must still establish a causal connection between the adverse action and his or her protected activity in order to establish a prima facie case of retaliation. Indeed, the plaintiff still has the burden of proving by a preponderance of the evidence that the employer’s legitimate, nondiscriminatory reason is a pretext for retaliation.

Moreover, a narrow interpretation of the adverse action requirement also fails to recognize that adverse actions motivated by unlawful retaliation not only harm the charging party, but co-workers and other employees as well. For example, such a threshold would fail to recognize or provide any kind of remedy for what the plaintiff’s co-workers in Munday must have felt about the EEO process when they were ordered by their supervisor to ignore and spy on the plaintiff, and report even the slightest workplace violations to the supervisor because the plaintiff had accused the supervisor of sexual harassment.

287. See Sweeney v. West, 149 F.3d 550, 556-57 (7th Cir. 1998) (suggesting that a broad interpretation of section 704(a) could potentially transform the admonition of a problem employee into a federal lawsuit); Cude & Steger, supra note 2, at 398 (“A liberal interpretation . . . opens the door to a myriad of claims for trivial acts, and gives the courts free reign to second-guess an employer’s business decisions. . . . [Whereas a narrow interpretation] leaves management prerogatives largely undisturbed and prevents the courts from becoming bogged down in trivial disputes within the workplace.”).

288. Zion, supra note 4, at 215; see also Glover, supra note 239, at 607-08 (concluding that concerns about liberal interpretation are “overstated”).

289. See supra Part I.C (discussing elements of the prima facie case of retaliation and the application of the burden-shifting analysis to claims of retaliation).

290. Id.

291. Id.


293. Munday v. Waste Mgmt. of N. Am., 126 F.3d 239, 241 (4th Cir. 1997); see supra
The threshold for determining what constitutes an adverse action in a claim of retaliation should not be determined by the "ultimate" nature of the employment action or the "material" nature of the harm to a term, condition, or privilege of employment suffered by the charging party. Rather, the threshold should be based on whether or not the adverse action is reasonably likely to deter a charging party or others from engaging in any EEO activity. A fact finder should not be precluded from reviewing whether such actions were more likely than not motivated by retaliatory animus, as such actions in the workplace, if left undeterred, send the powerful message that employees who exercise their unfettered right to file a charge of discrimination will be allowed to suffer retaliation. Ultimately, the question of what harm befalls a charging party who is a victim of retaliation is more appropriately addressed at the remedial stage, and not at the prima facie stage.

IV. RETALIATORY HARASSMENT SHOULD BE ACTIONABLE EVEN IF NOT "SEVERE OR PERVASIVE"

The Supreme Court has stated that a workplace permeated with animus which is sufficiently severe or pervasive so as to alter the conditions of employment and create an abusive working environment is actionable without regard to a specific requirement of economic harm or psychological injury. The Court has also concluded that a claim of harassment which results in a "tangible employment action" will result in vicarious liability for an employer, however, absent any tangible employment action, an employer has the opportunity to raise an affirmative defense to liability. The intersection of harassment law and the standard for stating a claim of retaliation will present interesting challenges for courts to resolve.

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294. See EEOC COMPLIANCE MANUAL, supra note 3, at 8-13.
295. Id. at 8-15.
296. See Hashimoto v. Dalton, 118 F.3d 671, 676 (9th Cir. 1997) (noting that harm suffered is a determination at the remedies, not the threshold stage).
298. In Burlington Indus. v. Ellerth, 524 U.S. 742 (1998), the Supreme Court defined a tangible employment action as "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." Ellerth, 524 U.S. at 761.
299. Id. at 765; Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).
courts will have to address whether, and to what extent, the section 703(a) harassment paradigm applies to section 704(a) claims of retaliation.

To state a claim of harassment under section 703(a), the alleged harassment must either result in a tangible employment action to the charging party or the harassment must be sufficiently severe or pervasive so as to alter the charging party's conditions of employment and create an abusive working environment.\(^{301}\) As argued previously, the "terms, conditions, and privileges of employment" language from section 703(a) does not apply to section 704(a) claims.\(^{302}\) The deterrence standard provides that claims of retaliation brought under section 704(a) must allege, for threshold purposes, that the adverse actions would be reasonably likely to deter a charging party or others from engaging in EEO activity.\(^{303}\) Thus, the deterrence standard, and not a severe or pervasive standard, should be utilized in order to determine whether any act of retaliation would reasonably be likely to deter a charging party or others from engaging in EEO activity.\(^{304}\) As a result, the distinction between claims of disparate treatment and harassment under section 704(a) disappears at the threshold stage.

While courts have been applying a "severe or pervasive" threshold to all claims of harassment, this is an inappropriate threshold to determine if adverse actions state a claim of retaliation under section 704(a) because conduct which is not "severe or pervasive" so as to alter the working conditions of the charging party may still reasonably deter a charging party or others from engaging in EEO activity.\(^{305}\) If courts fail to recognize this important distinction, then individuals such as Jean Mattern will continue to face the Hobson's choice of enduring sexual harassment so as to avoid retaliatory harassment, or by reporting sexual harassment, endure acts of retaliation which do not rise to the level of severe or pervasive conduct so as to alter the conditions of employment and create an abusive working environment, but which nonetheless chill one's desire to pursue a remedy under the applicable anti-discrimination statutes.\(^{306}\)

Thus far, every circuit addressing claims of harassment under section 704(a) has imported the section 703(a) harassment paradigm to claims of retaliatory harassment under section 704(a) and required a plaintiff to establish that the conduct at issue was sufficiently severe or pervasive so as to alter the conditions of employment.\(^{307}\) Moreover, the only circuit to

\(^{301}\) Harris, 510 U.S. at 21-22.
\(^{302}\) See infra Parts III.B-C.
\(^{303}\) See EEOC COMPLIANCE MANUAL, supra note 3, at 8-13.
\(^{304}\) See infra Part III.A.
\(^{305}\) See EEOC COMPLIANCE MANUAL, supra note 3, at 8-13 - 8-15.
\(^{306}\) See Mattern v. Eastman Kodak Co., 104 F.3d 702, 707-708 (5th Cir. 1997); infra discussion Part I.E.
\(^{307}\) See Richardson v. N.Y. State Dep't of Corr. Serv., 180 F.3d 426, 446 (2d Cir.)
specifically consider retaliatory harassment in the wake of Faragher and Ellerth concluded that the threshold for establishing a prima facie case of harassment based on retaliation required a showing of severe or pervasive conduct, and remanded the case to the district court in order to determine if the affirmative defense was available to the employer.308

Establishing a deterrence standard to measure all threshold claims of retaliation does not necessarily mean that the affirmative defenses set forth in Faragher and Ellerth, which are applied in section 703(a) claims of harassment, are not available in a claim of retaliatory harassment brought under section 704(a). In fact, the policy reasons for establishing the affirmative defense set forth in Faragher and Ellerth to section 703(a) claims of harassment also support the application of an affirmative defense to claims of harassment under section 704(a), which do not result in a tangible employment action.309 Arguably, employers should have an opportunity to establish the elements of the affirmative defense before a

1999); Richmond-Hopes v. City of Cleveland, 168 F.3d 490, No. 97-3595, 1998 WL 808222, at *9 (6th Cir. 1998); Gunnell v. Utah Valley State Coll., 152 F.3d 1253, 1262-64 (10th Cir. 1998); 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); Wyatt v. City of Boston, 35 F.3d 13, 15-16 (1st Cir. 1994). The Eighth Circuit may or may not have adopted such an analysis. Compare Cross v. Cleaver, 142 F.3d 1059, 1074 (8th Cir. 1998) (“[W]here a supervisory employee . . . is shown to have used . . . [his] authority to retaliate for the filing of a charge of sexual harassment, the plaintiff need not also prove that the employer participated in or knew or should have known of the retaliatory conduct to hold the employer liable.”), with Manning v. Metro. Life Ins. Co., 127 F.3d 686, 692 (8th Cir. 1997) (finding that ostracism in the workplace did not constitute a claim of retaliation because it did not rise to the level of an ultimate employment action).

308. See Morris v. Oldham County Fiscal Ct., 201 F.3d 784, 792-93 (6th Cir. 2000).

309. If harassment results in a tangible employment action, an employer is automatically liable, whereas if the harassment does not result in a tangible employment action, then the affirmative defense outlined in Faragher and Ellerth is available to exonerate an employer from liability. See Burlington Indus. v. Ellerth, 524 U.S. 742, 765 (1998). For the policy considerations articulated in Faragher and Ellerth, the Supreme Court was careful to limit what constituted a “tangible employment action” because such actions would result in automatic liability and provide no affirmative defense for employers. Id at 761. In Ellerth, the Supreme Court set forth the affirmative defense as follows:

An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. . . . The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Id. at 765 (citation omitted).
charging party or others would have been deterred by acts of retaliation.\textsuperscript{310} The resolution of this question, however, should in no way vitiate the need for courts to revise the existing standard for establishing a threshold, or prima facie case of retaliation under section 704(a).

V. CONCLUSION

Since the Civil Rights Act of 1991 was enacted, a majority of the circuits, in varying degrees, have chipped away the anti-retaliation provisions of the anti-discrimination statutes by limiting what actions are considered adverse for threshold purposes. A narrow construction undermines the anti-discrimination statutes and permits employers to retaliate with impunity. A deterrence standard ensures that actions taken with retaliatory intent are cognizable so long as the adverse action rises above the threshold of trivial conduct or a minor annoyance. The Supreme Court should grant certiorari, end the disparity amongst the circuits, and embrace the deterrence standard. Only a consistent application of a deterrence standard nationwide will ensure that the goals of our nation's anti-discrimination laws remain protected.

\textsuperscript{310} A question for courts to consider will be whether the same policy reasons discussed in Faragher and Ellerth will prompt courts to fashion an analogous affirmative defense in the retaliation context. Just as in claims of harassment under section 703(a), a court may opine that, for acts of retaliation which actually result in a tangible employment action, no affirmative defense is available. See Ellerth, 524 U.S. at 765 (holding that no affirmative defense is available when a supervisor's harassment culminates in a tangible employment action.) However, for acts of retaliation by a supervisor or co-workers which do not result in a tangible employment action, but may otherwise deter a reasonable person or others from engaging in EEO activity, courts may opine that an employer should have the opportunity to utilize the same affirmative defense available in claims of harassment rooted in claims brought under section 703(a). See id. at 763-64; Faragher v. City of Boca Raton, 524 U.S. 775, 806-08 (1998).
APPENDIX A.

Are the following adverse actions sufficiently adverse to state a claim of retaliation? This chart only represents a few of the many kinds of adverse actions often raised in complaints of retaliation. However, because courts interpret the adverse action element differently, claims based on these adverse actions may or may not be cognizable. While the conclusions in this chart are admittedly over-simplified because each court examined many facts which contributed to the conclusions reached in the cases cited below, the general disagreement amongst the circuits in this area is nonetheless troubling for advocates, employees, employers and fact finders.
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