COMMENT

TITLE VII SECTION 704(a) RETALIATION CLAIMS: TURNING A BLIND EYE TOWARD JUSTICE

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“The old law about ‘an eye for an eye’ leaves everybody blind.”

Dr. Martin Luther King, Jr.

I. INTRODUCTION

Within the burgeoning area of Title VII discrimination litigation, retaliation claims are garnering attention both for their increasing number and for their inconsistent adjudication by circuit courts of appeals. As the number of claims exponentially multiplies, so does confusion about the appropriate threshold of liability for employers’ retaliatory conduct; yet, the threshold set forth in section 704(a) of Title VII appears deceptively simple. The plain language of the provision prohibits employers from discriminating against employees for participating in Title VII processes or for opposing

1. Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1994) (Title VII). With a few notable exceptions, the Act applies to all private employers with fifteen or more employees. Id. § 2000(e)(b). It also applies to federal, state, and local government employers. Id.

2. Marisa Williams & Rhonda Rhodes, Recent Developments in Retaliation Law and Resulting Implications for the Federal Sector, 28 COLO. LAW. 59, 59 (1999) (noting that retaliation claims represent the new frontier in employment discrimination law);

3. Patricia A. Wise, UNDERSTANDING AND PREVENTING WORKPLACE RETALIATION 1 (Jerry Kline ed., 2000) (commenting that the number of retaliation claims filed with the Equal Employment Opportunity Commission (EEOC) more than doubled from 1991 to 1999, and that they “generally are easier to prove and result in larger damage awards than other discrimination claims”).


6. The intent of section 704(a) is to provide “exceptionally broad protection” for protestors of discriminatory employment practices. Pettway v. Am. Cast Iron Pipe Co., 411 F.2d 998, 1006 n.18 (5th Cir. 1969). The protection of the “participation clause” extends to those making a charge, testifying, or participating “in any manner” in an investigation, proceeding, hearing, or litigation of a Title VII claim. EEOC COMPLIANCE MANUAL § 8-II(C)(1) (CCH Inc. ed., 1999). The validity or reasonableness of an employee’s underlying discrimination charge is not a mitigating factor for an employer’s retaliatory conduct. See, e.g., Wyatt v. City of Boston, 35 F.3d 13, 15 (1st Cir. 1994). Additionally,
discrimination proscribed by Title VII. The divergent precedent, however, is far more complex and ranges from prohibiting merely harassing conduct to requiring that retaliation involve an “ultimate employment decision.”

This disarray in precedent stems from inconsistent statutory interpretation and inappropriate application of one of the prima facie elements of a section 704(a) claim. A split in authority has led to three distinct liability thresholds for Title VII, section 704(a) retaliation claims. Under the first threshold, an employer’s retaliatory conduct must rise to the level of an “ultimate employment decision”—those decisions involving hiring, promoting, compensating, or discharging—to be actionable. The second threshold, while not restricting actionable conduct to “ultimate employment decisions,” requires that retaliation “materially” or “tangibly” affect an employee’s terms or conditions of employment. In sharp contrast, the third threshold does not advocate a “laundry list” approach to retaliation against one so closely related or associated with the party pursuing a statutory claim that it would discourage the party from pursuing those rights is also prohibited.

6. In contrast to the broad interpretation given the participation clause, the coverage of the opposition clause has engendered more controversy. "The Meaning of Discrimination: Why Courts Have Erred in Requiring Employment Discrimination Plaintiffs to Prove That the Employer’s Action Was Materally Adverse or Ultimate," 47 U. Kan. L. Rev. 333 (1999) (arguing that judicially imposing a requirement of material adversity in discrimination claims is not warranted by statute, legislative history, or public policy); Rebecca Hanner White, "De Minimis Discrimination," 47 Emory L.J. 1121 (1998) (analyzing Title VII statutory language and discrimination decisions and determining that “de minimis” discrimination is actionable under Title VII).

7. See Richardson v. New York State Dep’t of Corr. Serv., 180 F.3d 426, 445–46 (2d Cir. 1999) (commenting upon the disagreement among courts about the severity of conduct necessary to establish a Title VII retaliation claim).


9. See, e.g., Mattern v. Eastman Kodak Co., 104 F.3d 702, 709 (5th Cir. 1997) (holding that the anti-retaliation provision of Title VII includes only “ultimate employment decisions“ and does not extend its protection to “vague harms”).

10. See, e.g., Hollins v. Atl. Co., 188 F.3d 652, 662 (6th Cir. 1999) (requiring a materially adverse change, such as termination or demotion, to sustain a section 704(a) retaliation claim).
retaliation; instead, it recognizes that “its forms are as varied as the human imagination will permit.”13

The last body of precedent is most consistent with the purpose underlying the anti-retaliation provision: “Maintaining unfettered access to statutory remedial mechanisms.”14 Courts frequently comment that the creation of a right is meaningless unless there is an ancillary right to be free from retaliation for the assertion of that right.15 During consideration of the Civil Rights Act of 1964, the House Judiciary Committee Report on Title VII illustrated that granting rights may be pointless if the exercise of those rights can be frustrated:

The right to vote . . . does not have much meaning on an empty stomach. The impetus to achieve excellence in education is lacking if gainful employment is closed to the graduate. The opportunity to enter a restaurant or hotel is a shallow victory where one’s pockets are empty. The principle of equal treatment under law can have little meaning if in practice its benefits are denied the citizen.16

Just as many provisions within the 1964 Civil Rights Act might not provide the opportunities promised without the added protection of Title VII, the anti-discrimination provisions of Title VII create no benefit unless employees can access their statutory rights without recrimination.17 Consequently, any retaliatory conduct by employers that deters employees from exercising their substantive rights under Title VII should be actionable.

A careful examination of pertinent statutory provisions, relevant Supreme Court cases, prima facie case elements, and representative decisions reveals how some courts have turned a blind eye to this premise. Failing to see the separate dignitary interest represented by section 704(a), these courts have shrouded retaliation claims in requirements that ignore the sui

13. Knox v. Indiana, 93 F.3d 1327, 1334 (7th Cir. 1996) (citing cases holding employers liable for sexual and racial harassment by co-workers and stating that "there is nothing to indicate that the principle of employer responsibility does not extend equally to other Title VII claims, such as a claim of unlawful retaliation").
15. E.g., Hanson v. Hoffman, 628 F.2d 42, 52 (D.C. Cir. 1980) (observing that retaliation for merely inquiring about one’s rights is “a subtle and insidious means of evading a statutory mandate”).
17. See EEOC COMPLIANCE MANUAL, supra note 5, § 8-I(A) (stating that permitting retaliatory activities has a “chilling effect” on employees’ willingness to speak out against discrimination).
generis nature of the provision. Part II of this Comment attempts to lift the veil of confusion surrounding section 704(a) claims by analyzing the language of the anti-retaliation provision and comparing it to other substantive provisions of Title VII. Part III then examines the prima facie elements of a retaliation claim. Parts IV and V illustrate how some courts have converted the requirement for “an adverse employment action” into a statutory requirement. Finally, this Comment advocates an approach to section 704(a) claims that makes actionable any conduct by employers that chills employee access to the anti-discrimination provisions of Title VII.

II. STATUTORY PROVISIONS

A. The Anti-Retaliation Provision

Section 704(a) of Title VII provides protection against retaliation for two groups of employees: (1) those opposing discrimination proscribed by Title VII and (2) those participating in Title VII processes:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants . . . 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. 19

Before interpreting section 704(a), it is first appropriate to identify the parties affected by it. Section 704(a) applies only to discrimination by an employer. 20 As such, only retaliatory conduct attributable to the employer, either directly or vicariously, is actionable. 21 Likewise, the provision covers only


20. Id.

21. See Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 754–55 (1998) (stating that Congress has directed courts to rely upon the general common law of agency to analyze a claim for vicarious liability of an employer); Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998) (holding an employer subject to vicarious liability for an actionable hostile work environment created by a supervisor with immediate authority over the employee, but allowing an affirmative defense where the employer takes no tangible employment action). This Comment takes the position that the standards of liability articulated in Burlington for a sexual harassment claim are equally applicable to a retaliatory harassment situation. See Richmond-Hopes v. City of Cleveland, 168 F.3d 490, 1998 WL 808222, at *9 (6th Cir. 1998) (unpublished table decision) (per curiam) (applying the standards in Burlington to a retaliatory harassment claim); but see Gregory v. Widnall,
employees, a term that the Supreme Court has concluded should be broadly interpreted to include both current and former employees. 22

Any further interpretation of section 704(a) begins with the premise that it clearly prohibits “discrimination,” 23 a term nebulous enough to require clarification. During a congressional debate before the enactment of Title VII, Senators Clark of Pennsylvania and Case of New Jersey stated: “It has been suggested that the concept of discrimination is vague. In fact it is clear and simple and has no hidden meanings. To discriminate is to make a distinction, to make a difference in treatment or favor...” 24 Accepting that manifest definition, section 704(a) sets the threshold for employer liability at any retaliatory conduct that treats employees who have accessed Title VII differently from employees who have not. 25 Section 704(a) appears to encompass differential treatment that is either favorable or adverse to the employee. 26 For example, if an employee in a typing pool files a claim alleging racial discrimination, section 704(a) forbids the employer from retaliating by substantially increasing or decreasing the typist’s workload in an attempt to force the employee to quit. While it is easy to understand that an increase in workload is retaliatory, it is harder to understand that lightening the load might be equally so. Yet such an action could frustrate an employee who takes  

153 F.3d 1071, 1075 (9th Cir. 1998) (declining to decide whether Burlington controls retaliation-based hostile environment claims). Retaliation is similar to sexual harassment in that it can take two shapes. Harassment that does not take the shape of a tangible employment action is similar to “hostile work environment” harassment. Harassment that does take the shape of a tangible employment action is similar to “quid pro quo” harassment. Tangible employment actions necessarily fall under the special province of supervisors. Retalatory harassment by supervisors, however, can fall into either category. This distinction is important because it illustrates that if retaliation occurs at the hands of co-workers, then the claim should be for hostile work environment. If, however, the retaliation occurs at the hand of a supervisor, the claim could be for hostile work environment or quid pro quo. This, in turn, is important because an employer may utilize an affirmative defense if the alleged retaliation occurs without a tangible employment action, but would be strictly liable if the retaliation results in a tangible employment action. See Burlington, 524 U.S. at 760–65 (1998) (using the concept of a tangible employment action to analyze an employer’s vicarious liability for sexual harassment).

23. 42 U.S.C § 2000e-3(a).
25. The EEOC, charged with administering the provisions of Title VII, advocates this statutory interpretation. See EEOC COMPLIANCE MANUAL, supra note 5, § 8-III(D).  
26. Id. § 614.1(d); but see Harris v. Gen. Motors Powertrain, 166 F.3d 1209, 1999 WL 7865, at *4 (4th Cir. 1999) (unpublished table decision) (per curiam) (finding that a transfer to a new job assignment that involved neither a demotion nor a pay cut did not give rise to an actionable retaliation claim).
pride in personal productivity or could cause resentment among co-workers whose own workloads might proportionately increase. If the retaliatory conduct is likely to deter protected activity, it is prohibited by the manifest terms of the provision. Thus, a facial acceptance of section 704(a) prohibits any treatment by an employer that differentiates an employee for accessing the substantive anti-discrimination provisions of Title VII.

B. The Anti-Discrimination Provision

Some courts, however, have been unwilling to examine the anti-retaliation provision independently of the preceding substantive anti-discrimination provisions of Title VII. Instead, their analyses find section 704(a) dependent upon section 703(a). Section 703(a) provides:

It shall be an unlawful employment practice for an employer? (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

These provisions have been interpreted to correspond to two forms of discrimination: disparate treatment and disparate impact.

1. Disparate Treatment and Disparate Impact Defined. Disparate treatment is that which treats an individual “less favorably than others because of [his or her] race, color, religion, sex, or national origin.” Usually the treatment is “clearly
unfavorable to the employee or applicant; people rarely challenge treatment that they consider favorable. Yet the plaintiff need not show that the treatment was unfavorable—only that it was different.\textsuperscript{32} Described in this manner, it is easy to see the correlation between disparate treatment and retaliatory discrimination, and the logic of using disparate treatment theories as a basis for analyzing retaliation claims.\textsuperscript{33}

Disparate treatment can be distinguished from those actions that result in a disparate impact upon groups of individuals.\textsuperscript{34} Disparate impact claims “involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another.”\textsuperscript{35} It is more difficult to see the application of this provision to retaliation claims. The provision might, however, have some correlation if an employer has a facially neutral policy that more harshly impacts those who participate in Title VII’s processes or oppose discrimination proscribed by Title VII.\textsuperscript{36}

2. Proof of Discriminatory Intent in Disparate Treatment Claims. One of the primary differences between disparate treatment and disparate impact claims is that intent to discriminate is crucial to proving the former but not essential to proving the latter.\textsuperscript{37} Proof of discriminatory intent in disparate treatment claims may be direct or circumstantial.\textsuperscript{38} An example of direct evidence in a disparate treatment claim might be a notation in a personnel file that an applicant was not hired because of his or her national origin. In such an instance, the intent to illegally discriminate is clear. In contrast, circumstantial evidence does not directly prove the motivation for an action; instead, such evidence may provide an inference that an action was unlawfully motivated.\textsuperscript{39} An example of circumstantial evidence might involve statistics showing that no

\textsuperscript{32} Charles A. Sullivan et al., Employment Discrimination § 5.2 (2d ed. 1988) (“In short, a difference in treatment on a prohibited basis is discriminatory, regardless of which way the difference cuts.”).

\textsuperscript{33} Id. § 7.2 (commenting that while most retaliation claims are of an individual nature, a pattern of discrimination against employees engaging in conduct protected by section 704(a) that would indicate systemic disparate treatment is conceivable).

\textsuperscript{34} Id. § 2.2 (describing briefly the two general theories of interpreting the “discrimination” proscribed by Title VII that have been adopted by the Supreme Court).

\textsuperscript{35} Int'l Bhd. of Teamsters, 431 U.S. at 335 n.15.

\textsuperscript{36} See Sullivan et al., supra note 32, § 7.2 (illustrating how the disparate impact discrimination model may apply in the retaliation area).

\textsuperscript{37} Id. § 2.2.

\textsuperscript{38} Lindemann & Grossman, supra note 6, at 10–11.

\textsuperscript{39} Id. at 11.
individual sharing the applicant’s national origin had ever been hired by an employer, although many qualified individuals applied. This evidence could lead to an inference that an employer’s practices, and the subsequent decision against hiring the particular applicant, were motivated by discriminatory intent.

Because most retaliation claims involve individual disparate treatment rather than group-wide disparate impact, courts adopting an analysis of section 703(a) in their consideration of section 704(a) claims should require proof of discriminatory intent.

3. Comparing the Language of Section 703(a) to that of Section 704(a). A review of the language of section 703(a), the substantive anti-discrimination provision of Title VII, indicates that it is simultaneously broader and narrower than section 704(a), the anti-retaliation provision. Section 703(a) is broader in that it protects any individual covered by Title VII from discrimination based upon certain immutable characteristics or based upon his or her religion. In contrast, section 704(a) protects only those employees who have participated in Title VII’s processes or who have opposed discrimination proscribed by Title VII. Section 703(a) is narrower than section 704(a) in that its first subsection limits its proscriptive reach to an individual’s “compensation, terms, conditions, or privileges of employment.”

Section 704(a) carries no such qualifying language. Courts that rely upon section 703(a) to interpret section 704(a) appear to ignore this important point or to find that ejusdem generis warrants the entanglement. While the wisdom of such an approach may be questionable, a broad interpretation of the phrase might not alter the purpose of the anti-retaliation provision.

4. Supreme Court Interpretation of Terms, Conditions, or Privileges of Employment. The first limitation in section 703(a),

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40. SULLIVAN ET AL., supra note 32, § 7.2 (stating that “[t]here is no doubt at all” about the utility of the section 703(a) disparate treatment model in retaliation claims).
41. 42 U.S.C. § 2000e-2(a) (1994) (prohibiting employment discrimination on the basis of an individual’s race, color, religion, sex, or national origin).
42. Id. § 2000e-3(a).
43. Id. § 2000e-2(a).
44. Id. § 2000e-3(a).
45. The ejusdem generis canon of statutory interpretation provides that “when a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed.” BLACK’S LAW DICTIONARY 535 (7th ed. 1999).
“compensation, terms, conditions, or privileges of employment,”\(^{46}\) can appropriately be read as merely differentiating matters regarding employment from those outside the realm of the employment relationship.\(^{47}\) This interpretation gains support from the Supreme Court’s decision in *Hishon v. King & Spalding*.\(^{48}\) In *Hishon*, the Supreme Court considered whether the implied promise of a partnership could be considered a “term, condition, or privilege of employment.”\(^{49}\) Determining that even benefits the employer was under no obligation to provide could constitute “incidents of employment,” the Court held that such benefits “form ‘an aspect of the relationship between the employer and employees.’”\(^{50}\) The Court reached this interpretation of the phrase by examining the legislative history of Title VII.\(^{51}\) The Court also relied upon a prior interpretation of a similar phrase in the National Labor Relations Act (NLRA).\(^{52}\) The *Hishon* decision would seem to indicate that it is the employment relationship itself that activates the anti-discrimination protection of Title VII.\(^{53}\) Discriminatory activities outside the employment relationship (for example, social invitations to an employer’s home) would not fall within the province of section 703(a). Applying this interpretation of “terms, conditions, or privileges of employment” to the anti-retaliation provision does not tamper with the provision’s primary purpose. Section 704(a), by using the term “employee” instead of the broader term “individual” used in section 703(a), presumes that such an employment relationship exists.


47. *See, e.g.*, *Nelson v. Upsala Coll.*, 51 F.3d 383, 388 (3d Cir. 1995) (stating that some wrongs perpetrated by an employer against an employee, such as physical assault, might be actionable, but the plaintiff must seek relief outside of Title VII); *Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194, 199 (3d Cir. 1994) (commenting that Title VII offers protection only within the employment relationship). *See also White, supra note 9, at 1151–52 (observing that the thrust of *Hishon v. King & Spalding*, 467 U.S. 69 (1984), serves to distinguish the employment relationship from other relationships).*

48. 467 U.S. 69, 77 (1984) (noting that Title VII protections apply to benefits arising from the employment relationship, not only to the employment itself).

49. *Id.* at 74–75 (evaluating an associate’s claim that a law firm’s failure to make her a partner was unlawful discrimination under Title VII).

50. *Id.* at 75–76 (citing S. Rep. No. 88-867, at 11 (1964), and *Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971)).

51. *Id.* at 75 & n.7 (citing S. Rep. No. 88-867, at 11, 24 (1964)).

52. *Id.* at 75–76 & n.8 (commenting that some sections of Title VII were patterned after the NLRA).

53. White, *supra* note 9, at 1151–52 (stating that *Hishon* supports the notion that the phrase “term, condition, or privilege of employment” is better read “as making clear that an employer who discriminates against an employee in a non-job-related context would not run afoul of Title VII, rather than as sheltering employment discrimination that does not significantly disadvantage an employee”) (footnote omitted).
Moreover, this interpretation is bolstered by the Court’s holding in *Meritor Savings Bank, FSB v. Vinson*, 54 in which the Court reiterates that the phrase “‘terms, conditions, or privileges of employment’ evinces a congressional intent ‘to strike at the entire spectrum of disparate treatment of men and women’ in employment.” 55 In *Meritor*, the Court held that sexual advances imposed upon a female employee by her supervisor were sufficient to state a cause of action for sexual harassment by creating a hostile work environment. 56 Rejecting the employer’s claims that Title VII addressed only economic losses, not “‘purely psychological aspects of the workplace environment,’” the Court ruled that the phrase “terms, conditions, or privileges of employment” extends beyond economic or tangible harm. 57 Again, this interpretation squares with the concept that any retaliatory conduct—whether it be economic, tangible, or not—is prohibited if it deters access to the benefits of Title VII.

Yet, oddly enough, *Meritor* also strikes a blow to the position that section 703(a) should be broadly interpreted. In its decision, the Court stated that “[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’” 58 Thus, *Meritor* might be read to require a materially adverse alteration in conditions in order to activate the protections of section 703(a). 59

This interpretation could also be inferred from the Supreme Court’s unanimous decision in *Harris v. Forklift Systems, Inc.* 60 In *Harris*, the court emphasized that “[c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview.” 61 The Court placed the required level of injury somewhere “between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological

55. Id. at 64 (citing Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978) (quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971))).
56. Id. at 67.
57. Id. at 64.
58. Id. at 67 (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).
59. White, supra note 9, at 1153–54 (stating that *Meritor* establishes a plausible argument for requiring actionable discrimination to either be “materially adverse” or “severe and pervasive”).
60. 510 U.S. 17 (1993).
61. Id. at 21.
injury. The Court then crafted a two-pronged approach to determining whether a hostile environment existed by suggesting consideration of both objective and subjective factors. Although this position would superficially appear to impose a threshold level of materiality upon an employer’s discriminatory conduct—a threshold that might be contrary to the purpose behind the anti-retaliation provision—there is another view of the holdings of both Meritor and Harris.

This view is manifested by one of the Supreme Court’s most recent decisions in the field of employment discrimination, Burlington Industries, Inc. v. Ellerth, in which the Court examined the question of an employer’s liability for sexually harassing supervisory conduct. It found that such claims must be examined under the agency principles it had initially referenced in Meritor. Applying agency principles, the Court held that “[a]n 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.” This decision indicates that when a supervisor manipulates his or her position in the employment relationship to discriminate against an employee—action that his or her position alone allows the supervisor to take—the employer is vicariously liable for that action. If, however, discrimination occurs that might be instituted by anyone in the workplace, the employer will be liable only if that discrimination is “sufficiently severe” that the employer should have been aware of it. Read in this manner, both Meritor and Harris could be limited to the proposition that section 703(a) covers only actions attributable to the employer. Again, this

62. Id.
63. Id. at 22 (holding that to be actionable conduct under Title VII, (1) the employee must perceive the work environment as hostile or abusive and (2) the employee’s perception must be reasonable).
64. 524 U.S. 742 (1998).
65. Id. at 746–47 (indicating that the employee had allegedly experienced “unwelcome and threatening sexual advances” from the employee’s supervisor).
66. Id. at 752 (citing its reliance upon agency principles discussed in Meritor).
67. Id. at 765 (emphasis added).
68. See id.; see also White, supra note 9, at 1158 (insisting that “it is not the economic or materially adverse nature of the discrimination that makes it actionable but the fact that it involves an action only supervisors can inflict on their subordinates”).
69. White, supra note 9, at 1157–58. White observes that often harassment is not tangible in that it is seldom recorded and often denied. Id. at 1159. Only when a supervisor’s harassment is severe or pervasive does it constitute actionable discrimination by the “employer.” Id.
interpretation is not contrary to the primary purpose behind the anti-retaliation provision. Materiality would only be an evidentiary factor used in analyzing whether an employer is liable for conduct, such as retaliatory harassment, when no tangible action has been taken.

This position also correlates with the necessity for intent in disparate treatment claims. When there is direct evidence of discrimination, intent is readily discerned. When only circumstantial evidence is available, however, intent becomes harder to prove. If there is evidence of a material alteration in the conditions of employment, such as discharge or demotion, then unlawful motive may be more obvious. When the discriminatory actions taken are subtle, however, materiality makes it more likely than not that the actions were intentionally discriminatory. Although this position seems readily defensible, many courts require materiality even when the intent to discriminate is clear.

5. Interpretation of “Tends to Deprive” or “Adversely Affects.” In disparate impact claims, as opposed to disparate treatment claims, an employment action that deprives or tends to deprive an individual of employment opportunities or otherwise “adversely affect[s] his status as an employee” is prohibited. Without question, this language imposes a statutory requirement of adversity that is warranted in disparate impact cases. If a facially neutral employment policy has no adverse impact, then there can be no evidence of discriminatory intent. If, however, the policy “deprives or tends to deprive” individuals of employment opportunities because of their race, color, religion, sex or national origin, discriminatory intent may be inferred. The

70. See Richmond-Hopes v. City of Cleveland, 168 F.3d 490, 1998 WL 808222, at *3 (6th Cir. 1998) (unpublished table decision) (per curiam) (finding the standards for employer liability set forth in Burlington applicable to a retaliatory harassment claim); but see Gregory v. Widnall, 153 F.3d 1071, 1075 (9th Cir. 1998) (indicating uncertainty about whether Burlington controls retaliation-based hostile environment claims).


72. LINDEMANN & GROSSMAN, supra note 6, at 11.

73. Id. (amplifying that circumstantial evidence only permits inferring the existence of the fact).

74. See Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997) (commenting 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’”).


76. Id.
anti-retaliation provision carries no corresponding language requiring that an adverse impact exist. It does, however, require that an employer take action “against” an employee who has participated in Title VII’s processes or opposed discrimination proscribed by Title VII.77 The plain meaning of the word “against” is “in opposition to.”78 Applying this meaning to the context of the anti-retaliation provision results in the conclusion that an employer may not take any action in opposition to an employee’s protected activity. To import a standard of material adversity into retaliation claims is contrary to the ordinary meaning of the language in the provision and imposes a standard applicable to disparate impact, rather than disparate treatment claims. It also thwarts the purpose behind the anti-retaliation provision. Even so, this interpretation has occurred under the guise of requiring an adverse employment action as part of the prima facie case of retaliation.79

III. PRIMA FACIE REQUIREMENTS OF RETALIATION

Courts substantially agree on the elements necessary to establish a prima facie case of retaliation.80 Covered employees must demonstrate the following: (1) they engaged in protected opposition to discrimination or participated in a Title VII proceeding;81 (2) they suffered an adverse employment action contemporaneously or subsequent to the protected activity; and (3) there is a causal relation between the protected activity and the adverse action.82 If the employee has direct evidence of

77. Id.
79. Lidge, supra note 9, at 334–35 (commenting that this requirement contradicts statutory language, legislative history, and public policy).
80. But see Donna Smith Cude & Brian Steger, Does Justice Need Glasses? Unlawful Retaliation Under Title VII Following Mattern: Will Courts Know It When They See It?, 14 LAB. LAW. 373, 373 (1998) (arguing that courts are unable to specifically delineate the requirements of a claim for retaliation under Title VII but they believe they “know retaliation when they see it”).
81. LINDEMANN & GROSSMAN, supra note 6, at 650. The authors comment that while the participation clause of section 704(a) has been interpreted broadly, the opposition clause is more strictly construed so that opposition conduct that is unlawful or disruptive may nullify statutory protection that might otherwise exist. Id. at 650–51 (citations omitted).
82. Once the prima facie case is established, the order and allocation of burdens of proof in retaliation claims generally follow the standards established for Title VII disparate treatment cases. Richardson v. New York State Dept of Corr. Serv., 180 F.3d 426, 443 (2d Cir. 1999) (explaining that retaliation claims are evaluated under the burden-shifting rules set forth by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801–02 (1973) (establishing that once an employee carries his burden of establishing a prima facie case of discrimination under Title VII, the employer carries the burden “to articulate some legitimate, nondiscriminatory reason for the employee’s
retaliation—for example, a memorandum from supervisory personnel that the employee is being demoted because he or she is a troublemaker for filing a section 703(a) complaint—then liability should be automatically established because intent to retaliate is clear.\textsuperscript{83} The only question remaining would be the extent to which the employee had been harmed.\textsuperscript{84}

With circumstantial evidence of intent, however, the establishment of these elements by an employee gives rise only to a presumption of retaliation.\textsuperscript{85} This presumption, in turn, shifts the burden of production to the employer to articulate a legitimate, non-retaliatory reason for the adverse employment action.\textsuperscript{86} Once the employer makes such a showing, the presumption of retaliation disappears, and the employee must prove the proffered reason is a mere pretext for retaliation.\textsuperscript{87} In this regard, retaliation claims follow the shifting burden framework for disparate treatment established by the Supreme Court in \textit{McDonnell Douglas Corp. v. Green}.\textsuperscript{88}

In applying the prima facie case requirements to retaliation claims, under section 704(a) courts have construed the elements in accordance with the case law interpreting section 703(a).\textsuperscript{89} Such an interpretation might not be unjustified if the requirement of an “adverse employment action” were limited to the concept that retaliatory conduct should cause harm to be actionable. Whether an action caused harm would require a case-by-case analysis and would depend upon the employment relationship in each case. Actions that might constitute adversity

\textsuperscript{83} EEOC COMPLIANCE MANUAL, supra note 5, § 614.1(d) (providing an example of retaliatory motive proven by direct evidence).

\textsuperscript{84} Smith v. Sec’y of the Navy, 659 F.2d 1113, 1120 (D.C. Cir. 1981) (“Questions of statutory violation and appropriate statutory remedy are conceptually distinct. An illegal act of discrimination—whether based on race or some other factor such as a motive for reprisal—is a wrong in itself under Title VII, regardless of whether that wrong would warrant an award of [damages] . . . .”) (citations omitted).

\textsuperscript{85} Raney v. Vinson Guard Serv., Inc., 120 F.3d 1192, 1196 (11th Cir. 1997) (describing the shifting burdens of Title VII retaliation claims).

\textsuperscript{86} \textit{Id}.

\textsuperscript{87} \textit{Id}.

\textsuperscript{88} 411 U.S.792, 802 (1973).

\textsuperscript{89} EEOC COMPLIANCE MANUAL, supra note 5, § 8-II(D)(3) (disagreeing with those courts that use section 703(a) to interpret section 704(a)—an interpretation the Commission believes is overly restrictive).
in one working environment could easily be of little consequence in another.

Courts, however, have not limited their consideration of adversity tied to “terms, conditions, or privileges of employment” in this manner. Instead, in overlaying the provisions of section 703(a) onto the prima facie element requiring an adverse action, they have substantively changed the requirements for a retaliation claim.\textsuperscript{90} An example of this change can be seen in the Fourth Circuit decision, \textit{Munday v. Waste Management of North America, Inc.}\textsuperscript{91}

Munday was a truck driver who filed a sexual harassment claim against her employer that was ultimately resolved by a settlement agreement between the parties.\textsuperscript{92} The agreement was premised upon Munday’s return to work at Waste Management.\textsuperscript{93} Prior to her return, the other employees were instructed by their managers to refrain both from sexually harassing Munday and from socializing with her.\textsuperscript{94} Upon her return, Munday heard that employees had been told to ignore her and to report any conversations to management.\textsuperscript{95} Confronting one of her managers, Munday learned that these allegations were true and that management “wanted to get rid of [her].”\textsuperscript{96} At a meeting held to address Munday’s concerns, one manager verbally assaulted her claiming “he had heard a rumor that she planned to sue the company again.”\textsuperscript{97}

In an action against Waste Management for retaliation, Munday was awarded both compensatory and punitive damages after the district court found a pattern of retaliation.\textsuperscript{98} The Fourth Circuit overturned the decision by holding that, “as a matter of law, this scenario does not rise to the level of an adverse employment action for Title VII purposes.”\textsuperscript{99} In reaching

\textsuperscript{90} Passer v. Am. Chem. Soc’y, 935 F.2d 322, 331 (D.C. Cir. 1991) (emphasizing that section 704(a) “does not limit its reach only to acts of retaliation that take the form of cognizable employment actions such as discharge, transfer or demotion”).
\textsuperscript{91} 126 F.3d 239 (4th Cir. 1997).
\textsuperscript{92} Id. at 241.
\textsuperscript{93} Id. (stating that the employer “agreed, among other things, to expunge Miss Munday’s termination, to reinstate Miss Munday, and not to retaliate against her for filing the complaint”).
\textsuperscript{94} Id. (stating that the employers were told to “avoid [Munday] as much as possible”).
\textsuperscript{95} Id.
\textsuperscript{96} Id.
\textsuperscript{97} Id.
\textsuperscript{98} Id. at 242 (pointing out that the district court allowed recovery on the retaliation claim even though she did not state a prima facie case of discrimination under section 703(a)).
\textsuperscript{99} Id. at 243.
this decision, the court found that Munday’s employment status had not been altered, and, as a consequence, she had suffered no adversity.\textsuperscript{100} Finding that an employee is not “guaranteed a working environment free of stress,”\textsuperscript{101} the court observed that, “In no case in this circuit have we found an adverse employment action to encompass a situation where the employer has instructed employees to ignore and spy on an employee who engaged in protected activity, without evidence that the \textit{terms, conditions, or benefits} of her employment were adversely affected.”\textsuperscript{102} The \textit{Munday} decision thus represents the injection of section 703(a)’s provisions into the retaliation context, belying the independent thrust of section 704(a) and turning a blind eye to the retaliation Munday suffered.

Ignoring the separate dignitary interests represented by the anti-retaliation provision, courts are interjecting an interpretation of section 703(a) that is inconsistent both with the deterrent purpose of the anti-retaliation provision and with logical analysis of statutory language. Importing standards developed in response to interpretation of section 703(a), these courts hold that retaliatory conduct must “materially” or “tangibly affect” an employee’s “terms, conditions, or privileges of employment.”\textsuperscript{103} This creates a higher than warranted threshold of employer liability in retaliation claims. Still other courts require that the action reach the level of an “ultimate employment decision” to be afforded protection by Title VII.\textsuperscript{104}

\textsuperscript{100} \textit{Id.} at 244.  
\textsuperscript{101} \textit{Id.} (quoting Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985)).  
\textsuperscript{102} \textit{Id.} at 243 (emphasis added).  
\textsuperscript{103} \textit{See, e.g.}, Hollins v. Atl. Co., 188 F.3d 652, 662 (6th Cir. 1999) (adopting the precedent requiring a materially adverse change, such as termination or demotion, to satisfy the prima facie element of adverse employment action); Torres v. Pisano, 116 F.3d 625, 639–40 (2d Cir. 1997) (finding that an employer’s requests that the plaintiff drop her EEOC charges did not constitute retaliation because she did not suffer “a materially adverse change in the terms and conditions of [her] employment”); Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997) (commenting that courts have incorporated a requirement that retaliation must be “tangible enough to alter an employee’s compensation, terms, conditions, or privileges of employment” into the definition of “adverse employment action”).  
\textsuperscript{104} \textit{See, e.g.}, Matter v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997) (reaffirming its position that Title VII was designed to address only “ultimate employment decisions’ . . . ‘such as hiring, granting leave, discharging, promoting, and compensating’) (citations omitted); Ledergerber v. Stangler, 122 F.3d 1142, 1144 (8th Cir. 1997) (opining that actions with a tangential effect on employment do not rise to the level of “ultimate employment decision[s]” actionable under section 704(a)).
IV. THE ULTIMATE EMPLOYMENT DECISION THRESHOLD

A. Page v. Bolger

The ultimate employment decision threshold of employer liability originated in a Fourth Circuit decision, Page v. Bolger. Carl Page, a black postal employee, sued his employer under section 717 of Title VII, the anti-retaliation provision applicable to certain federal employees. Page alleged that he had been denied promotions on two occasions because of racial discrimination. He based his claim on the Postal Service’s failure to follow promotion procedures outlined in its Personnel Handbook. The handbook provided that “every effort” would be made to include a minority member on the committee reviewing applications for promotion.

In rejecting Page’s discrimination action, the Fourth Circuit analogized action under section 717 to a disparate treatment claim that might be presented under section 703(a)(1). It found that Supreme Court cases interpreting disparate treatment had “consistently focused on the question whether there ha[d] been discrimination in what could be characterized as ultimate employment decisions such as hiring, granting leave, discharging, promoting, and compensating.” The court then concluded that this was the “general level of decision . . . contemplated by the term ‘personnel actions’ in [section] 717.” Additionally, the court found 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 [section] 717 and comparable provisions of Title VII.”

Simply because the Supreme Court had “focused” upon cases involving ultimate employment decisions seems an inadequate reason to reject other employment actions that are

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105. 645 F.2d 227 (4th Cir. 1981) (en banc).
106. 42 U.S.C. § 2000e-16(a) (1994) (extending Title VII’s coverage to certain categories of federal applicants and employees, including Postal Workers).
107. Page, 645 F.2d at 228.
108. Id. (stating that a review committee of at least three individuals was to select the “most outstanding candidates” to recommend for the promotion).
109. Id. at 228–29 (stating that the review committee consisted of “three white males”).
110. Id. at 233.
111. Id.
112. Id.
113. Id.
discriminatory.114 It is, as one commentator notes, akin to saying: “Larceny is a crime. Driving under the influence is not larceny. Therefore, driving under the influence is not a crime.”115 Instead, the proper inquiry under section 717 should have been whether the Postal Service, by violating its own promotion procedures, discriminated against Page because of his race.116 If the Service had intentionally failed to “make every effort” to place a minority representative on the review committee because it wanted to minimize the possibility of minority promotion, then the Service would have violated the provisions in its personnel handbook.117 Assuming that the personnel handbook enumerated the benefits that an employee might expect to enjoy as part of his employment relationship, then the Service’s failure to follow its own policy violated the “terms, conditions, or privileges” of Page’s employment.118 Under this reading, the Postal Service’s actions would have violated Title VII.

B. Mattern v. Eastman Kodak Co.

The reasoning in the Page decision was adopted by the Fifth Circuit in Dollis v. Rubin119 and then extended to retaliation claims in Mattern v. Eastman Kodak Co.120 Mattern, a female employee enrolled in a mechanic’s apprenticeship program, initially alleged two Title VII, section 703(a) violations—sexual harassment by two senior mechanics, and the existence of a hostile work environment.121 After Mattern filed these charges with the EEOC, her employer, Eastman, initiated an investigation, which led to one of the two senior mechanics

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114. Lidge, supra note 9, at 362 & n.186 (pointing out that the Supreme Court subsequently discounted this logic in both Meritor and Harris).
115. Id. at 364.
116. Id. at 365 (stating that the court should have looked at whether composition of the review committee was a “term, condition, or privilege” of employment rather than whether the committee’s composition was an “ultimate employment decision”).
117. See Page, 645 F.2d at 228.
118. Lidge, supra note 9, at 365–66 (stating that “an express provision in the Postal Service Personnel Handbook designating how promotions are decided . . . should fall within the term ‘privilege of employment’”).
119. 77 F.3d 777 (5th Cir. 1995). Dollis v. Rubin presents a Title VII action against an employer for sex and race discrimination and retaliation. Id. at 780. In addressing the retaliation claim, the Fifth Circuit relied upon the “ultimate employment decision” language and reasoning of the Page court by repeating its observation that the Supreme Court had dealt only with matters that involved “hiring, granting leave, discharging, promoting, and compensating.” Id. at 779, 781–82.
120. 104 F.3d 702 (5th Cir. 1997).
121. Id. at 704. Mattern alleged that her supervisors were tacitly aware of and approved the harassment. Id.
taking early retirement.  

No action was taken against the second mechanic.  

Although Eastman did transfer Mattern to another crew with a different immediate supervisor, she continued working for the same departmental supervisors.  

Approximately four months after the transfer, Mattern resigned her apprenticeship and filed suit alleging Title VII sexual harassment and retaliation.  

As the basis for her claim, Mattern offered five forms of proof.  

First, Mattern told her supervisor that she felt ill the day Eastman brought disciplinary proceedings against one of the mechanics.  

When her supervisor instructed her to report to the company’s medical department for a work-related illness, Mattern went home, preferring to take a day of vacation.  

Eastman sent two supervisors to her home, one of whom was named in her EEOC charge, to notify her that she must return to the medical department if her illness was work-related.  

Second, Mattern was reprimanded for not being at her workstation at a time when she was at Eastman’s Human Resources Department discussing her claim.  

Third, Mattern’s co-workers, professedly with supervisory approval, became hostile to Mattern’s mere presence on the job, refusing to speak with her on occasion, implicitly threatening her on others, and allegedly stealing her tools.  

Fourth, Mattern became so anxious that she fell ill, a situation her doctor attributed to the conditions at Eastman.  

Fifth, Mattern began to receive negative work evaluations by supervisors who had praised her work in the past.  

Many of the negative work evaluations involved Mattern’s inability to rebuild and re-align centrifugal pumps.  

Because this skill was essential to her success within the apprenticeship program, and because three negative evaluations led to expulsion from the program, Mattern was
assigned additional work in the skill.\textsuperscript{135} During one such assignment, Mattern was working directly with a mechanic who testified that he and Mattern properly rebuilt a pump.\textsuperscript{136} Yet, one of the supervisors charged in Mattern’s EEOC complaint reported to her superiors that the pump failed due to a re-assembly defect.\textsuperscript{137} On another assignment, a supervisor ordered Mattern to re-align a pump as it rested on a wooden pallet.\textsuperscript{138} Mattern was unable to do so, claiming that the pump was deliberately placed on a less than solid platform in order to make it more difficult to perform the assigned task.\textsuperscript{139} Mattern resigned presumably in anticipation of her third negative evaluation and her eventual removal from the program.\textsuperscript{140}

While acknowledging that sending supervisors to an employee’s home to prompt a return to work was “highly unusual, if not unprecedented,” a panel of the Fifth Circuit still found that none of the actions alleged by Mattern rose to the level of “adverse employment action.”\textsuperscript{141}

The court first addressed the fact that Mattern did not prove the actions taken against her were attributable to management.\textsuperscript{142} Next, the court concluded that the events about which Mattern complained did not meet the standard set by prior cases.\textsuperscript{143} The court cited its decision in \textit{Dollis} holding that “Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions.”\textsuperscript{144} In relying upon \textit{Dollis}, the Fifth Circuit did not attempt to justify interjecting its “ultimate employment decision” stance into the retaliation context.\textsuperscript{145} Instead, it commented that, “No authority need be cited for the necessary and longstanding rule that, absent a change in the law, a decision by our court is binding on subsequent panels. There has not been such a change.”\textsuperscript{146}

\textsuperscript{135} \textit{Id.} at 703–04, 706.
\textsuperscript{136} \textit{Id.} at 706.
\textsuperscript{137} \textit{Id.}
\textsuperscript{138} \textit{Id.}
\textsuperscript{139} \textit{Id.}
\textsuperscript{140} \textit{Id.} at 703–04.
\textsuperscript{141} \textit{Id.} at 705, 708.
\textsuperscript{142} \textit{Id.} at 707 (explaining that Title VII liability requires proof that employees act as agents of the employer).
\textsuperscript{143} \textit{Id.} at 708.
\textsuperscript{144} \textit{Id.} at 707 (quoting Dollis v. Rubin, 77 F.3d 777, 781–82 (5th Cir. 1995)).
\textsuperscript{145} \textit{Id.} at 707.
\textsuperscript{146} \textit{Id.}
Despite a jury decision to the contrary, the Fifth Circuit determined that a reasonable juror could not find that the acts in question were condoned or directed by Eastman, and, therefore, no agency relationship existed.147 This finding discounts the visits by supervisory personnel to Mattern’s home ordering her to return to work, the transfer, a missed pay increase, negative performance reviews, and threats of firing.148 In minimizing the significance of these actions, the court commented that they lacked consequence and did not meet the standard set by Dollis.149

To further justify its position that the threshold of liability for employers must rise to the level of an ultimate employment decision, the court analyzed the statutory anti-retaliation provision.150 It compared the language in section 704(a) to that in section 703(a)(1) and determined that the provisions were comparable because both proscribed discrimination.151 Then, the court contrasted those provisions with the second subsection of section 703(a).152 It found that section 703(a)(2), with its “vague proscription . . . [of] ‘limitation’ of employees which deprive or ‘would tend to deprive’ the employee of ‘opportunities’ or ‘adversely affect his status,’” reached much farther than the first subsection.153 The court reasoned that by reaching acts “which merely ‘would tend’ to affect the employee,” the second subsection was much broader than the first.154 By correlation, therefore, the court concluded that section 704(a) excluded the “vague harms” actionable under section 703(a)(2) and included only “ultimate employment decisions.”155

C. Criticism of the Mattern Decision

The dissent in Mattern argued that section 704(a) “affords an employee an independent hostile work environment retaliatory discrimination cause of action.”156 In doing so, it emphasized the independence of the provision: “There can be no

147. Id. at 707–08 (emphasizing that Title VII covers “employers and their “agents,” not “employees”).
148. Id. at 708.
149. Id. (stating that these actions do not constitute “adverse employment actions”).
150. Id. at 708–09.
151. Id. (using the language surrounding section 703(a)(1)’s use of the term “discrimination” to limit its reach in section 704(a)).
152. Id. at 709.
153. Id.
154. Id.
155. Id.
156. Id. at 710 (Dennis, J., dissenting).
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.”\textsuperscript{157} The dissent also chided the majority for its interpretation of and reliance upon \textit{Page v. Bolger}.\textsuperscript{158} Concluding that \textit{Page} did not rule out a hostile work environment cause of action, the dissent emphasized that the decision indicated only that section 717 does not prohibit discrimination in “interlocutory or mediate decisions having no immediate effect upon employment conditions . . . such as [the] composition of [a] review committee[ ].”\textsuperscript{159} Indeed, by implication, the dissent stated that the opinion found section 717 proscribed discrimination in “end-decisions” that have “immediate effect upon employment conditions,” such as an employer’s creation of a hostile environment.\textsuperscript{160} Most importantly, however, the dissent pointed out a phenomenon that had insinuated itself into retaliation law: conversion of the prima facie element of an ‘adverse employment action’ into a substantive statutory requirement.\textsuperscript{161}

\textbf{V. THE MATERIAL OR TANGIBLE THRESHOLD}

In \textit{Mattern}, the Fifth Circuit found that the actions complained of did not rise to the level of an “ultimate employment decision;” consequently, they were not actionable.\textsuperscript{163} The court reached this determination despite a jury finding of retaliatory intent.\textsuperscript{164} Other courts advocating the “ultimate

\textsuperscript{157} \textit{Id.} at 715 (Dennis, J., dissenting).
\textsuperscript{158} \textit{Id.} at 716 (Dennis, J., dissenting) (stating that the majority misinterpreted and incorrectly applied dicta from \textit{Page}).
\textsuperscript{159} \textit{Id.} at 717 (Dennis, J., dissenting).
\textsuperscript{160} \textit{Id.} (Dennis, J., dissenting).
\textsuperscript{161} \textit{Id.} at 712 (Dennis, J., dissenting).
\textsuperscript{162} \textit{Id.} (Dennis, J., dissenting).
\textsuperscript{163} \textit{Id.} at 709.
\textsuperscript{164} \textit{Id.} at 703.
employment decision” threshold of employer liability similarly eschew evidence of illegal motivation and concentrate only upon the level of retaliatory response. Courts that do consider intent, however, have also raised the threshold of employer liability in retaliation claims. They do so by requiring that an “adverse employment action,” an accepted element of a prima facie case, “materially” or “tangibly” alter an employee’s terms, conditions, or privileges of employment in order to constitute retaliation. This approach, like the “ultimate employment decision” approach, overlays the qualifying language in section 703(a) regarding “terms, conditions, or privileges of employment” onto retaliation claims. By compelling a finding of material adversity in those areas, however, it adds a substantive requirement to the anti-retaliation provision not warranted by the statutory language. This is a matter of confusing proof of intent with statutory coverage.

Spring v. Sheboygan Area School District was apparently the first case in which a circuit court of appeals demanded that an employer’s discriminatory conduct cause a “materially adverse” change in an employee’s “terms or conditions of employment.” In Spring, the plaintiff worked as a school teacher in the Sheboygan School District for fifteen years prior to being appointed principal of Grant Elementary School. During her tenure as principal, Spring was evaluated by the district’s director of administration “as a fine, caring, and very hardworking principal, if a little too sensitive.” Ten years after assuming the position as principal, the district’s director of administration approached Spring, who was then over sixty-five, about her retirement plans. Although the director discussed retirement plans with three other district principals, he did not approach employees under forty about the possibility of

165. See, e.g., Manning v. Metropolitan Life Ins. Co., 127 F.3d 686, 689, 692 (8th Cir. 1997) (concluding that intense hostility, including veiled death threats, did not rise to the level of an “ultimate employment decision” and was therefore not within the realm of section 704(a)).

166. See Munday v. Waste Mgmt. of N. Am., Inc., 126 F.3d 239, 243 (4th Cir. 1997); refer to notes 95–104 supra and accompanying text.

167. Lidge, supra note 9, at 367–68 (“This . . . is a complete misreading of the language and purpose of Title VII.”).

168. Id. (explaining that the motive or severity of the employment decision is relevant to intent but normally not relevant to the issue of whether the decision is covered by the statute).

169. 865 F.2d 883 (7th Cir. 1989).

170. Lidge, supra note 9, at 350–58.

171. Spring, 865 F.2d. at 884.

172. Id.

173. Id.
That same year, the newly appointed superintendent of schools also asked Spring whether she was considering retiring and offered to calculate any retirement benefits that might accrue in such a situation. Soon after, the new superintendent of schools developed a district-wide organization plan that was communicated to Spring during her quarterly performance evaluation meeting. Pursuant to the plan, Spring would assume a dual position as principal of both the Lincoln-Erdman and Jackson elementary schools within the district. Spring would also receive a new two-year contract and a merit pay increase. Before presenting this plan to the school board, the superintendent approached the director once more to inquire about any plans Spring might have to retire.

After visiting the two schools, Spring resigned, stating that the district “wished her gone, and her new assignment was a public humiliation.” She then filed suit against the district alleging it had discriminated against her because of her age and had constructively discharged her by assigning her to the dual principal positions. The federal district court granted a summary judgment for the Sheboygan School District finding that Spring had not been subjected to an adverse employment action. The appellate court affirmed, noting that the Age Discrimination in Employment Act (ADEA) outlaws discrimination based upon age, “not changes in duties or working conditions that cause no materially significant disadvantage to an older employee.”

The district court gave the following three reasons for its decision: 1) there had been dual assignments of principals by the school district in the past; 2) the reorganization plan provided a legitimate business reason for the transfer; and 3) the action was not adverse.

174. Id.
175. Id. at 884–85.
176. Id. at 885.
177. Id.
178. Id.
179. Id.
180. Id.
181. Id. (relating that Spring filed this action pursuant to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621–634 (1994)).
182. Id. (stating the district court held that Spring failed to raise an issue of fact that her work conditions equated to constructive discharge).
184. Id. (emphasis added).
185. Spring, 865 F.2d at 885–86.
The first reason, that the district had taken similar action in the past, is not relevant to whether the action taken in the particular instance violates employment discrimination laws.\textsuperscript{186} It might, however, speak to intent.\textsuperscript{187} The second reason, that there was a legitimate business purpose behind the transfer, is also irrelevant to whether the transfer was covered by the ADEA.\textsuperscript{188} It would, however, be relevant to whether the district discriminated against Spring because of her age.\textsuperscript{189} Both of these reasons confuse the issue of intent with the issue of statutory coverage.\textsuperscript{190}

The last reason given by the court makes a substantial assumption about which actions are adverse. The court commented that the socio-economic backgrounds of the students at the new schools to which Spring had been assigned were upper middle class.\textsuperscript{191} In contrast, the students at the school where Spring had been principal for over ten years were both socially and economically more diverse.\textsuperscript{192} Additionally, the court mentioned that the new schools Spring had been assigned to had no special programs, whereas Grant had a program for emotionally disturbed children.\textsuperscript{193} When it found that these factors were not adverse, the court assumed that no reasonable jury could find working with disadvantaged, rather than advantaged, students more desirable.\textsuperscript{194}

In reaching its decision, the court also discounted Spring's argument that the transfer increased her administrative duties by fifty percent and that driving time between the two schools would diminish the amount of time available to perform those duties.\textsuperscript{195} This is another example of confusing intent with statutory coverage and applying faulty reasoning to the concept of adversity.\textsuperscript{196} More importantly, the court did not look at materiality as a means of determining whether Spring had pled a prima facie case that Sheboygan School District intended to
discriminate against her because of her age. Instead, the court “appeared to hold that an employment decision was not actionable at all unless it was materially adverse.”

The Seventh Circuit adopted the “materially adverse” language in *Spring* as a prima facie element four years later in *Crady v. Liberty National Bank & Trust Co. of Indiana*. In *Crady*, the plaintiff had been transferred from one city, where his position was assistant vice-president and bank manager, to another city, where he was only a collection officer. The plaintiff alleged that the transfer was a result of age discrimination. The court, however, found that because the transfer did not impact his salary and benefits, the plaintiff had failed to state a prima facie case of age discrimination. In rendering its decision, the court noted that a “materially adverse” employment action was necessary to establish a prima facie case of discrimination and that the transfer and corresponding alteration in job responsibilities were insufficient to constitute “material” adversity.

While in *Crady* the court seemed to indicate that materiality was only pertinent to establishing a prima facie case of discrimination, other courts adopting the requirement have not been so clear. This is particularly true as the requirement worked its way into the retaliation context.

The Sixth Circuit also adopted the materially adverse threshold for employer liability in retaliation claims as evidenced by its recent decision in *Hollins v. Atlantic Co.* In *Hollins*, the court found that threats of discharge and lowered performance ratings had no effect on an employee's wages and, thus, were not materially adverse enough to support a claim for retaliation.

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197. White, *supra* note 9, at 1143 (stating that *Spring*, like *Page* and *Mattern*, interpreted the statute as requiring a certain level of employer decision making to be actionable).
198. 993 F.2d 132 (7th Cir. 1993).
199. *Id.* at 133.
200. *Id.* at 134.
201. *Id.* at 136.
202. *Id.* (stating the plaintiff failed to show that his new responsibilities were “less significant” than his old responsibilities).
203. *See, e.g.*, *Hollins v. Atlantic Co.*, 188 F.3d 652, 662 (6th Cir. 1999) (requiring a plaintiff to show a materially adverse change to satisfy the prima facie element of an “adverse employment action”); *Torres v. Pisano*, 116 F.3d 625, 640 (2d Cir. 1997) (finding that requesting the plaintiff drop her EEOC charges was not retaliation because it did not constitute “a materially adverse change in the terms and conditions of [her] employment”); *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir. 1997) (commenting that courts require retaliation “tangible enough to alter an employee's “compensation, terms, conditions, or privileges of employment”).
204. 188 F.3d 652, 662 (6th Cir. 1999).
under Title VII. In defense of its decision, the court explained its concept of materiality by citing the Seventh Circuit’s holding in *Crady*: “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.”

While noting that the materially adverse requirement was established within the framework of the ADEA and adopted by the Sixth Circuit in conjunction with a claim under the Americans with Disabilities Act, the court indicated it was satisfied that the standard was applicable to retaliation claims.

In *Robinson v. City of Pittsburgh*, the Third Circuit found that even if many of the complainant’s allegations—including restricted job duties, reassignment, failure to transfer, and unsubstantiated oral reprimands—were believed, they would “not rise to the level of what our cases have described as ‘adverse employment action.’” The court went further by holding that “the ‘adverse employment action’ element of a retaliation plaintiff’s prima facie case incorporates the same requirement that the retaliatory conduct rise to the level of a violation of [section 703(a)(1) or (2)].”

Similarly, the Second Circuit, in *Garber v. New York City Police Department* found that an involuntary transfer was not sufficiently adverse to sustain a claim of retaliation. The court commented that, because the transfer did not involve a change in job description, salary, benefits, or opportunity for promotion, the employment action was not “material” enough to be considered an adverse employment action.

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205. *Id.*
206. *Id.* (quoting *Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993)).
207. *Hollins*, 188 F.3d at 662.
208. *Id.* (noting that the “materially” adverse standard was adopted by the Sixth Circuit in *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 886 (6th Cir. 1996) in response to a claim under 42 U.S.C. §§ 12101–12213 (1990 & Supp. IV 1995)).
209. *Id.*
210. 120 F.3d 1286 (3d Cir. 1997).
211. *Id.* at 1300.
212. *Id.* at 1300–01.
214. *Id.* at *3.
215. *Id.* (“[A] plaintiff’s subjective perception that a demotion has occurred is not enough.”).
VI. THE LIBERAL THRESHOLD

There is nothing in the anti-retaliation provision that demands an employer’s action be material or tangible or reach the level of an ultimate employment decision.216 A more liberal threshold of employer liability recognizes the purpose behind the anti-retaliation provision and curtails conduct that would deter employees from accessing the substantive provisions of Title VII.

In Knox v. State of Indiana,217 the Seventh Circuit found that “[t]here is nothing in the law of retaliation that restricts the type of retaliatory act that might be visited upon an employee who seeks to invoke her rights by filing a complaint.”218 The plaintiff in Knox presented an underlying claim of sexual harassment by her supervisor.219 Knox was a correctional officer whose direct supervisor sent graphic e-mails, made explicit phone calls, and blatantly verbalized his desire to have sexual relations with her.220 Following Knox’s continued refusals, the supervisor indicated he “definitely saw a shift change in [her] future.”221 When Knox reported this harassing conduct to an affirmative action officer, the supervisor was officially reprimanded for his actions and demoted from Lead Captain to Correctional Officer.222 In response to this action, the supervisor initiated a “relentless campaign of [co-worker] harassment” that was “intended to make Knox’s life ‘hell.’”223 When Knox again reported the discriminatory conduct to the affirmative action officer, she was initially ignored.224 Eventually, a memorandum prohibiting retaliatory gossip was circulated to all employees.225 Additionally, those directly involved were counseled and disciplined.226 Upholding a jury verdict in the case, the Seventh

216. See 42 U.S.C. §2000e-3(a) (1994) (forbidding “discrimination” against an employee who has opposed any activity proscribed by Title VII or who has participated in a Title VII proceeding, and providing no further qualifications or restrictions).
217. 93 F.3d 1327 (7th Cir. 1996).
218. Id. at 1334 (citing additional authority “questioning whether the law . . . requires the retaliatory action to be job-related” and “emphasizing [the] breadth of definition of adverse employment action”).
219. Id. at 1331.
220. Id. at 1330.
221. Id. (alteration in original).
222. Id. at 1331.
223. Id.
224. Id. (stating that the affirmative action officer told Knox that she could not investigate until Knox provided her with the names of the co-workers involved).
225. Id.
226. Id.
Circuit discussed its position that retaliation can take as many different forms as there are employment situations.\textsuperscript{227}

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.\textsuperscript{228}

The liberal threshold approach to employer liability taken by the Seventh Circuit in \textit{Knox} acknowledges the purpose behind the statutory anti-retaliation provision and advocates a case-by-case analysis of the circumstances surrounding each claim.\textsuperscript{229}

Several other circuits have joined in this interpretation of section 704(a).\textsuperscript{230} Additionally, it is the position most compatible with the latest retaliation guidelines set forth by the EEOC.\textsuperscript{231}

Recently, the EEOC acknowledged the split among the circuits concerning “adverse employment action” and explicitly expressed its disagreement with decisions tied to “terms, conditions, or privileges of employment.”\textsuperscript{232} It stated that these opinions are erroneously premised upon the more restrictive language in the anti-discrimination section of Title VII.\textsuperscript{233} The EEOC contends that the anti-retaliation provision was specifically drafted to be broader in its perspective because retaliatory conduct,

\begin{itemize}
\item \textsuperscript{227} \textit{Id.} at 1334.
\item \textsuperscript{228} \textit{Id.}
\item \textsuperscript{229} \textit{See id.} (noting that “[t]he law deliberately does not take a ‘laundry list’ approach”).
\item \textsuperscript{230} \textit{See Aviles v. Cornell Forge Co.}, 183 F.3d 598, 605 (7th Cir. 1999) (finding section 704(a) intentionally broader than section 703(a) and thus extending to claims beyond “job action”); \textit{Gunnell v. Utah Valley State Coll.}, 152 F.3d 1253, 1264 (10th Cir. 1998) (indicating “adverse employment action” should be liberally interpreted and that co-worker retaliation, if sufficiently severe, might serve as the basis for a section 704(a) retaliation claim); \textit{Wideman v. Wal-Mart Stores, Inc.}, 141 F.3d 1453, 1456 (11th Cir. 1998) (joining other circuits in holding that Title VII’s protection against retaliation extends to actions that fall short of “ultimate employment decisions,” but refraining from establishing the exact threshold level of substantiality); \textit{Hashimoto v. Dalton}, 118 F.3d 671, 675 (9th Cir. 1997) (quoting \textit{Passer v. American Chemical Society}, 935 F.2d 322, 331 (D.C. Cir. 1991), for the proposition that “Title VII ‘does not limit its reach only to acts of retaliation that take the form of cognizable employment actions such as discharge, transfer, or demotion’”); \textit{Wyatt v. City of Boston}, 35 F.3d 13, 15–16 (1st Cir. 1994) (accepting, in addition to discharge, such actions as “demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations and toleration of harassment by other employees” as actionable under section 704(a)).
\item \textsuperscript{231} \textit{EEOC COMPLIANCE MANUAL}, supra note 5, § 8-II(D)(3).
\item \textsuperscript{232} \textit{Id.}
\item \textsuperscript{233} \textit{Id.}
\end{itemize}
Regardless of the degree or quality of harm to the particular complainant, . . . harms the public interest by deterring others from filing a charge. An interpretation of Title VII that permits some forms of retaliation to go unpunished would undermine the effectiveness of the EEO statutes and conflict with the language and purpose of the anti-retaliation provisions. 234

Thus, while the EEOC would not find “petty slights and trivial annoyances” actionable because they would be less likely to deter protected activity, it would find that section 704(a) protects employees from any significant retaliatory action that discouraged participation in the Title VII process. 235

VII. ARGUMENTS FOR RAISING THE THRESHOLD OF EMPLOYER LIABILITY

Commentators who argue for the “ultimate employment decision” or “materially adverse” thresholds of employer liability contend that a case-by-case approach to retaliation claims leaves employers uncertain about which employment actions might be unlawful. 236 They argue that courts were not intended to oversee the day-to-day affairs of businesses and that decisions that are not ultimate, material, or tangible should be left to the employer’s discretion. 237 Finally, they point to the increasing backlog of employment discrimination cases clogging the federal courts as reason to limit the purview of Title VII. 238

The concern over the unpredictability of a liberal threshold of employer liability is overstated. If retaliation is truly minor, it is doubtful that an employee would want to entangle himself in the litigation process. 239 Additionally, “petty slights and trivial annoyances” 240 are unlikely to involve a tangible employment action that is attributable to the employer through agency principles or to constitute the severity of harassment required by Burlington. 241

234. Id. (footnotes omitted).
235. Id.
236. E.g., Cude & Steger, supra note 80, at 373–74 (claiming that businesses need bright-line guidance regarding retaliatory conduct and that a case-by-case approach “leave[s] employers in the dark”).
237. Id. at 407 (arguing that courts “are not, were not intended to be, and should not become[] personnel managers . . . of American businesses”).
238. Id. at 410.
239. Lidge, supra note 9, at 407–08.
240. EEOC COMPLIANCE MANUAL, supra note 5, § 8-II(D)(3).
241. See White, supra note 9, at 1190–91; refer to text accompanying notes 65–70 supra (discussing Burlington).
Proponents of the “ultimate employment decision” threshold of employer liability have a stronger argument that courts are not personnel managers and should not be involved in the day-to-day decisions of businesses. This argument is grounded in the Supreme Court’s decision in Furnco Construction Corp. v. Waters. In Furnco, the Court counseled against “[t]he dangers of embarking on a course . . . where the court requires businesses to adopt what it perceives to be the ‘best’ [employment practices].” The response to this argument, however, can also be found in Furnco, in which the Court further stated, “Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it.” Arguably, Title VII is such a mandate. In Title VII, Congress decreed that employers could not retaliate against employees accessing the statute’s substantive anti-discrimination provisions. It is, therefore, the responsibility of the courts to hold employers accountable for any business practices—even those of a de minimis nature—that display discriminatory intent or that retaliate against employees who access Title VII.

Such a posture would defer to the EEOC’s statutory interpretation of section 704(a). While the EEOC’s interpretation of section 704(a) was not promulgated in the rule-making context, courts may recognize that the Chevron doctrine provides a valuable resource in determining whether an agency’s judgment and experience should be given credence. Under the Chevron doctrine, a court is advised to consider two factors when reviewing an agency’s construction of a statute. First, a court should examine whether Congress has explicitly spoken to the precise question at hand in the statutory language or legislative history. If a court, utilizing traditional tools of statutory construction, ascertains the intent of Congress on the precise question, then both the court and the agency must give effect to the unambiguous intention of Congress. If, however, Congress has not directly addressed the question, “the court does not

243. Id. at 578.
244. Id. (emphasis added).
245. 42 U.S.C § 2000e-3(a) (1994).
247. Id. at 842.
248. Id. at 842–43.
simply impose its own construction on the statute.”

Instead, the court examines the second factor, whether the agency’s answer is based upon a permissible construction of the statute. The agency’s construction need not be the only permissible interpretation, but as long as it is not “arbitrary, capricious, or manifestly contrary to the statute” it should be accorded considerable weight.

Finally, while the increase in employment related litigation is a reality that should be addressed, it presents a legislative, not a judicial, issue. If Congress determines that Title VII’s anti-retaliation proscription is overly broad, then it has the power to amend the statute to require an “ultimate employment decision” or a “materially adverse employment action.”

VIII. AN APPROPRIATE THRESHOLD FOR EMPLOYER LIABILITY

To determine an appropriate threshold for employer liability in a Title VII retaliation claim, it is necessary to return to the statutory provision to determine whether Congress has explicitly spoken to the precise question at hand. Language within the anti-retaliation provision clearly sets it apart from section 703(a). Both provisions require that the employer be the actor and make it an unlawful employment practice “to discriminate.” Those similarities alone, however, are insufficient to demand that section 704(a) rely upon section 703(a) for interpretation. First, the classes of people protected by the two provisions differ. While section 703 extends protection to individuals who are discriminated against because of their “race,

249. Id. at 843. “The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.” Id. (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)) (alteration in original).

250. Chevron, 467 U.S. at 843. If an agency’s reading fills gaps or defines terms of a statute in a manner reasonably in accord with the legislation’s revealed design, the agency’s judgment is given controlling weight. Nationsbank v. Variable Annuity Life Ins. Co., 513 U.S. 251, 257 (1995).


252. Chevron, 467 U.S. at 844. This deference is accorded whenever “the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.” Id. (quoting United States v. Shimer, 367 U.S. 374, 382 (1961)).

253. Refer to notes 244–50 supra (describing this as the first step in a Chevron analysis).


color, religion, sex, or national origin,” 256 section 704(a) proscribes retaliation against employees who either oppose unlawful discrimination or participate in a Title VII cause of action. 257 These are two very distinct classes. Additionally, the thrusts of the provisions differ. The substantive anti-discrimination provisions strike at the core of inequity in society. The anti-retaliation provision, on the other hand, ensures that the strike will be effective. 258

Proponents of linking the provisions argue that reliance upon section 703(a) for interpretation of section 704(a) is justified by the application of *ejusdem generis.* 259 Under *ejusdem generis*, “when a general term follows a specific one, the general term should be understood as reference to subjects akin to the one with specific enumeration.” 260 Yet, application of this principle presumes that the provision under consideration is ambiguous. 261 And, indeed, the Supreme Court has found at least one term in section 704(a) to be so. 262 Still, applying the principle should be avoided if “its application would defeat the intention of Congress or render the general statutory language meaningless.” 263 While legislative history regarding section 704(a) is scant, 264 the intent of Congress was clearly to ensure that employees accessing the protections of Title VII could do so without recrimination. The one Supreme Court decision interpreting section 704(a) seems to support this view of legislative intent. 265

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257. Id. § 2000e-3(a).
258. Refer to text accompanying note 14 supra.
259. See Cude & Steger, supra note 80, at 397 (discussing that the doctrine of *ejusdem generis* makes the “ultimate employment decision” standard consistent with the statutory language).
262. See Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997) (discussing that “employees’ . . . is ambiguous as to whether it excludes former employees”). For an interesting discussion of how Justice Scalia, in joining this opinion, failed to follow his own advice to look for the “ordinary meaning” even when there is no plain meaning, see Philip P. Frickey, *Revisiting the Revival of Theory in Statutory Interpretation: A Lecture in Honor of Irving Younger*, 84 MINN. L. REV. 199, 214 (1999).
263. Powell, 423 U.S. at 94 (Stewart, J., concurring in part and dissenting in part).
265. Robinson, 519 U.S. at 345 (stating that section 704(a) “protects employees from retaliation for filing a ‘charge’ under Title VII” to support the Court’s conclusion that the term “employees” encompasses former employees).
Robinson v. Shell Oil Co.\textsuperscript{266} presented a case in which a discharged employee filed a charge against his former employer alleging racial discrimination.\textsuperscript{267} While that charge was pending, the employee sought a position with another company.\textsuperscript{268} In response to an inquiry from the potential employer, Robinson’s former employer provided a negative reference.\textsuperscript{269} Robinson sued his former employer, alleging that the negative reference was in retaliation for his filing the discrimination charge.\textsuperscript{270} In a decision that provided an expansive interpretation of the term “employee,” the Supreme Court rendered an opinion in a situation involving an employee reference.\textsuperscript{271} Providing a reference, even a negative one, would not qualify as an “ultimate employment decision.” Indeed, the Court emphasized that a liberal interpretation of the term “employee” within the provision was more in keeping with the broader context of Title VII.\textsuperscript{272} The Court further agreed that “it would be destructive of the purpose of the anti-retaliation provision for an employer to be able to retaliate with impunity against an entire class of acts under Title VII.”\textsuperscript{273} While the Court specifically mentioned termination as an example of the acts it was referencing,\textsuperscript{274} it certainly did not, by failing to mention others, specifically exclude them.

Any act by an employer that deters employees from exercising their statutory rights under Title VII comes within the plain meaning of section 704(a).\textsuperscript{275} Lateral transfers, reprimands, negative job evaluations, and social ostracism may all fall within the purview of the anti-retaliation provision.\textsuperscript{276} Co-worker retaliatory harassment, if sufficiently severe, might likewise be actionable under the provision.\textsuperscript{277}
Courts interpreting the anti-retaliation provision in a more limiting manner are striking a blow to the entire statutory scheme of Title VII. The anti-retaliation provision is an enforcement mechanism. If courts allow employers to recriminate, even in seemingly insignificant ways, against employees seeking the protection of Title VII, then the Act’s protections are diminished. Courts, instead, should look to the existence of the employment relationship, subjecting it to scrutiny under the general common law rules of agency.\footnote{278} If there is direct evidence of intent to retaliate against an employee because of the employee’s protected activity, then the only remaining question should be one of appropriate relief.\footnote{279} If there is circumstantial evidence of intent, then the shifting burden analysis explicated in \textit{McDonnell Douglas Corp. v. Green}\footnote{280} should be applied.\footnote{281}

This paradigm is consistent with the purpose of section 704(a) and Supreme Court precedent. Additionally, it conforms to the position taken by the EEOC, the agency charged with administering Title VII.\footnote{282}

\textbf{IX. CONCLUSION}

There is currently disarray among the circuit courts of appeals regarding the threshold for employer liability in Title VII retaliation claims.\footnote{283} Some circuits require that an employer’s actions rise to the level of an “ultimate employment decision.”\footnote{284} Others hold that an employer’s retaliatory actions must be “materially” or “tangibly” adverse to gain Title VII protection.\footnote{285}

\begin{itemize}
\item \footnote{278} See id. at 754–55.
\item \footnote{279} Refer to note 85 supra and accompanying text.
\item \footnote{280} 411 U.S. 792, 802–03 (1973); refer to notes 87–90 supra and accompanying text.
\item \footnote{281} Although decided under the ADEA, the holding in \textit{Reeves v. Sanderson Plumbing Products, Inc.}, 530 U.S. 133 (2000), regarding the appropriate procedure for a claim involving circumstantial evidence, should apply to Title VII claims. Therefore, once a defendant employer meets the burden of producing a legitimate, nondiscriminatory reason for an adverse employment action, the McDonnell Douglas framework disappears and the sole remaining issue is discrimination \textit{vel non}. \textit{Id.} at 142–43.
\item \footnote{282} Although EEOC guidelines are not binding upon courts, they “constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.” \textit{Meritor Sav. Bank, FSB v. Vinson}, 477 U.S. 57, 65 (1986) (quoting \textit{Skidmore v. Swift & Co.}, 323 U.S. 134, 140 (1944)). The EEOC finds lateral transfers, unfavorable job references, and changes in work schedule all actions likely to deter workers from engaging in protected activity. \textit{Ray v. Henderson}, 217 F.3d 1234, 1243 (9th Cir. 2000).
\item \footnote{283} Williams & Rhodes, \textit{supra} note 2, at 59.
\item \footnote{284} See, \textit{e.g.}, Mattern v. Eastman Kodak Co., 104 F.3d 702, 709 (5th Cir. 1997) (stating that there can be no adverse employment action absent an ultimate employee decision).
\item \footnote{285} See, \textit{e.g.}, \textit{Richardson v. New York State Dep’t of Corr. Serv.}, 180 F.3d 426, 446.
\end{itemize}
Courts imposing these higher thresholds of liability interpret the anti-retaliation provision in accordance with terms appearing in the anti-discrimination provision. They also add materiality as a statutory requirement, confusing the issue of intent with the issue of coverage. Such an interpretation overlooks the independent interest protected by section 704(a). As the enforcement mechanism for Title VII, the anti-retaliation provision should receive a liberal, rather than restrictive, interpretation, providing broad-based protection for all individuals in the unfortunate position of having to resort to Title VII to halt discriminatory practices in the workplace.

Linda M. Glover

(2d Cir. 1999).

286. See EEOC COMPLIANCE MANUAL, supra note 5, § 8-II(D)(3).