

Protecting Employees from Employees: Applying Title VII's Anti-Retaliation Provision to Coworker Harassment

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Introduction

Imagine going to work every day knowing that you must endure your coworkers' degrading and derogatory comments. Your work environment is so full of hostility and anger toward you that you not only dread, but also fear, facing your coworkers everyday. You feel hopeless because you are unable to end the animosity provoked solely by characteristics and stereotypes you cannot control. You must work to support yourself, but you cannot live up to expectations under these conditions.

Imagine mustering the courage to protect yourself by filing a complaint of discrimination with the Equal Employment Opportunity Commission and having to relive all of the indecent and painful experiences to sustain your complaint. Imagine that, in response to the complaint, you are further ostracized and chastised by your coworkers. Imagine the hopelessness of having no source of support or guidance, and no legal protection from your coworkers' desire to punish your recourse to anti-discrimination laws.

Congress enacted Title VII of the Civil Rights Act of 1964¹ to protect employees from workplace discrimination by affording them "the right to work in an environment free from discriminatory intimidation, ridicule, and insult."² The two primary purposes of Title VII are to ensure equal opportunities in employment by preventing discrimination, and to make persons

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1. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 2653 (codified as amended at 42 U.S.C. § 2000e to 2000e-17 (1999)).

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

whole for injuries suffered due to unlawful employment discrimination.³ To achieve these aims, Congress made specific types of employment practices unlawful under Title VII's anti-discrimination provision, section 703(a).⁴

In addition to providing protection against specific discriminatory employment practices, section 704(a) of Title VII prohibits employers from retaliating against employees who have filed discrimination charges with the EEOC.⁵ The federal circuit courts uniformly recognize that a hostile work environment claim is actionable under the anti-discrimination provision.⁶ They disagree, however, as to whether a hostile work environment claim is also prohibited by the anti-retaliation provision.

This Article addresses whether retaliatory harassment by coworkers may constitute an adverse employment action under section 704(a) of Title VII. Part I provides background information regarding the interpretations of the adverse employment action requirement. It discusses the relationship between sections 703(a) and 704(a). It also explains how the courts construe the adverse employment action requirement under section 703(a). Finally, it describes the differing interpretations of the adverse employment action requirement under section 704(a). Part II addresses whether broadening the scope of section 704(a) to proscribe retaliatory coworker harassment comports with the text, purpose, and judicial interpretation and of the statute. Part III concludes that courts should uniformly recognize that coworker retaliatory harassment violates section 704(a) if (1) the abusive conduct was sufficiently severe or pervasive so as to alter the conditions of employment; and (2) the employer knew of the discrimination; but (3) failed to take reasonable remedial steps.

3. See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 2653 (codified as amended at 42 U.S.C. § 2000e (1999)).

4. See 42 U.S.C. § 2000e-2(a)(1) to (a)(2) (1999).

5. See 42 U.S.C. § 2000e-3(a) (1999).

6. See *infra* notes 33-53 and accompanying text; see also *Faragher v. City of Boca Raton*, 524 U.S. 775, 785-86 (1998) (noting that the federal courts of appeals have followed the substantive contours of section 703(a)).

I. Interpretation of the Anti-Retaliation Provision

A. *The Relationship Between the Anti-Discrimination and Anti-Retaliation Provisions of Title VII and the Prima Facie Case*

The substantive anti-discrimination provision of Title VII contains two sub-provisions, sections 703(a)(1) and 703(a)(2).⁷ Section 703(a)(1) makes it unlawful for an employer 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.”⁸ Section 703(a)(2) states that it is unlawful for an employer “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.”⁹ Title VII also contains an anti-retaliation provision, section 704(a), which makes it illegal for an employer “to discriminate against any of his employees or applicants . . . because [the employee or applicant] has opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under [Title VII].”¹⁰

Although the three provisions use markedly different language,¹¹ courts have applied the discrimination concepts developed under each provision to the others.¹² For example, courts apply the burden-shifting approach, first developed under *McDonnell Douglas Corp. v. Green*¹³ for disparate treatment

7. See 42 U.S.C. §§ 2000e-2 to 2000e-17 (2000).

8. 42 U.S.C. § 2000e-2(a)(1) (1999).

9. 42 U.S.C. § 2000e-2(a)(2) (1999).

10. 42 U.S.C. § 2000e-3(a) (1999).

11. Compare 42 U.S.C. § 2000e-2(a)(1) (1999) and 42 U.S.C. § 2000e-2(a)(2) (1999), with 42 U.S.C. § 2000e-3(a) (1999).

12. See discussion *infra* Part I.C.1-2 (describing judicial interpretation of the anti-retaliation provision); see also Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L.J. 1121, 1148 (1998) (“Title VII is a statute containing broadly worded prohibitions that necessarily have required extensive interpretations by the courts and the Equal Employment Opportunity Commission.”).

13. 411 U.S. 792 (1973). Under the *McDonnell Douglas* model for disparate treatment discrimination cases, a plaintiff must first establish a prima facie case of discrimination by a preponderance of the evidence. See *id.* at 802. If a prima facie case is established, a presumption of discrimination arises in favor of the plaintiff. See *id.* The burden of production then shifts to the defendant to produce a

discrimination cases under section 703(a), to retaliation discrimination cases under section 704(a).¹⁴ Following the *McDonnell Douglas* paradigm, cases of retaliation require the plaintiff first to establish a prima facie case of retaliation by a preponderance of the evidence.¹⁵ The prima facie case requires the plaintiff to demonstrate that (1) he or she engaged in statutorily protected activity under Title VII;¹⁶ (2) he or she suffered an adverse employment action;¹⁷ and (3) there is a causal link between the protected activity and the adverse employment action.¹⁸ If the plaintiff can establish these three elements, a

legitimate, nondiscriminatory reason for the adverse action. *See id.* at 802-03. If the defendant rebuts the presumption of discrimination, the plaintiff may still prevail if he or she demonstrates the reason articulated by the defendant was a mere pretext for discrimination. *See id.* at 804. The overall burden of persuasion always remains on the plaintiff to prove that he or she was a victim of intentional discrimination. *See id.* at 805; *see also* *Reeves v. Sanderson Plumbing Prods.*, 120 S. Ct. 2097, 2105-12 (2000). The *Reeves* court applied the *McDonnell Douglas* paradigm to a claim brought under the Age Discrimination in Employment Act. *See id.* It held that a plaintiff's prima facie case of age bias, together with evidence that the employer's asserted reason for taking the allegedly discriminatory action was false, can sustain a jury's finding for the plaintiff even without direct proof of a discriminatory motive. *See id.*

14. *See* *Richardson v. N.Y. State Dep't of Corr. Serv.*, 180 F.3d 426, 443 (2d Cir. 1999) ("We evaluate retaliation claims under the burden shifting rules established by the Supreme Court in *McDonnell Douglas v. Green*"); *see also* Melissa A. Essary & Terence D. Freidman, *Retaliation Claims Under Title VII, the ADEA, and the ADA: Untouchable Employees, Uncertain Employers, Unresolved Courts*, 63 MO. L. REV. 115, 120 (1998) (discussing the application of the *McDonnell Douglas* burden-shifting paradigm in retaliation cases).

15. *See* *Gunnell v. Utah Valley State Coll.*, 152 F.3d 1253, 1263 (10th Cir. 1998); *Munday v. Waste Mgmt. of N. Am., Inc.*, 126 F.3d 239, 242 (4th Cir. 1997); *Manning v. Metro. Life Ins. Co.*, 127 F.3d 686, 692 (8th Cir. 1997); *Smart v. Ball State Univ.*, 89 F.3d 437, 439 (7th Cir. 1996); *Knox v. Indiana*, 93 F.3d 1327, 1333 (7th Cir. 1996).

16. The plaintiff's protected activity must be motivated by a reasonable, good-faith belief that unlawful discriminatory conduct occurred, and that the action is attributable to the employer. *See* *Wu v. Thomas*, 863 F.2d 1543, 1549 (11th Cir. 1989); *see also* *Collins v. Illinois*, 830 F.2d 692, 702 (7th Cir. 1987) (noting that it is not necessary that the employer is actually committing an unlawful employment practice under Title VII; rather, it is sufficient for a plaintiff to reasonably believe that the employer is violating the statute); *Rucker v. Higher Educ. Aids Bd.*, 669 F.2d 1179, 1182 (7th Cir. 1982) (holding that even an incorrect belief that an employer action constituted a violation of Title VII, if reasonable, is enough to satisfy the first prong of the prima facie case of retaliation); *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1137 (5th Cir. 1981) (noting that a plaintiff can satisfy the first prong of the prima facie case by showing a reasonable belief that an unlawful employment practice was occurring).

17. *See* *Gunnell*, 152 F.3d at 1262.

18. *See supra* note 15. To establish a causal connection between the plaintiff's protected activity and the adverse employment action, the plaintiff must demonstrate that the employer would not have taken the adverse action but for the protected activity. *See* *Grizzle v. Travelers Health Network, Inc.*, 14 F.3d 261, 267-68 (5th Cir. 1994) (holding that a retaliation claim fails where a plaintiff is unable

presumption of retaliation arises in favor of the plaintiff.¹⁹ The burden of production then shifts to the defendant to produce a legitimate, nondiscriminatory reason for the adverse action.²⁰ If the defendant-employer meets its burden, the presumption of retaliation is rebutted.²¹ A plaintiff may still prevail, however, if he or she is able to establish that the reason articulated by the defendant was a mere pretext for retaliation.²² The plaintiff retains the overall burden of persuasion to show that there was retaliation throughout the case.²³

Each prong of the prima facie case has generated a significant body of law defining what will suffice in stating a claim.²⁴ The second prong of the test, however, requiring that the complainant suffer an adverse employment action, is the most controversial.²⁵ Although the federal courts agree that a plaintiff must demonstrate the second element of the prima facie case of retaliation,²⁶ there is lack of consensus among courts as to what conduct may constitute an adverse employment action.²⁷

Courts also look to the anti-discrimination provision for guidance in interpreting the substantive requirements of the anti-retaliation provision, including the determination of what actions constitute an adverse employment action.²⁸ Although the provisions are not identical in the prohibited activities, both section 703(a)(1) and section 704(a) make it an unlawful employment action for an employer "to discriminate."²⁹ Moreover,

to produce evidence that her employer knew about her complaint); *see also* *Manharon v. Columbia Univ. Coll. of Physicians & Surgeons*, 842 F.2d 590, 593-94 (2nd Cir. 1988) (requiring the plaintiff to demonstrate the defendant's knowledge of the protected activity and that such knowledge motivated the employer to retaliate).

19. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973); *see also* *Richardson*, 180 F.3d at 443; *Gunnell*, 152 F.3d at 1263; *Munday*, 126 F.3d at 242; *Manning*, 127 F.3d at 692; *Smart*, 89 F.3d at 439; *Knox*, 93 F.3d at 1333; *Essary & Freidman*, *supra* note 14, at 120 (discussing the application of the *McDonnell Douglas* burden-shifting paradigm in retaliation cases).

20. *See supra* note 19.

21. *See supra* note 19.

22. *See supra* note 19.

23. *See supra* note 19.

24. *See* Marisa Williams & Rhonda Rhodes, *Recent Developments in Retaliation Law and Resulting Implications for the Federal Sector*, COLO. LAW., Jan. 28, 1999, at 59, 60.

25. *See id.*

26. *See supra* note 15.

27. *See* discussion *infra* Part I.C (describing judicial interpretations of the anti-retaliation provisions).

28. *See* discussion *infra* Part I.C (describing judicial interpretations of the anti-retaliation provisions).

29. *Compare* 42 U.S.C. § 2000e-2(a)(1) (1999), *with* 42 U.S.C. § 2000e-3(a)

like the prima facie case of retaliation, the prima facie case of discrimination requires the plaintiff to show that he or she suffered an adverse employment action.³⁰ Therefore, despite failure of section 704(a) to specifically mention "compensation, terms, conditions, or privileges of employment,"³¹ courts equate discrimination actionable under section 704(a) with discrimination actionable under section 703(a)(1).³²

B. Adverse Employment Actions Under Section 703(a)(1)

Section 703(a)(1) of Title VII makes it an unlawful employment practice for an employer 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, sex, or national origin."³³ Consistent with the liberal interpretation of Title VII, the Supreme Court has broadly construed the provision to include any aspect of the employment relationship.³⁴ In addition, it has recognized that an adverse employment action may occur through either explicit or constructive alterations in the terms and conditions of employment.³⁵

1. Explicit Alterations in the Terms and Conditions of Employment Through Tangible Employment Actions

A tangible employment action is a materially adverse change in employment status, such as a termination of employment, a

(1999). Title VII, however, does not define the term "discriminate." See 42 U.S.C. §§ 2000e to 2000e-17.

30. The prima facie case of disparate treatment discrimination under section 703(a)(1) requires a showing that (1) the plaintiff was a member of a class protected under Title VII; (2) the plaintiff applied for or performed an available position; (3) the plaintiff was qualified for the position; (4) the plaintiff suffered an adverse employment action; and (5) the employer gave preference to someone outside the protected class. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

31. Compare 42 U.S.C. § 2000e-2(a)(1) (1999), with 42 U.S.C. § 2000e-3(a) (1999). Section 703(a)(1) proscribes discrimination with respect to "compensation, terms, conditions or privileges of employment." Section 704(a) simply proscribes discrimination.

32. See discussion *infra* Part I.C (examining the more liberal construction of the adverse employment action adopted by some circuits).

33. 42 U.S.C. § 2000e-2(a)(1) (1999).

34. See *Hishon v. King & Spalding*, 467 U.S. 69, 75-77 (1984) (construing the provision to guarantee equal employment opportunity by eradicating discrimination in all aspects of the employment relationship); see also *White*, *supra* note 12, at 1151 (recognizing that courts now understand that harm need not be economic in nature to be considered materially significant).

35. See *Burlington Indus. v. Ellerth*, 524 U.S. 742, 752 (1998).

demotion evidenced by a decrease in wage or salary, a failure to promote, a material loss of benefits, or significantly diminished material responsibilities.³⁶ In most cases, the tangible employment action will inflict direct economic harm.³⁷ Only a supervisor is empowered to make economic decisions affecting other employees under his or her control; therefore, only a supervisor can cause this type of injury.³⁸ Thus, a tangible employment action cannot result from coworker actions. Since the supervisor is acting as an agent for the employer, the employer is vicariously liable when supervisory discrimination results in a tangible employment action.³⁹

2. Constructive Alterations in the Terms and Conditions of Employment Through a Hostile Work Environment

Section 703(a) also forbids constructive alterations in the terms and conditions of employment due to a hostile work environment.⁴⁰ In *Meritor Savings Bank v. Vinson*,⁴¹ the Supreme Court expressly rejected an interpretation of Title VII that limited its protection to tangible economic matters and explained that the phrase “terms, conditions or privileges of employment” in section 703(a)(1) is an expansive concept which includes protection against a hostile work environment based on discrimination.⁴²

Title VII, however, does not regulate all adverse conduct in the workplace.⁴³ For a hostile work environment to exist as

36. See *id.* at 761. Tangible employment action claims are also identified as “quid pro quo” claims. See *id.* Not all adverse actions, however, are severe or pervasive enough to be tangible employment actions. See, e.g., *Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 887 (6th Cir. 1996) (finding that a demotion without a change in pay, benefits, duties or prestige was also insufficient to support a claim); *Flaherty v. Gas Research Inst.*, 31 F.3d 451, 456 (7th Cir. 1994) (holding that a bruised ego was insufficient to create liability); *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994) (holding that reassignment to a more inconvenient job did not create liability).

37. See *Burlington Indus.*, 524 U.S. at 762.

38. See *id.*

39. See *id.* at 754–65 (discussing the applicability of agency law to impose liability upon the employer). The employer is liable independent of whether the employer knew, should have known, or approved of the supervisory action. See *id.* at 761 (citing *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 70–71 (1986)).

40. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998) (“We have repeatedly made clear that although the statute mentions specific employment decisions with immediate consequences, the scope of the prohibition is not limited to the ‘economic’ or ‘tangible’ discrimination and that it covers more than ‘terms’ and ‘conditions’ in the narrow contractual sense.”) (citations omitted); *Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993); *Meritor*, 477 U.S. at 64–66.

41. 477 U.S. 57 (1986).

42. See *id.* at 64–66.

43. See *id.* at 67 (“Not all workplace conduct that may be described as

proscribed by Title VII, the workplace must be "permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."⁴⁴ This standard is a compromise between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible physical injury.⁴⁵ It requires that the discriminatory conduct be so severe or pervasive that it creates an objectively and subjectively hostile work environment.⁴⁶ Moreover, the abusive conduct must be sufficiently continuous and concerted in order to be deemed pervasive.⁴⁷ However, the standard does not require the conduct to be so abusive as to seriously affect an employee's emotional or psychological health.⁴⁸ Nor does it require that the employee suffer tangible adverse effects such as an inability to perform the job or obstruction of career advancement.⁴⁹

In determining whether the work environment is sufficiently hostile or abusive, courts must consider the totality of the circumstances,⁵⁰ including (1) the frequency of the discriminatory conduct; (2) the severity of the conduct; (3) whether the conduct was physically threatening or humiliating or merely offensive; (4) whether the conduct unreasonably interfered with the employee's work; and (5) what psychological harm, if any, resulted.⁵¹

Under the hostile work environment doctrine, the imposition of liability on the employer depends on who is harassing the victim. In cases where a supervisor creates a hostile work environment, the employer is vicariously liable.⁵² In such cases, however, the employer may offer an affirmative defense to liability and damages by showing that (1) it exercised reasonable care to

'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII.')

44. *Harris*, 510 U.S. at 21 (quoting *Meritor*, 477 U.S. at 65-67).

45. *See id.*

46. *See Faragher*, 524 U.S. at 788; *Harris*, 510 U.S. at 21-23 (holding that a Title VII hostile environment claim will succeed only where the discriminatory conduct is so severe or pervasive as to create an objectively hostile or abusive work environment and where the victim subjectively perceives the environment to be abusive). The conduct must be more severe than simple teasing or crude comments. *See Faragher*, 524 U.S. at 788 (citing *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998)).

47. *See id.* at 787 n.1. Episodic harassment, unless extremely serious, is insufficient to meet the "pervasive" requirement. *See id.*

48. *See Harris*, 510 U.S. at 22.

49. *See id.*

50. *See id.* at 23.

51. *See Faragher*, 524 U.S. at 786-88; *Harris*, 510 U.S. at 23.

52. *See Harris*, 510 U.S. at 23.

avoid and/or eliminate harassment when it might occur; and (2) the plaintiff employee failed to act with reasonable care to take advantage of the employer's safeguards and otherwise to prevent harm that could have been avoided.⁵³

When the employee is a victim of coworker harassment, the employer will be liable only if its own negligence caused the hostile work environment.⁵⁴ The employer is negligent if it knew or should have known about the conduct and failed to stop it.⁵⁵ For the employer to be liable for a hostile work environment created by coworker harassment, it must have known of the harassment and acquiesced in such a manner as to condone and encourage the coworkers' actions.⁵⁶

C. Adverse Employment Actions Under the Anti-Retaliation Provision

The Supreme Court has never limited its application of hostile work environment discrimination to section the standard applicable under 703(a).⁵⁷ However, the federal circuit courts widely disagree about whether a hostile work environment caused by retaliatory coworker harassment is even actionable under section 704(a).⁵⁸

53. See *Burlington Indus. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher*, 524 U.S. at 775, 805-07.

54. See *Burlington Indus.*, 524 U.S. at 758-59 (citing RESTATEMENT (SECOND) OF AGENCY § 219(2)(b) (1957)).

55. See *id.*

56. See *id.* at 760 (citing 29 C.F.R. § 1604.11(d) (1997)) (providing the "knows or should have known" standard for liability in cases of harassment between "fellow employees"); *Faragher*, 524 U.S. at 788-89 (citing cases in which employers were liable for harassment by co-workers because the employer knew of the harassment but failed to act).

57. See discussion *supra* Part I.B.1-2 (describing the development of adverse employment actions under the substantive anti-discrimination law provision, section 703(a)(1), of Title VII).

58. Compare *Fiedler v. UAL Corp.*, 218 F.3d 973, 984-85 (9th Cir. 2000) (recognizing that if the retaliation provision were interpreted in a strict manner, "employers could retaliate at will so long as the retaliation does not rise to the level of a constructive discharge" and that "Title VII's protection against retaliatory discrimination extends to employer liability that rises to the level of an adverse employment action"); *Richardson v. N.Y. State Dep't of Corr. Serv.*, 180 F.3d 426, 446 (2d Cir. 1999) ("[U]nchecked retaliatory coworker harassment, if sufficiently severe, may constitute adverse employment action so as to satisfy the second prong of the retaliation prima facie case."); *Gunnell v. Utah Valley State Coll.*, 152 F.3d 1253, 1264 (10th Cir. 1998) ("Under our circuit precedent we believe that coworker hostility or retaliatory harassment, if sufficiently severe, may constitute 'adverse employment action' for purposes of a retaliation claim."); *Knox v. Indiana*, 93 F.3d 1327, 1334 (7th Cir. 1996) ("No one would question the retaliatory effect of many actions that put the complainant in a more unfriendly working environment Nothing indicates why a different form of retaliation – namely, retaliating against

1. Limiting Adverse Employment Actions to Ultimate Employment Decisions

The Fifth and Eighth Circuits refuse to recognize any action less than an ultimate employment decision as within the prohibition of section 704(a).⁵⁹ These courts define an ultimate employment decision as an act such as “hiring, granting leave, discharging, promoting, and compensating.”⁶⁰ Thus, the term can be considered synonymous with a tangible employment action as described in *Burlington Industries v. Ellerth*.⁶¹ By so limiting the definition of adverse employment, the courts only recognize retaliation in the form of a tangible employment action⁶² and completely disregard the hostile work environment doctrine developed under section 703(a)(1).⁶³

A leading example is *Mattern v. Eastman Kodak Co.*⁶⁴ Mattern was a former employee who alleged that management personnel and coworkers retaliated against her after she filed a sexual harassment claim with the Equal Employment Opportunity Commission.⁶⁵ To support her claim of retaliation, Mattern alleged several incidents of retaliatory harassment, including that her coworkers uttered “accidents happen” as she passed by them, that her locker was broken into, and that her work equipment was stolen.⁶⁶ She also alleged that management failed to act after it

a complainant by permitting her fellow employees to punish her for invoking her rights under Title VII – does not fall within the statute.”); *Wyatt v. City of Boston*, 35 F.3d 13, 15-16 (1st Cir. 1994) (providing examples of actions other than discharge that fall within the scope of section 704(a) such as “employer actions such as demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations and toleration of harassment by other employees”), *with Manning v. Metro. Life Ins. Co.*, 127 F.3d 686, 692 (8th Cir. 1997) (requiring tangible changes in job duties resulting from an ultimate employment decision); *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997) (requiring employer action in the nature of an ultimate employment decision).

59. *See Manning*, 127 F.3d at 692; *Mattern*, 104 F.3d at 707.

60. *Mattern*, 104 F.3d at 707.

61. *See discussion supra* Part I.B.1 (describing how a tangible employment action may constitute an adverse employment action under Title VII).

62. *See Manning*, 127 F.3d at 692; *Mattern*, 104 F.3d at 707.

63. *See supra* note 62; *see also Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997) (finding no adverse employment action when employee suffered no “material change in the terms and conditions of her employment”).

64. 104 F.3d 702 (5th Cir. 1997).

65. *See id.* at 703-04.

66. *See id.* at 705. Other alleged actions were (1) receiving a home visit from a supervisor to instruct her to report to a company doctor; (2) being reprimanded for not being at her work station when she was in the Human Resources Department protesting her abuse; (3) being threatened with firing by a supervisor; (4) receiving a negative performance evaluation that caused her to miss a pay increase and be placed on final warning; and (5) being required to climb scaffolding in a uniform

learned of her coworker harassment.⁶⁷ The jury found in her favor.⁶⁸ The Fifth Circuit Court of Appeals reversed, reasoning that none of the actions she complained of were ultimate employment actions.⁶⁹

Like other circuits, the court in *Mattern* looked to the anti-discrimination provision for guidance in its interpretation of the anti-retaliation provision.⁷⁰ However, rather than interpreting Title VII liberally, as is consistent with the purpose and precedential interpretation of the Act, the court construed both section 703(a)(1) and section 704(a) narrowly.

In doing so, the court first compared the text of sections 703(a)(1) and 703(a)(2), the two sub-provisions of the substantive anti-discrimination section.⁷¹ It then determined the reach of section 703(a)(2) to be much greater than that of section 703(a)(1).⁷² Thus, the court concluded, section 703(a)(1) must exclude the "vague harms" contemplated in section 703(a)(2) and include only ultimate employment decisions.⁷³ Since sections 703(a)(1) and 704(a) both make it unlawful for an employer "to discriminate," the court reasoned that the anti-retaliation provision must also exclude such harms and must only protect against ultimate employment actions.⁷⁴

To define an ultimate employment action, the *Mattern* court relied on the judicial interpretation formerly applied exclusively to claims against the federal government under section 717 of Title VII⁷⁵ and extended it to sections 703(a)(1) and 704(a).⁷⁶ In

that was too large for her. *See id.* at 705-06.

67. *See id.* at 704.

68. *See id.*

69. *See id.* at 707-08. ("Hostility from fellow employees, having tools stolen, and resulting anxiety, without more, do not constitute ultimate employment decisions, and therefore are not the required adverse employment actions.")

70. *See id.* at 708-09.

71. *See id.*; *see also* 42 U.S.C. § 2000e-2(a)(1) to (a)(2) (1999).

72. *See Mattern*, 104 F.3d at 709 (citing *Dollis v. Rubin*, 77 F.3d 777, 782 (5th Cir. 1985) (citing *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981))).

73. *See Mattern*, 104 F.3d at 709.

74. *See id.*

75. Title VII was amended in 1972 to include federal employees within its scope, as stated in section 717. *See* 42 U.S.C. § 2000e-17 (1999) ("All personnel actions affecting employees or applicants for employment [in federal government positions] shall be made free from any discrimination based on race, color, religion, sex, or national origin."). Some lower courts have construed the prohibition of discrimination in "personnel actions" in section 717 to reach only discrimination in ultimate employment decisions. *See, e.g., Page v. Bolger*, 645 F.2d 227, 233-34 (4th Cir. 1981). In *Page*, an African-American postal worker alleged he had been denied a promotion because of his race and brought suit against his employer under section 717 of Title VII. *See id.* at 228-29. The Fourth Circuit rejected his claim.

adopting this interpretation and applying it to section 704(a), the court expressly rejected coworker hostility as actionable under the anti-retaliation provision.⁷⁷ Although the *Mattern* court recognized that hostility from coworkers might have an effect on the conditions of a person's employment, the court refused to recognize that such behavior is enough to constitute an adverse employment action because it does not rise to the level of an ultimate employment decision.⁷⁸ The court reasoned that the conduct of which *Mattern* complained was not an ultimate employment decision, but merely tangential to future employment decisions that could be considered ultimate.⁷⁹

The *Mattern* court also emphasized that its interpretation supports the important policy of balancing the rights of the employer and the employee. Concerned over how deeply into the employment relationship Title VII should intrude, the court stated that a more expansive construction of the adverse employment action element would hinder the ability of the employer to manage its employees.⁸⁰ Moreover, the court was troubled that employers may have difficulty separating conduct that is retaliatory from conduct that is simply the result of negative interpersonal relations.⁸¹ It therefore held that the use of the ultimate employment decision bright-line rule properly shields the employer from fear that an employee may brandish his protected

In its analysis, the court analogized section 717 to section 703 of Title VII, stating, "[t]he proper object of inquiry in a claim of disparate treatment has consistently focused on the question whether there has been discrimination in what could be characterized as ultimate employment decisions such as hiring, granting leave, discharging, promoting, and compensating. This is the general level of decisions we think contemplated by the term 'personnel action.'" *Id.* at 233. The court further noted that, while decisions other than those specified could fall within the meaning of the term "personnel action," "it is obvious to us that there are many interlocutory or mediate decisions having no immediate effect upon employment conditions which were not intended to fall within the proscriptions of section 717 and comparable provisions of Title VII." *Id.*; see also *Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir. 1985) (adopting the *Page* court limitation on "personnel action" under section 717 to ultimate employment decisions in a retaliation claim).

76. See *Mattern*, 104 F.3d at 707.

77. See *id.*

78. See *id.*

79. See *id.* at 707-08.

80. See *id.* at 708 ("To hold otherwise would be to expand the definition of 'adverse employment action' to include events such as disciplinary filings, supervisor's reprimands, and even poor performance by the employee - anything which might jeopardize employment in the future. Such expansion is unwarranted.")

81. See *id.*; see also Holland & Hart, *Retaliation by Co-Workers can Lead to Liability in Discrimination Case*, WYO. EMP. L. LETTER, Oct. 1998 (explaining that employers need to be careful to separate actions based on personality conflicts from those based on retaliation).

status against any and all adverse events that might affect him at the workplace.⁸²

The Eighth Circuit also narrowly construes the definition of adverse employment action to include only ultimate employment decisions.⁸³ Specifically, in *Manning v. Metropolitan Life Insurance Co.*,⁸⁴ the court held that coworker retaliatory harassment in the form of “hostility and personal animus” and “ostracization” is insufficiently severe to support a claim for retaliation.⁸⁵ The court further stated that “[a]bsent evidence of some more tangible change in duties or working conditions that constituted a material employment disadvantage . . . [the plaintiffs] did not present evidence sufficient to demonstrate any adverse employment action that constitutes the sort of ultimate employment decision intended to be actionable under Title VII.”⁸⁶ Thus, the Eighth Circuit also requires the retaliation to be in the form of a tangible employment action and rejects the application of the hostile work environment doctrine to the anti-retaliation provision.

2. Courts that Broaden the Scope and Recognize that Co-Worker Harassment May Be an Adverse Employment Action

Other circuits adopt a more liberal construction of the adverse employment action, finding decisions with substantially less significant consequences to be sufficient.⁸⁷ In fact, the First,

82. See *Mattern*, 104 F.3d at 707-08; see also *Williams v. Bristol-Meyers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996) (“A transfer involving no reduction in pay and no more than a minor change in working conditions will not do, either. Otherwise every trivial personnel action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit.”) (internal citations omitted).

83. See, e.g., *Manning v. Metro. Life Ins. Co.*, 127 F.3d 686 (8th Cir. 1997); *Ledergerber v. Stangler*, 122 F.3d 1142 (8th Cir. 1997); *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379 (8th Cir. 1994).

84. 127 F.3d 686 (8th Cir. 1997).

85. See *id.* at 692.

86. *Id.* (citing *Ledergerber*, 122 F.3d at 1144).

87. See, e.g., *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998) (“We join the majority of circuits which have addressed the issue and hold that Title VII’s protection against retaliatory discrimination extends to adverse actions which fall short of ultimate employment decisions.”); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 984-86 (10th Cir. 1996) (construing section 704(a) to reach beyond ultimate employment decisions and protect an employee from a malicious prosecution action brought by a former employer); *Harrison v. Metro. Gov’t of Nashville*, 80 F.3d 1107, 1119 (6th Cir. 1996) (holding that “an atmosphere in which the plaintiff’s activities were scrutinized more carefully than those of comparably situated employees . . . does support finding a retaliation”); *Welsh v. Derwinski*, 14 F.3d 85, 86 (1st Cir. 1994) (rejecting the argument that an adverse

Second, Seventh, Ninth and Tenth Circuits have held explicitly that coworker retaliatory harassment, if sufficiently severe, can constitute an adverse employment action for purposes of a Title VII retaliation claim.⁸⁸ These courts reason that, just as an employer may be liable under section 703(a)(1) for coworker harassment based on a protected characteristic, so too may an employer be liable for harassment motivated by retaliation under section 704(a) if it is severe or pervasive enough to materially alter the work environment.⁸⁹ Although section 704(a) does not itself contain language requiring a materially adverse employment action in order to state a claim,⁹⁰ the courts infer the requirement from the basic prohibition of employment discrimination set forth in section 703(a)(1).⁹¹ Consistent with the Supreme Court's analysis of a hostile work environment claim,⁹² these courts take a case-by-case approach to determine whether the retaliatory harassment is sufficiently severe or pervasive to support a claim of discrimination.⁹³

employment action only involved discharge, demotion or failure to promote; rather, adverse employment action includes many things such as constant rudeness and conspicuous discriminatory acts).

88. See, e.g., *Fiedler v. UAL Corp.*, 218 F.3d 973, 985 (9th Cir. 2000) ("Title VII's protection against retaliatory discrimination extends to employer liability that rises to the level of an adverse employment action"); *Richardson v. N.Y. State Dep't of Corr. Serv.*, 180 F.3d 426 (2d Cir. 1999):

Just as an employer will be liable . . . for a racially or sexually hostile work environment created by a victim's co-workers if the employer knows about (or reasonably should know about) that harassment but fails to take appropriately remedial action, so too will an employer be held accountable for allowing retaliatory co-worker harassment to occur if it knows about that harassment but fails to act to stop it.

Id. at 446; see also *Gunnell v. Utah Valley State Coll.*, 152 F.3d 1253, 1264 (10th Cir. 1998) ("[C]o-worker hostility or retaliatory harassment, if sufficiently severe, may constitute 'adverse employment action' for purposes of a retaliation claim."); *Knox v. Indiana*, 93 F.3d 1327, 1334 (7th Cir. 1996) ("[T]here is nothing to indicate that the principle of employer responsibility [involved in direct claims of harassment by coworkers] does not extend equally to other Title VII claims, such as a claim of unlawful retaliation."); *Wyatt v. City of Boston*, 35 F.3d 13, 15-16 (1st Cir. 1994) (stating that "employer actions such as demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations and toleration of harassment by other employees" would constitute adverse employment action under Title VII). The Sixth Circuit has explicitly reserved to rule on whether an employer can be liable for coworkers' retaliatory harassment. See *Morris v. Oldham County Fiscal Ct.*, 201 F.3d 784, 791 n.8 (6th Cir. 2000).

89. See *Richardson*, 180 F.3d at 446.

90. See 42 U.S.C. § 2000e-3(a) (1999).

91. See *Richardson*, 180 F.3d at 446; *Gunnell*, 152 F.3d at 1264; *Knox*, 93 F.3d at 1334; *Wyatt*, 35 F.3d at 15-16.

92. See *Harris v. Forklift Sys.*, 510 U.S. 17, 23 (1993) (listing factors considered to analyze a hostile environment claim).

93. See, e.g., *Gunnell v. Utah Valley State Coll.*, 152 F.3d 1253, 1264 (10th Cir.

One example of a case where coworker retaliatory harassment was found to be sufficiently severe is *Knox v. Indiana*.⁹⁴ Knox was a correctional officer at a state correctional facility. During her employment, she was subjected to “blatant sexual harassment on the job” by her supervisor and reported the action to the facility’s affirmative action officer.⁹⁵ After being informed that Knox had filed harassment charges against him, her supervisor told his friends who also worked at the correctional facility.⁹⁶ Thereafter, these fellow employees began to make insulting and demeaning statements about Knox, both to staff and in front of inmates.⁹⁷ In addition, they openly remarked that “they intended to make Knox’s life ‘hell,’ and that they were going to ‘get her.’”⁹⁸ Knox reported the relentless campaign of coworker retaliatory harassment to her supervisor.⁹⁹ However, the affirmative action officer failed to make a reasonable effort to stop the retaliatory harassment.¹⁰⁰

In finding the employer liable for retaliatory harassment by its employees, the Seventh Circuit Court of Appeals noted that it is well established that an employer can be held liable under Title VII for sexual harassment by coworkers if the employer had actual or constructive knowledge of the harassment and failed to address the problem adequately.¹⁰¹ The court further found that “there is nothing to indicate that the principle of employer responsibility [involved in direct claims of harassment by coworkers] does not extend equally to other Title VII claims, such as a claim of unlawful retaliation.”¹⁰²

The Tenth Circuit Court of Appeals applied the same hostile work environment analysis to a retaliation claim in *Gunnell v. Utah Valley State College*.¹⁰³ Gunnell was a former employee who brought an action against her employer for sexual harassment and

1998) (“Co-worker hostility or retaliatory harassment, if sufficiently severe, may constitute an ‘adverse employment action’ for purposes of a retaliation claim.”); *Wyatt v. City of Boston*, 35 F.3d at 15-16 (stating that employer actions such as toleration of harassment by other employees may constitute an adverse employment action under Title VII).

94. 93 F.3d 1327 (7th Cir. 1996).

95. *See id.* at 1329.

96. *See id.* at 1331.

97. *See id.*

98. *Id.*

99. *Id.*

100. *See id.*

101. *See id.* at 1333-35.

102. *Id.* at 1334.

103. 152 F.3d 1253 (10th Cir. 1998).

retaliation.¹⁰⁴ While still employed, she complained to the employer's personnel director that her supervisor had subjected her to verbal and physical sexual harassment, including gestures, comments and unwelcome physical contact.¹⁰⁵ In response to the complaint, Gunnell alleged that her coworkers shunned her, made false statements about her, and excluded her from office communications.¹⁰⁶ She never reported the retaliatory conduct.¹⁰⁷ The court noted that the remedial nature of Title VII dictated a liberal definition of adverse employment action,¹⁰⁸ and determined that "coworker hostility or retaliatory harassment, if sufficiently severe, may constitute 'adverse employment action' for the purposes of a retaliation claim."¹⁰⁹ Nevertheless, since none of the supervisory or management-level personnel knew of the coworkers' retaliation, the employer was not liable.¹¹⁰

Munday v. Waste Management of North America, Inc.,¹¹¹ provides an example of conduct that is insufficiently severe or pervasive to constitute an adverse employment action under the anti-retaliation provision. After Munday filed a discrimination suit against her employer, the general manager of the facility where she worked instructed employees to ignore her and report to him anything she said to other employees.¹¹² He targeted only Munday, but did not generally forbid other employees from speaking or associating with others.¹¹³ He also yelled at her because he had heard a rumor that she planned to sue the company again.¹¹⁴ Munday denied this and attempted to address her concerns, but the manager stated, colorfully, that he did not care about her problems.¹¹⁵ Although recognizing that coworker harassment may adversely affect the work environment,¹¹⁶ the

104. *Id.* at 1257.

105. *See id.*

106. *See id.* Gunnell also alleged that she was given inferior office equipment, assigned menial office tasks and that her job was restructured to minimize duties and complexity. *See id.*

107. *See id.* at 1257-59.

108. *See id.* at 1264 (citing *Jeffries v. Kansan*, 147 F.3d 1220, 1231-32 (10th Cir. 1998)).

109. *Id.* at 1264.

110. *See id.* at 1265.

111. 126 F.3d 239 (4th Cir. 1997).

112. *See id.* at 241.

113. *See id.*

114. *See id.*

115. *See id.*

116. *See id.* at 244 (noting that intolerable working conditions may constitute a constructive discharge and therefore rise to the level of an adverse employment action).

Fourth Circuit Court of Appeals refused to recognize the ostracizing and spying as sufficiently severe to support a claim for retaliation.¹¹⁷

The common denominator in the analyses of these courts is that the harassment must be sufficiently severe or pervasive to constitute a hostile work environment and that the employer must be negligent in failing to stop the retaliation.¹¹⁸ This follows what the Supreme Court has dictated as the proper analysis under Title VII.¹¹⁹

3. The EEOC's Interpretation

The Equal Employment Opportunity Commission acknowledges the split among the courts regarding the scope of the adverse employment action requirement,¹²⁰ but concludes that section 704(a) should be construed broadly.¹²¹ Moreover, among the actions identified as forbidden retaliation, the EEOC Compliance Manual specifically recognizes coworker harassment or intimidation as a violation of section 704(a).¹²² Consistent with the Supreme Court's interpretation of a hostile work environment claim,¹²³ the EEOC requires that the retaliation subjectively and objectively create severe or pervasive hostility in the employee's

117. See *id.* at 243 ("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 terms, conditions, or benefits of her employment were adversely effected.")

118. See *Knox v. Indiana*, 93 F.3d 1327, 1332-33 (7th Cir. 1996); *Gunnell v. Utah Valley State Coll.*, 152 F.3d 1253, 1265 (10th Cir. 1998) ("An employer may not be held liable for the retaliatory acts of co-workers if none of its supervisory or management-level personnel orchestrated, condoned, or encouraged the co-workers' actions, and no such management participation could occur if the supervisory or management-level personnel did not actually know of the co-workers' retaliation.")

119. See discussion *supra* Part I.B.2 (describing the hostile work environment doctrine in employment discrimination cases).

120. See EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ("EEOC") COMPLIANCE MANUAL § 614.7 (1992); see also Williams & Rhodes, *supra* note 24, at 62 (quoting the EEOC Directive 915.003 at 8-13) ("[s]ome courts have held that the retaliation provisions apply only to retaliation that takes the form of ultimate employment actions. . . [o]thers have construed the provisions more broadly, but have required that the action materially affect the terms, conditions, or privileges of employment.") (citations omitted).

121. See EEOC, *supra* note 120, § 614.7 (1992); see also Williams & Rhodes, *supra* note 24 and accompanying text.

122. See EEOC, *supra* note 120, § 614.7 (1992) ("If others, such as coworkers . . . retaliate against [an employee] for having opposed employment discrimination, the [employer] will, under certain circumstances, have a duty to take steps reasonably calculated to end the retaliation.")

123. See discussion *supra* Part I.B.2 (describing the hostile work environment doctrine in employment discrimination cases).

working environment.¹²⁴ In addition, the Manual indicates that an employer is liable under section 704(a) for failing to take reasonable steps to remedy or prevent coworker retaliation.¹²⁵

II. Broadening the Scope of Section 704(a) to Proscribe Retaliatory Co-Worker Harassment

An extension of section 704(a) to recognize retaliatory harassment by coworkers as within the scope of the provision is consistent with the text, liberal interpretation, and broad purpose of the provision.

A. Recognizing Co-Worker Retaliatory Harassment as an Adverse Employment Action is Consistent with the Language of Title VII, Section 704(a)

Section 704(a), the anti-retaliation provision of Title VII, makes it unlawful for:

an employer to discriminate against any of his employees or applicants for employment . . . because he [the employee or applicant] has opposed any practice[,] made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII].¹²⁶

The anti-retaliation provision is, on its face, broader than the substantive anti-discrimination provision.¹²⁷ The anti-discrimination provision contains detailed and specific text, with numerous and precise verbs and explicit restrictions with respect to the terms, conditions or privileges of employment and employment opportunities.¹²⁸ In contrast, the anti-retaliation provision does not.¹²⁹ It simply and broadly prohibits an employer

124. See EEOC, *supra* note 120, § 614.7 (1992) (recognizing that retaliation against people who protest unlawful employment discrimination can take many forms).

125. See EEOC, *supra* note 120, § 614.7 (1992).

126. 42 U.S.C. § 2000e-3(a) (1999).

127. See 42 U.S.C. § 2000e-2(a)(1) to (a)(2) (1999); 42 U.S.C. § 2000e-3(a) (1999).

128. See 42 U.S.C. § 2000e-2(a)(1) to (a)(2) (1999).

129. See 42 U.S.C. § 2000e-3(a) (1999); see also *Knox v. State of Indiana*, 93 F.3d 1327, 1334 (7th Cir. 1996) ("There is nothing in the law of retaliation that restricts the type of retaliatory act that might be visited upon an employee who seeks to invoke her rights by filing a complaint. It need only be an adverse employment action, . . . adverse [employment] actions can take many shapes and sizes The law deliberately does not take a laundry list approach to retaliation because unfortunately its forms are as varied as the human imagination will permit."); *Passer v. Am. Chem. Soc'y*, 935 F.2d 322, 331 (D.C. Cir. 1991) ("The statute itself proscribes 'discriminat[ion]' against those who invoke the Act's protections; the statute does not limit its reach only to acts of retaliation that take the form of cognizable employment actions such as discharge, transfer, or demotion.").

from discriminating against an employee because he vindicated himself and fought for his Title VII rights.¹³⁰ Thus, the anti-retaliation provision, which does not limit the scope of unlawful employment action to specific actions or conditions, should be construed more broadly than the substantive anti-discrimination provision.

B. Recognizing Coworker Retaliatory Harassment as an Adverse Employment Action Is Consistent with the Liberal Interpretation and Broad Purpose of Title VII and Section 704(a)

The purpose of section 704(a) is to prevent employers from chilling employees' assertion of Title VII rights.¹³¹ To achieve the specific purpose of the provision and the overall purposes of Title VII,¹³² section 704(a) affords broad protection against retaliation for those who seek protection of employment-related civil rights.¹³³ Recognizing that claims may not come within the scope of the retaliation provision if interpreted literally, courts are extending the scope to comport with both the overall purpose of Title VII and the specific purpose of section 704(a).¹³⁴

For example, although the text of neither provision provides the distinction, the courts interpret section 704(a) to allow a

130. See 42 U.S.C. § 2000e-3(a) (1999).

131. See Civil Rights Act of 1964, § 704, Pub. L. No. 88-352, 78 Stat. 2653 (1964) (codified as amended at 42 U.S.C. § 2000e-3(a) (1999)); see also EEOC, *supra* note 120, § 614.7 (1992).

132. See Civil Rights Act of 1964, § 704, Pub. L. No. 88-352, 78 Stat. 2653 (codified as amended at 42 U.S.C. § 2000e-3(a) (1999)).

133. See, e.g., *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998) ("Permitting employers to discriminate against an employee who files a charge of discrimination so long as the retaliatory discrimination does not constitute an ultimate employment action could stifle employees' willingness to file charges of discrimination."); *Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998, 1006 n.18 (5th Cir. 1969) ("The protection of assistance and participation in any manner would be illusory if [an] employer could retaliate against [an] employee for having assisted or participated in a [Title VII] proceeding."); see also EEOC, *supra* note 120, § 614.7 (1992).

134. See, e.g., *McDonnell v. Cisneros*, 84 F.3d 256, 262 (7th Cir. 1996) (identifying situations, "apparently not foreseen by Congress, in which a literal interpretation of the provision would leave a gaping hole in the protection of complainants and witnesses"). The court, in dicta, stated that it would extend the protection of the anti-retaliation provision to situations where (1) an employer retaliates against an employee for failing to prevent the filing of a Title VII complaint by a coworker; and (2) the employer either does not know who the complainant is and decides therefore to retaliate against a group of workers that he knows includes the complainant, or makes a mistake and retaliates against the wrong person. See *id.* "Both are cases of genuine retaliation, and we cannot think of any reason . . . other than pure oversight, why Congress should have excluded them from the protection of [section 704(a)]." *Id.*

retaliation claim even when no actual discrimination has occurred or if a discrimination claim under section 703(a) fails.¹³⁵ An employee need not prove a discrimination claim to sustain a retaliation claim. Rather, he or she must only reasonably believe that an unlawful employment practice has occurred.¹³⁶ Recognition of retaliation claims under section 704(a) in situations where a discrimination claim under section 703(a) is not viable further implies that a retaliation claim has a broader objective than a discrimination claim.¹³⁷

The Supreme Court's decision in *Robinson v. Shell Oil Co.*¹³⁸ further supports the broad interpretation of section 704(a). Although the text of the provision only prohibits discrimination against "employees or applicants for employment,"¹³⁹ the Court held that section 704(a) also extends to former employees as long as the alleged discrimination is related to, or arises out of, the employment relationship.¹⁴⁰ The retaliation provision thus protects a former employee from post-employment actions allegedly taken in retaliation for the employee's protected activity.¹⁴¹ Further evidence of the courts' willingness to extend the application of the anti-retaliation provision is that courts have extended the scope of section 704(a) of Title VII to encompass suits brought to remedy retaliatory action resulting from the prosecution of a claim under the Equal Pay Act¹⁴² and other anti-discrimination statutes.¹⁴³ Therefore, the further broadening of

135. See, e.g., *Wu v. Thomas*, 863 F.2d 1543, 1549 (11th Cir. 1989); *Rucker v. Higher Educ. Aids Bd.*, 669 F.2d 1179, 1182 (7th Cir. 1982); *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1137 (5th Cir. 1981) (noting that a plaintiff can satisfy the first prong of the prima facie case by showing a reasonable belief that an unlawful employment practice occurred, and that the action was attributable to the employer).

136. See *Collins v. Illinois*, 830 F.2d 692, 702 (7th Cir. 1987) (noting that it is not necessary that the employer is actually committing an unlawful employment practice under Title VII; rather, it is sufficient for a plaintiff to reasonably believe that the employer is violating the statute).

137. See *White*, *supra* note 12, at 1165-66 and accompanying text.

138. 519 U.S. 337 (1997).

139. See 42 U.S.C. § 2000e-3(a) (1999).

140. See *Robinson*, 519 U.S. at 346; see also *Passer v. Am. Chem. Soc'y*, 935 F.2d 322, 331 (D.C. Cir. 1991) (holding that a cancellation of a major symposium in former employee's honor after the employer learned that the employee filed charges of age discrimination could be an adverse employment action under the anti-retaliation provision).

141. See *Robinson*, 519 U.S. at 346 (recognizing that a former employee is protected under section 704(a) thereby allowing him or her to bring a claim against a former employer for giving negative job references to other potential employers in retaliation for the employee filing a Title VII claim).

142. Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2000).

143. See *Passer*, 935 F.2d at 322 (D.C. Cir. 1991); see also *Wu v. Thomas*, 863

section 704(a) to include coworker retaliatory harassment is consistent with the liberal interpretation of the provision.

C. Limiting Adverse Employment Actions to Ultimate Employment Decisions Is Inconsistent with the Language, Interpretation and Purpose of Title VII and Section 704(a)

Confining an adverse employment action to an ultimate employment decision conflicts with the clear statutory language, purpose and judicial interpretation of section 704(a) of Title VII. The Fifth and Eighth Circuits' interpretation of section 704(a), limiting an adverse employment action to an ultimate employment decision, is inconsistent with the plain language of the provision.¹⁴⁴ The ordinary understanding of the verb "discriminate" is not limited to the actions defined as ultimate employment decisions.¹⁴⁵ Rather, the plain meaning is defined broadly to encompass all manners of differentiation and discernment.¹⁴⁶

The narrow definition of the adverse employment action, which necessarily links it to ultimate employment decisions, also squarely conflicts with the broad purpose of Title VII. Courts that limit the definition of adverse employment actions to ultimate employment decisions rely on the notion that Title VII was designed to address only ultimate employment decisions.¹⁴⁷ However, the Supreme Court has expressly declined to limit Title VII's prohibition against discrimination to employment actions with tangible economic effects.¹⁴⁸ Furthermore, the Supreme Court has held that Title VII is violated when an employer discriminates on the basis of a protected characteristic by creating

F.2d 1543, 1547-48 (11th Cir. 1989) (recognizing claim of retaliation based on a suit alleging gender discrimination under the Equal Pay Act, Title VII of the Civil Rights Act, and 42 U.S.C. § 1983).

144. See *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998) (directly criticizing the *Mattern* court's limitation of adverse employment action to ultimate employment decisions).

145. See *id.*; see also *Passer*, 935 F.2d at 331 ("The statute itself proscribes 'discriminat[ion]' against those who invoke the Act's protections; the statute does not limit its reach only to acts of retaliation that take the form of cognizable employment actions such as discharge, transfer or demotion.").

146. See WEBSTER'S NEW WORLD DICTIONARY 423 (David B. Guralink et al. eds., 2d ed. 1986).

147. See *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (1997) (relying on *Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir. 1995)) ("Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions.").

148. See discussion *supra* Part I.B (describing the liberal interpretation of Title VII's anti-discrimination provision).

a hostile or abusive work environment, which can be determined only by "looking at all the circumstances[.]"¹⁴⁹ Such interpretations clearly indicate that Title VII extends protection against employment actions beyond ultimate employment decisions.

Furthermore, the courts that adopt the ultimate employment decision standard essentially adopt mutually contradictory positions in treating retaliation claims. The confinement of the adverse employment action to only ultimate employment actions renders a retaliation claim far more limited than an underlying discrimination claim.¹⁵⁰ Paradoxically, all courts, including the ultimate employment decision courts, recognize that a retaliation claim may exist even when no actual discrimination has occurred,¹⁵¹ implying that a retaliation claim has a broader objective than a discrimination claim.

Finally, the *Mattern* court's reliance on section 717 of Title VII to define the adverse employment action is misplaced.¹⁵² Although both provisions were enacted to effectuate the general goals of Title VII, the provisions are substantially distinct in several ways.¹⁵³ First, section 717 specifically requires that there be a personnel action, thereby narrowing significantly the scope of the provision.¹⁵⁴ A personnel action is not merely discrimination, but need not necessarily rise to the level of an ultimate employment action.¹⁵⁵ The language of section 704(a) is broader

149. *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998).

150. See discussion *supra* Part I.C.1 (describing the restriction of adverse employment actions to ultimate employment decisions).

151. See, e.g., *Wu v. Thomas*, 863 F.2d 1543, 1549 (11th Cir. 1989) (noting that a retaliation claim does not require that the employer actually have been engaged in an unlawful employment practice; instead, the plaintiff need only have a "reasonable belief" that an unlawful employment practice was occurring); *Payne v. McLeoner's Wholesale & Retail Stores*, 654 F.2d 1130, 1137-40 (5th Cir. 1981) (requiring only a reasonable belief that the employer engaged in an unlawful employment practice to establish a prima facie case of retaliatory discharge).

152. See *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 717 (5th Cir. 1997) (Dennis, J., dissenting) (stating that *Page v. Bolger*, the decision on which the majority opinion relied, did not restrict recovery under section 717 to situations where an employee was discriminated against by the employer in an "ultimate employment decision" such as "hiring, granting leave, discharging, promoting, and compensation").

153. Compare 42 U.S.C. § 2000e-3(a) (1999), with 42 U.S.C. § 2000e-17 (1999).

154. See 42 U.S.C. § 2000e-17 (1999).

155. While the *Page* court explicitly qualified its definition of a personnel action, it nonetheless stated that its list of described actions was not exhaustive. See *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981) ("[W]e suggest no general test for defining those 'ultimate employment decisions' which alone should be held directly covered by [section 717] and comparable anti-discrimination provisions under Title VII. Among the myriad of decisions constantly being taken at all levels and with

regarding its prohibition on employer conduct in that it prohibits *any* discrimination, as opposed to merely personnel actions.¹⁵⁶ Second, section 717 exclusively addresses discrimination in federal employment.¹⁵⁷ Its purpose is to extend the protection of Title VII to employees of the federal government.¹⁵⁸ By doing so, Congress did not intend to restrict the protection of employees in the private sector, accorded by sections 703(a) and 704(a).¹⁵⁹ If Congress intended to restrict the protection under sections 703(a) and 704(a) to that of section 717, it would have amended the language to reflect this narrow application.¹⁶⁰ Thus, by erroneously relying on section 717 to interpret sections 703(a) and 704(a), the *Mattern* court squarely contradicted both the text and purpose of the provisions and impeded the protection of the civil rights of employees.

III. Courts Should Uniformly Recognize that Coworker Retaliatory Harassment May Violate Section 704(a)

A. Courts Should Extend the Hostile Work Environment Discrimination Doctrine Developed Under Section 703(a) to Section 704(a)

To ensure the achievement of the purposes of Title VII, courts frequently turn to section 703(a), the substantive anti-discrimination provision, for guidance in interpretation of section 704(a), the anti-retaliation provision.¹⁶¹ Under section 703(a)(1), an employer may be liable for discriminatory harassment when the conduct (1) is sufficiently severe or pervasive as to alter the conditions of employment and create a hostile or abusive work environment; and (2) the employer knew or should have known of

all degrees of significance in the general employment contexts covered by Title VII there are certainly others than those we have so far specifically identified that may be so considered . . .").

156. Compare 42 U.S.C. § 2000e-3(a) (1999), with 42 U.S.C. § 2000e-17 (1999).

157. See *Page*, 645 F.2d at 233; see also *Mattern*, 104 F.3d. at 717-18 n.1 (Dennis, J., dissenting) (noting that there is no indication that the *Page* court intended the 'personnel actions' definition to apply to the retaliation provision in §2000e-3(a)).

158. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended at 42 U.S.C. §2000e-17 (1999)).

159. See *id.*

160. Congress did not change the text of sections 703(a) and 704(a) when it amended Title VII to add section 717. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended at 42 U.S.C. §2000e-17 (1999)).

161. See discussion *supra* Part I.A (discussing judicial interpretation of anti-discrimination and anti-retaliation provisions).

the harassment but failed to take reasonably calculated steps to end the abuse.¹⁶² Consistent with this approach, and noting that the scope of section 704(a) is broader than that of section 703(a),¹⁶³ courts should extend the hostile work environment doctrine of discrimination recognized under section 703(a) to section 704(a). By recognizing that retaliatory coworker harassment is within the scope of section 704(a), courts comply with the text and liberal interpretation of the provision and carry out the purposes of both the anti-retaliation provision and Title VII.¹⁶⁴

There is no rationale supporting an interpretation of Title VII that affords less protection against retaliatory discrimination than against discrimination protected under the substantive anti-discrimination provision. The individual and collective effects of discrimination are similar, independent of whether they are motivated by discrimination against a protected characteristic or protected activity.

Furthermore, the policy reasons given by courts that limit an adverse employment action to ultimate employment decisions are unwarranted. For example, the *Mattern* court warned that a broadening of the definition would unjustifiably expose an employer to liability in such a way that it would interfere with the employer's managerial and enforcement powers.¹⁶⁵ Two arguments repudiate this apprehension. First, noting the lack of legislative history that supports a restriction of section 704(a) to a narrower interpretation than section 703(a), the Seventh Circuit Court of Appeals in *Knox v. Indiana* stated:

There is nothing in the law of retaliation that restricts the type of retaliatory act that might be visited upon an employee who seeks to invoke her rights by filing a complaint. It need only be an adverse employment action . . . adverse actions can take many shapes and sizes The law deliberately does not take a 'laundry list' approach to retaliation, because unfortunately its forms are as varied as the human imagination will permit.¹⁶⁶

Thus, the provision itself justifies the liberal interpretation and extension of it to proscribe coworker retaliatory harassment.

162. See discussion *supra* Part I.B.2 (describing employer liability for hostile work environment).

163. See discussion *supra* Part II.B (comparing scope of sections 703(a) and 704(a)).

164. See discussion *supra* Part II.A-B (arguing that an extension of 704(a) to recognize coworker retaliation as discrimination is consistent with the text, intent, and purpose of the provision).

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

166. *Knox v. Indiana*, 93 F.3d 1327, 1335 (7th Cir. 1996).

Second, the courts that have extended the definition of adverse employment action to employer actions beyond ultimate employment decisions have created safeguards to protect against the slippery slope effect. All courts recognize that not all adverse behavior constitutes an adverse employment action¹⁶⁷ and realize that reserving employment discrimination statutes for workplace decisions of material consequence conserves judicial resources and avoids trivializing discrimination complaints.¹⁶⁸ As the Supreme Court explained in *Faragher v. City of Boca Raton*,¹⁶⁹ “[t]hese standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a general civility code.”¹⁷⁰

Restricting actionable harassment to severe or pervasive situations will filter out complaints attacking “the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes and occasional teasing.”¹⁷¹ Therefore, the judicially created limitations imposed on hostile work environment claims under section 703(a) maintain the balance of rights between employer and employee. Similarly, by limiting the scope of section 704(a) to retaliatory discrimination that is so severe or pervasive as to materially alter the terms or conditions of employment, courts have balanced carefully the rights of the employer with those of the employee.

167. See, e.g., *Drake v. Minn. Mining & Mfg. Co.*, 134 F.3d 878, 885 (7th Cir. 1998) (noting that Title VII is not directed at “unpleasantness per se” but only against discrimination in the conditions of employment); *Sweeney v. West*, 149 F.3d 550 (7th Cir. 1998) (holding that reprimands in the form of counseling statements do not constitute adverse employment action); *Manning v. Metro. Life Ins. Co.*, 127 F.3d 686, 692 (8th Cir. 1997) (“Although actions short of termination may constitute an adverse employment action within the meaning of the statute, ‘not everything that makes an employee unhappy is an actionable adverse employment action.’”) (quoting *Montandon v. Farmland Indus.*, 116 F.3d 355, 359 (8th Cir. 1997)); *Wanamaker v. Columbian Rope Co.*, 108 F.3d 462, 466 (2d Cir. 1997) (“[N]ot every unpleasant matter short of [discharge or demotion] creates cause of action’ [for retaliation].”).

168. See, e.g., *Williams v. Bristol-Meyers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996) (noting that courts are expressing fear that trivial personnel actions that a disgruntled employee did not like would form the basis of a discrimination suit); see also *White*, *supra* note 12, at 1128 n.30 (noting that the Seventh Circuit, in defending the need for a materially adverse employment action stated that “[t]he Equal Employment Opportunity Commission, already staggering under an avalanche of filings too heavy for it to cope with, would be crushed, and serious complaints would be lost among the trivial.”) (quoting *Williams*, 85 F.3d at 274).

169. 524 U.S. 775 (1998).

170. *Id.* at 787-88 (quoting *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81(1998)).

171. *Id.* at 775 (quoting BARBARA LINDERMAN & DAVID D. KADUE, *SEXUAL HARASSMENT IN EMPLOYMENT LAW* 175 (1992)).

B. Courts Need Uniform Interpretation

The lack of consensus among jurisdictions as to what constitutes adverse employment action has spurred demands for uniform interpretation to clarify the scope of the provision.¹⁷² This could be done either through Supreme Court interpretation or statutory amendment of section 704(a). The wide variation in interpretation has led to an increase in litigation and unpredictable results.¹⁷³ Consistent interpretation is needed so both employees and employers know which actions are protected under the statute, thereby leading to a reduction in litigation and a closer adherence to the purposes of Title VII.¹⁷⁴

Until a uniform interpretation of an adverse employment action under section 704(a) is recognized, employers may take proactive steps to protect themselves against retaliation claims.¹⁷⁵ First, employers must inform supervisors about which activities are protected, in order to avoid inadvertent violations of Title VII.¹⁷⁶ Second, employers must provide well-drafted and widely published anti-discrimination and anti-retaliation policies.¹⁷⁷ Complaints of discrimination or harassment must be treated confidentially to reduce the chance that a complaining employee will be subject to reprisal by coworkers.¹⁷⁸ In addition, if an employee complains to management about discrimination, the employee must be told to immediately report any acts of retaliation. Honest, regular evaluations also play an important role, as it is much easier for an employer to defend a retaliation claim against a former employee who has a long and well-documented history of performance problems than against an employee who was terminated for no established reason shortly

172. See Eric J. Wallach & Mark E. Greenfield, *The EEOC Has Delineated the Risk of Liability for Retaliation when an Employer Takes Action Against a Worker who Complains of Discrimination or Harassment*, 20 NAT'L L.J. 47, 47 (1998) (noting that retaliation complaints received each year by the EEOC more than doubled in number between 1991 and 1997, from 7900 to 18,100); see also White, *supra* note 12, at 1124 n.14 (noting a 300% increase in all employment cases filed in federal district courts for the same time period).

173. See Wallach & Greenfield, *supra* note 172; see also *supra* note 12 and accompanying text (noting broad interpretation of various anti-discrimination provisions).

174. See *supra* note 172 and accompanying text (stating that unwary employers, confident that they have engaged in no unlawful discrimination, are unwittingly subjecting themselves to liability by retaliating, either intentionally or inadvertently, against an employee or former employee who believes otherwise).

175. See *supra* note 172 and accompanying text.

176. See *supra* note 172 and accompanying text.

177. See *supra* note 172 and accompanying text.

178. See *supra* note 172 and accompanying text.

after complaining of discriminatory conduct.¹⁷⁹ In taking such precautions, employers will fulfill the purpose of section 704(a) by minimizing retaliatory harassment.

Conclusion

To better achieve the purposes of the provision and balance the rights of employers and employees, courts should uniformly recognize that an employer violates section 704(a) when (1) the abusive conduct was sufficiently severe or pervasive so as to alter the conditions of employment; and (2) the employer knew of the discrimination; but (3) failed to take reasonable remedial steps.

The Supreme Court has recognized that discriminatory harassment that is severe or pervasive enough to create a hostile work environment violates the substantive anti-discrimination provisions of Title VII.¹⁸⁰ Since the scope of section 704(a) is broader than that of section 703(a), it necessarily follows that an employer not only violates section 703(a) when it condones severe or pervasive harassment, but also violates section 704(a) when it discriminates against an employee for participating in the enforcement of Title VII by creating a hostile or abusive work environment.

Moreover, there is no justification for interpreting Title VII to afford less protection against retaliatory discrimination than against discrimination based on a protected characteristic. The negative and degrading psychological effects on the victim are the same, and exist independently of whether the discriminatory motive is based on a protected characteristic or a protected activity. Both forms of harassment, if sufficiently severe, may alter the terms and conditions of employment for the victim. Thus, since an employer may be liable under section 703(a) for a hostile work environment resulting from discrimination, it should also be liable under section 704(a) for hostile work environment caused by coworker retaliatory harassment. Interpreting Title VII to prohibit coworker retaliatory harassment is the most effective means to both balance the rights of employers and employees and purposively enact the broader anti-discrimination objectives of Title VII.

179. See *supra* note 172 and accompanying text.

180. See discussion *supra* Part I.B.2 (describing the hostile work environment doctrine in employment discrimination cases).

