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I. INTRODUCTION

Employees *X*, *Y*, and *Z* all work for *Company A*. These employees individually file complaints with the Equal Employment Opportunity Commission (EEOC), against *Company A*, because of perceived sexual harassment. Subsequently, a supervisor of employee *X* solicits other employees to make negative comments about employee *X*. Further, employee *Y* receives a negative year-end performance evaluation. Because a condition of employment requires positive performance evaluations in order to receive pay increases, employee *Y* is precluded from receiving a pay raise. Additionally, employee *Z* is denied a promotion to a position for which he or she is highly qualified.

This hypothetical presents the issue of whether an action is an adverse employment action, warranting retaliation claims under Title VII. The circuits are split three ways on this issue. One group of circuits adopts an "expansive" approach, defining adverse employment action broadly to include any action that is reasonably likely to deter alleged victims or others from engaging in future protected activity.[1] Under this approach, *X*, *Y*, and *Z* have been subjected to an adverse employment action, because the employer's behavior is likely to deter them, or others, from engaging in protected activity in the future.[2]

A second group of circuits adopts an "intermediate" approach, holding that adverse employment action includes any decision that adversely affects the terms, conditions, or benefits of employment.[3] Under this approach, employee *X* has not suffered an adverse employment action unless he or she can prove that the negative comments somehow affected a term, condition, or benefit of employment.[4] Similarly, employee *Z* has not suffered an adverse employment action unless he or she can demonstrate that the failure to consider him or her

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1. *See, e.g.*, Ray v. Henderson, 217 F.3d 1234, 1242-43 (9th Cir. 2000).
2. *See, e.g., id.*
3. *See, e.g.*, Von Gunten v. Maryland, 243 F.3d 858, 865-66 (4th Cir. 2001) (quoting Munday v. Waste Mgmt. of N. Am., Inc., 126 F.3d 239, 243 (4th Cir. 1997)).
4. *See, e.g., id.* (quoting *Munday*, 126 F.3d at 243).

for the promotion somehow affected a term, benefit, or condition of his or her employment.[5] However, employee *Y* may have suffered an adverse employment action when he or she received negative comments on his or her year-end evaluation because it prevented him or her from receiving a pay raise, which negatively affected a benefit of employment (i.e., pay raises) and a term and condition of employment (i.e., receiving positive performance reviews is a prerequisite to receiving pay increases).[6]

A third group of circuits adopts a "restrictive" approach, holding that only ultimate employment decisions—such as hiring, firing, promoting, and demoting—constitute actionable adverse employment actions.[7] Under this approach, neither employee *X* nor employee *Y* has suffered an adverse employment action because negative comments from fellow employees, negative comments on performance reviews, and failures to obtain pay raises do not constitute ultimate employment decisions.[8] Employee *Z*, however, has suffered an adverse employment action because matters concerning promotions constitute ultimate employment decisions.[9]

This article argues that the circuits should adopt the expansive approach in determining what constitutes adverse employment action in the retaliation context. Part II discusses generally the burden-shifting framework used by the circuits in evaluating retaliation claims under Title VII. Part III provides a detailed overview of the expansive, intermediate, and restrictive approaches used by the circuits in determining what actions constitute adverse employment actions. Part IV analyzes the strengths and weaknesses of each approach. Further, Part IV argues that the circuits should adopt the expansive approach, explains why they should adopt the expansive approach, and sets forth the effect this approach will have on employees and employers. Part V concludes that the expansive approach is the best policy approach because: (1) its broad definition of adverse employment action provides employees complete protection against unlawful retaliation; (2) it establishes a threshold level of substantiality that must be met for unlawful discrimination to be cognizable under the anti-retaliation clause; (3) it effectuates the letter and purpose of Title VII; (4) it is not outcome determinative; and (5) it facilitates conformity between § 2000e-3 and § 2000e-2 of Title VII.

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5. *See, e.g., id.* (quoting *Munday*, 126 F.3d at 243).
6. *See, e.g., id.* (quoting *Munday*, 126 F.3d at 243).
7. *See, e.g.*, Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997) (quoting Dollis v. Rubin, 77 F.3d 777, 782 (5th Cir. 1995) (quoting Page v. Bolger, 645 F.2d 227, 233 (4th Cir. 1981) (defining "ultimate employment decisions")).
8. *See, e.g., id.*
9. *See id.*

II. THE TITLE VII BURDEN-SHIFTING FRAMEWORK

Section 704(a) of Title VII of the 1964 Civil Rights Act protects two kinds of conduct against retaliation.[10] First, an employee is protected from retaliation for participating in any administrative or judicial investigation, proceeding, or hearing, to enforce rights under Title VII.[11] Second, an employee is protected from retaliation for opposing, in good faith, any practices that the employee reasonably believes are prohibited by Title VII.[12]

In retaliation cases, the plaintiff bears the initial burden of establishing a prima facie case of retaliation.[13] Specifically, the plaintiff must show that: (1) the plaintiff engaged in protected activity, (2) the employer was aware of the plaintiff's protected participation or opposition, (3) the plaintiff suffered an adverse employment decision thereafter, and (4) some causal connection exists between the activity and the adverse employment action.[14] These elements must be shown by a preponderance of the evidence.[15]

If the plaintiff establishes a prima facie case of retaliation, the burden shifts to the employer to produce evidence of "a legitimate, nondiscriminatory reason for the adverse action."[16] If the employer meets this burden, the presumption of retaliation is negated, and the plaintiff is then required to present evidence proving that the reason offered by the employer was in reality a pretext for unlawful discrimination.[17] The plaintiff can do this by establishing that the defendant's proffered reason: "(1) has no basis in fact; (2) did not actually motivate the adverse action; or (3) was insufficient to motivate the adverse action."[18] Throughout this burden-shifting framework, "the plaintiff bears the burden of persuasion."[19]

Despite the circuit courts' universal adoption of this burden-shifting framework for analyzing retaliation claims, these courts vary widely as to how each element is satisfied. Specifically, the circuit courts disagree as to the meaning of adverse employment action.[20]

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10. *See* 42 U.S.C. § 2000e-3(a) (2003).
11. *Id.*
12. *Id.*
13. *See, e.g.*, Abbott v. Crown Motor Co., 348 F.3d 537, 541 (6th Cir. 2003).
14. *Id.* (citing Strouss v. Mich. Dep't of Corr., 250 F.3d 336, 342 (6th Cir. 2001); Nguyen v. City of Cleveland, 229 F.3d 559, 563 (6th Cir. 2000)).
15. *Id.*
16. *Id.* at 542 (quoting *Nguyen*, 229 F.3d at 563).
17. *Id.* (citing Manzer v. Diamond Shamrock Chems. Co., 29 F.3d 1078, 1084 (6th Cir. 1994)).
18. *Id.* (citing *Manzer*, 29 F.3d at 1084).
19. *Id.* (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993)).
20. *See supra* notes 1-7 and accompanying text.

III. THE EXPANSIVE, INTERMEDIATE, AND RESTRICTIVE APPROACHES

The circuits are split three ways regarding the meaning of adverse employment action in the retaliation context. The United States Courts of Appeals for the First, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits, as well as the EEOC, have adopted the expansive approach. These circuits define adverse employment action broadly to include any action that is reasonably likely to deter alleged victims or others from engaging in future protected activities.[21] However, the Second, Third, and Fourth Circuits take the intermediate approach, holding that adverse employment action includes any decision that materially affects the terms and conditions of employment.[22] The

21. *See, e.g.*, Ray v. Henderson, 217 F.3d 1234, 1243-44 (9th Cir. 2000) (holding that employer's elimination of employee meetings, termination of flexible start-time policy, institution of workplace "lockdown," disproportionate reduction in an employee's workload and salary, and creation of a hostile work environment amount to adverse employment actions); Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1455 (11th Cir. 1998) (holding that adverse employment actions include a requirement that an employee work without a lunch break, giving an employee a one-day suspension, soliciting other employees for negative statements about a particular employee, changing an employee's schedule without notification, making negative comments about an employee, and needlessly delaying authorization for medical treatment); Knox v. Indiana, 93 F.3d 1327, 1334 (7th Cir. 1996) (holding that retaliation includes "actions like moving the person from a spacious, brightly lit office to a dingy closet, depriving the person of previously available support services . . . or cutting off challenging assignments"); Berry v. Stevinson Chevrolet, 74 F.3d 980, 986 (10th Cir. 1996) (holding that adverse employment action includes malicious prosecution against a former employee); Wyatt v. City of Boston, 35 F.3d 13, 15-16 (1st Cir. 1994) (holding that "demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations and toleration of harassment by other employees" constitute adverse employment actions); Passer v. Am. Chem. Soc'y, 935 F.2d 322, 330-32 (D.C. Cir. 1991) (holding that an employer's cancellation of a public event honoring an employee can constitute an adverse employment action under the Age Discrimination in Employment Act [hereinafter ADEA], which has an anti-retaliation provision parallel to that in Title VII); U.S. Equal Employment Opportunity Comm'n, COMPLIANCE MANUAL, § 8-II.D.3, *available at* http://www.eeoc.gov/policy/docs/retal.html (last modified July 6, 2000) [hereinafter EEOC MANUAL] (adverse employment action means "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity").

22. *See, e.g.*, Von Gunten v. Maryland, 243 F.3d 858, 865 (4th Cir. 2001); Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997) (holding that "retaliatory conduct must be serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment . . . [to] constitute [an] 'adverse employment action'"); Torres v. Pisano, 116 F.3d 625, 640 (2d Cir. 1997) (holding that in order to demonstrate an adverse employment action, an employee must demonstrate "a materially adverse change in the terms and conditions of employment") (quoting McKenney v. New York City Off-Track Betting Corp., 903 F. Supp. 619, 623 (S.D.N.Y. 1995)).

Fifth and Eighth Circuits take the restrictive approach, holding that only ultimate employment decisions—such as hiring, firing, promoting, and demoting—constitute actionable adverse employment actions.[23]

A. *Expansive Approach*

A majority of the circuits, as well as the EEOC, have adopted an expansive definition of adverse employment action, which encompasses any action that is reasonably likely to deter the alleged victim or others from engaging in future protected activity.[24] An example is *Ray v. Henderson*,[25] a case decided in 2000 by the United States Court of Appeals for the Ninth Circuit.

The plaintiff in this case was William Ray, a rural postal carrier in Willits, California, who alleged retaliation by his superiors for his involvement in protected activity.[26] At the Willits Post Office, Ray's immediate supervisor was Dale Briggs and the Postmaster was Dan Carey.[27] In 1994, Ray and some of his co-workers grew anxious about sexual bias and harassment directed toward female employees at the Willits Post Office.[28] A female employee first addressed this harassment at an Employee Involvement meeting in March 1994, when the employee raised her hand and asked to speak.[29] Carey, however, "immediately wheeled around, swinging his arm, yelled and pointed. He ordered [the employee] out of the meeting."[30] After the female employee left, Ray raised his objections to the negative treatment of female employees at the post office.[31] Carey denied the charges and called Ray a "liar."[32]

Ray again complained about the treatment of female employees at the post office at a Rural Carriers Employee Involvement meeting in April 1994.[33] Again, Carey refuted the charges.[34] Because these complaints were continuously denied and ignored, Ray, along with two of his co-workers, wrote a letter to Lito Sajones, Carey's supervisor, con-

23. *See, e.g.*, Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997) (quoting Dollis v. Rubin, 77 F.3d 777, 782 (5th Cir. 1995) (quoting Page v. Bolger, 645 F.2d 227, 233 (4th Cir. 1981))); Ledergerber v. Stangler, 122 F.3d 1142, 1144 (8th Cir. 1997) (holding that "a transfer involving minor changes in working conditions and no reduction in pay or benefits" is not an adverse employment action).
24. *See supra* note 20 and accompanying text.
25. 217 F.3d 1234 (9th Cir. 2000).
26. *Id.* at 1237, 1239.
27. *Id.* at 1237.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*

cerning the complaints.[35] Following this letter, Briggs and Carey publicly berated Ray on numerous occasions.[36] During a staff meeting in November 1994, Ray made a proposal for improving efficiency, for which Briggs scolded him.[37] In December 1994, Carey called Ray a "rabble rouser" and a "troublemaker," and threatened to cancel all future Employee Involvement meetings.[38] Further, Carey threatened to end the "self management" policy that permitted the employees to establish the times they would come to and leave work.[39] Additionally, Ray was forced to leave a meeting with Briggs and Carey concerning the employees' rights to communicate with each other after Carey rebuked him and made intimidating gestures.[40]

In February 1995, Carey followed through on his threat and eliminated the Employee Involvement program and the self management policy.[41] Specifically, all carriers in rural areas were obligated to start work at 7:00 a.m.[42] This change resulted in less time for Ray to sort letters and magazines before he began his route, and forced him to stay at work later in the day so he could complete administrative work that he had, prior to the change in policy, been able to complete earlier in the day.[43] In May 1995, Ray requested permission to begin working at 6:30 a.m. in order to leave work early to care for his ailing wife.[44] Briggs agreed, but he threatened to withdraw this concession on numerous occasions.[45]

Briggs' and Carey's hostility toward Ray continued through the fall of 1995.[46] Once, during an office meeting, Briggs yelled at Ray to "'shut up' and 'that's a direct order.'"[47] Moreover, false misconduct charges were levied against Ray on two separate occasions.[48]

Ray requested counseling with the EEOC in October 1995, alleging that the management at the Willits Post Office employed a "singling-out-and-punish method of controlling and frightening and eventually demoralizing the workers."[49] Additionally, Ray's EEOC request averred that four people had vocalized to him their feeling that the

35. *Id.*
36. *Id.* at 1238.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*

Superintendent of Postal Operations should be killed, demonstrating that the issue was not isolated to his complaints.[50]

In November 1995, Ray went on stress leave.[51] During that time, Carey received a copy of Ray's [EEOC] complaint and instituted a "lockdown" at the post office.[52] Carey alleged that the lockdown was necessary "because Ray's complaint to the [EEOC] contained a death threat."[53] Briggs then ordered Ray not to return to work pending the Postal Inspector's investigation into whether the letter was in fact a threat.[54] Ray was allowed to return to work after the Inspector concluded that the letter did not contain a death threat.[55] Nevertheless, Bill Wilber, a temporary supervisor, told the employees that Ray had made a death threat.[56] Further, Carey terminated Ray's 6:30 a.m. start time and required him to report for work at 7:00 a.m.[57] This action was taken "in response to the supposed death threat . . . because [Ray] 'had to be supervised at all times.'"[58]

Ray then wrote four complaint letters to the EEOC between December 1995 and April 1996.[59] Ray's route was then lessened by ninety boxes. This reduction cost Ray approximately $3,000 out of his yearly salary.[60] Although all postal workers' routes were to some degree decreased, Ray's decrease was the most severe.[61]

On May 28, 1997, an administrative law judge (ALJ) heard Ray's complaint.[62] "The ALJ found that the United States Postal Service (USPS) had retaliated against Ray after he filed his written EEOC counseling request."[63] The USPS denied these findings on August 13, 1997.[64] Ray responded with a complaint filed in federal district court, alleging, among other claims, that the USPS retaliated against him for engaging in protected activity.[65] The district court granted the USPS's motion for summary judgment, and Ray appealed to the Ninth Circuit.[66]

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50. *Id.* at 1238-39.
51. *Id.* at 1239.
52. *Id.* Lock-down means that the loading dock doors were to be locked at all times. *Id.* The result was that for each carrier, entry into the docks which should have taken seconds actually took several minutes. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* On appeal, Ray chose to challenge the grant of summary judgment only as to the retaliation claim. *Id.*

On appeal, the parties stipulated that Ray's EEOC complaints regarding the treatment of female employees were protected activities, but disputed whether Ray suffered adverse employment actions.[67] In particular, Ray asserted that, in retaliation for staging complaints, Carey and Briggs disbanded the Employee Involvement program, abolished flexible start times, introduced lockdowns, cut back his workload (and hence his salary), and reduced his workload disproportionately to reductions imposed on other employees.[68]

The Ninth Circuit began by acknowledging the three-way split among the circuits in defining adverse employment action.[69] The Ninth Circuit continued by observing that it has already "found that a wide array of disadvantageous changes in the workplace constitute adverse employment actions."[70] Thus, the Ninth Circuit concluded that these cases place it with those circuits that take an expansive view of the type of actions that can be considered adverse employment actions.[71]

Despite this precedent, the USPS argued that the Ninth Circuit should adopt the restrictive approach taken by the Fifth and Eighth Circuits.[72] The USPS relied on the 1998 United States Supreme Court case of *Burlington Industries, Inc. v. Ellerth*,[73] "for the proposition that only ultimate employment actions such as 'hiring, firing, failing to promote, reassignment with significantly different responsibilities [and] a decision causing a significant change in benefits' constitute adverse employment actions."[74]

The Ninth Circuit disagreed, stating that *Burlington Industries* dealt with employment actions that subject employers to vicarious responsi-

67. *Id.* at 1240.
68. *Id.* at 1243-44.
69. *Id.* at 1240.
70. *Id.* at 1240-41 (discussing Hashimoto v. Dalton, 118 F.3d 671, 676 (9th Cir. 1997) (holding that dissemination of an unfavorable job reference is an adverse employment action, even though the poor reference did not affect the prospective employer's decision not to hire the plaintiff); *see also* Strother v. S. Cal. Permanente Med. Group, 79 F.3d 859, 869 (9th Cir. 1996) (holding that while "mere ostracism" by co-workers does not constitute an adverse employment action, a lateral transfer does; and adverse employment actions also include exclusions from meetings, seminars, and positions that would make an employee eligible for salary increases, as well as being given a more burdensome work schedule while being denied secretarial support); Yartzoff v. Thomas, 809 F.2d 1371, 1376 (9th Cir. 1987) (holding that "[t]ransfers of job duties and undeserved performance ratings, if proven, would constitute 'adverse employment decisions'"); St. John v. Employment Dev. Dep't, 642 F.2d 273, 274 (9th Cir. 1981) (holding that a transfer to another job of the same pay and status may constitute an adverse employment action).
71. *Ray*, 217 F.3d at 1240.
72. *Id.* at 1242.
73. 524 U.S. 742 (1998).
74. *Ray*, 217 F.3d at 1242 n.5.

bility for harassment, if such acts are taken by supervisors.[75] Further, the Ninth Circuit pointed out that despite the Supreme Court's citation to circuit court Title VII cases defining adverse employment actions, the Court specifically did not adopt those cases' holdings: "Without endorsing the specific results of those decisions, we think it prudent to import the concept of a tangible employment action for resolution of the vicarious liability issue we consider here."[76]

Additionally, the Ninth Circuit refused to adopt the Fifth and Eighth Circuits' restrictive approach because the court could not reconcile such a rule with its prior decisions.[77] Specifically, the Ninth Circuit noted it had already held that lateral transfers, unfavorable references that have no affect on a prospective employer's hiring decisions, and the imposition of a more burdensome work schedule do not constitute ultimate employment actions.[78] Similarly, the Ninth Circuit stated that it could not adopt the intermediate approach utilized by the Second and Third Circuits because that approach did not comport with Ninth Circuit precedent.[79] In particular, the Ninth Circuit observed that although "some actions that [it] consider[s] to be adverse (such as disadvantageous transfers or changes in work schedules) do 'materially affect the terms and conditions of employment,' others (such as an unfavorable reference not affecting an employee's job prospects) do not."[80]

Moreover, the Ninth Circuit looked to the EEOC's interpretation of adverse employment action in adopting the expansive approach.[81] The EEOC has interpreted adverse employment action to mean "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity."[82] Thus, according to the Ninth Circuit, the EEOC interpretation includes "lateral transfers, unfavorable job references, and changes in work schedules . . . [because such] actions are all reasonably likely to deter employees from engaging in protected activity."[83] The Ninth Circuit did state, however, that this interpretation does not contemplate all offensive statements by co-workers because not all offensive statements discourage employees from participating in protected activity.[84]

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75. *Id.*
76. *Id.* (quoting *Burlington Indus.*, 524 U.S. at 761).
77. *Id.* at 1242.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. EEOC MANUAL, *supra* note 21, at § 8-II.D.3.
83. *Ray*, 217 F.3d at 1243.
84. *Id.*

Additionally, the Ninth Circuit stated that the EEOC test "effectuates the letter and purpose of Title VII."[85] Under 42 U.S.C. § 2000e-3(a), it is unlawful to discriminate against an employee for exercising his right to engage in protected activity.[86] As such, the Ninth Circuit found that the provision does not constrain the form of discrimination covered, and neither does the provision require that an action meet a minimum gravity.[87] In fact, according to the Ninth Circuit, the harshness of the action in relation to the employee relates to the measure of damages, not liability.[88]

For these reasons, the Ninth Circuit adopted the EEOC test, holding that an action constitutes "an adverse employment action if it is reasonably likely to deter employees from engaging in protected activity."[89] Accordingly, the Ninth Circuit held that because Briggs' retaliatory actions decreased Ray's pay, the amount of time Ray had available to complete his assignments, and his ability to voice opinions and affect the post office's policy, the supervisors' behavior qualified as an adverse employment action because it was "reasonably likely to deter Ray or other employees from complaining about discrimination."[90] Further, the Ninth Circuit suggested that such activity created a hostile work environment, which can provide the basis for a retaliation claim under Title VII.[91] Consequently, the Ninth Circuit reversed the grant of summary judgment and remanded the case for a trial on the merits of the retaliation claim.[92]

B. Intermediate Approach

Another group of circuits has adopted an intermediate approach, holding that adverse employment action includes any decision that materially affects the terms and conditions of employment.[93] An example of this approach is the Fourth Circuit case of *Von Gunten v. Maryland*.[94]

In *Von Gunten*, the plaintiff, Barbara von Gunten, was employed as an Environmental Health Aide III by the Maryland Department of the Environment (MDE).[95] After von Gunten's sixth week of work at the MDE, William Beatty, the head of the Shellfish Monitoring Section, gave von Gunten a favorable review, stating that she had demon-

85. *Id.*
86. 42 U.S.C. § 2000e-3(a) (2003).
87. *Ray*, 217 F.3d at 1243 (citing Knox v. Indiana, 93 F.3d 1327, 1334 (7th Cir. 1996)).
88. *Id.* (quoting Hashimoto v. Dalton, 118 F.3d 671, 676 (9th Cir. 1997)).
89. *Id.*
90. *Id.* at 1244.
91. *Id.* at 1245-46.
92. *Id.* at 1246.
93. *See supra* note 22 and accompanying text.
94. 243 F.3d 858 (4th Cir. 2001).
95. *Id.* at 861.

strated motivation and that she could work well with the other employees.[96] In June 1996, von Gunten was assigned to full-time boat work under the supervision of Vernon Burch, collecting water samples from the Chesapeake Bay.[97] Beatty supervised both von Gunten and Burch.[98]

Soon after she started working with Burch problems appeared.[99] Von Gunten claimed that Burch "urinated off of the boat, made coarse and sexually charged comments toward her, stared at her, and touched her without her consent."[100] In August 1996, von Gunten complained about the sexual harassment to Beatty.[101] Beatty then contacted Burch's supervisor, John Steinfort, who met with Burch, von Gunten, and Beatty.[102] Beatty and Steinfort distributed the MDE anti-harassment policy to von Gunten and Burch, explaining that sexual harassment between employees was prohibited.[103] After the meeting, however, von Gunten complained to the supervisors that Burch's conduct had worsened.[104]

In December 1996, Beatty watched von Gunten and Burch working. He witnessed von Gunten acting unprofessionally, and the next day saw Burch strike "von Gunten across the buttocks with an oar."[105] Subsequently, von Gunten requested from Steinfort that she be removed from Burch's boat, to which Steinfort agreed.[106]

On the following day, von Gunten told Steinfort that she planned to communicate her harassment concerns to MDE's Fair Practices Office.[107] That same day, Steinfort contacted Steven Bieber, an MDE Fair Practices officer, and MDE's personnel director, to tell them he did not believe that von Gunten's claim could be substantiated.[108] The next day, von Gunten mailed a letter to the MDE's Fair Practices offices requesting its assistance.[109] In response to von Gunten's letter, Bieber undertook an investigation, concluding that despite some evidence of harassment, the harassment did not rise to such a level as to constitute an abusive working environment.[110]

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96. *Id.* at 862.
97. *Id.* at 861-62. An aide generally spends the three winter months conducting shoreline surveys, and the remaining nine months of the year performing boat work. *Id.*
98. *Id.* at 862.
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*

Von Gunten claimed that MDE's actions following her letter to their Fair Practices Office amounted to unlawful retaliation in violation of Title VII.[111] Among MDE's actions were the repossession of her state-issued car, a down-grade in her annual evaluation, a reassignment to shoreline survey work, improperly handled administrative affairs, and retaliatory harassment that created a hostile work environment.[112]

In August 1997, MDE offered von Gunten a new aide position, which "would have required her to spend less time on boat work and more time performing shoreline surveys."[113] Additionally, the new position would have required von Gunten to spend more time working in the same field office as Beatty and Steinfort, likely increasing their contact.[114] Von Gunten declined the offer.[115]

Von Gunten met with officials from MDE's Fair Practices Office concerning her claims of harassment and retaliation in October 1997.[116] Believing that the MDE Fair Practice officers were unconcerned with her claims, von Gunten resigned the following month.[117]

After receiving notice from the EEOC of her right to sue, von Gunten filed suit against MDE, alleging sexual harassment, constructive discharge, and retaliation under Title VII.[118] The district court granted MDE's motion for summary judgment concerning her constructive discharge and retaliation claims.[119] The court denied summary judgment of von Gunten's sexual harassment claim.[120] The sexual harassment claim was tried before a jury, which returned a verdict in favor of MDE.[121] Von Gunten then appealed the jury verdict to the Fourth Circuit.[122]

The Fourth Circuit initially responded to the EEOC view that, unlike 42 U.S.C. § 2000e-2 (1994), which prohibits discriminatory employment action, § 2000e-3 prohibits both adverse employment actions, and "any retaliatory conduct by an employer that is reasonably likely to deter protected activity."[123] The Fourth Circuit noted that it had repeatedly held that retaliation claims, like discrimination claims, require proof of an adverse employment action.[124] The Fourth Cir-

111. *Id.*
112. *Id.* at 862-63.
113. *Id.* at 863.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.* at 863 n.1; *see also* 42 U.S.C. §§ 2000e-2 through 3 (2003).
124. *Von Gunten*, 243 F.3d at 863 n.1 (citing Ross v. Communications Satellite Corp., 759 F.2d 355, 365 (4th Cir. 1985)).

cuit continued by acknowledging *Ross v. Communications Satellite Corp.*, which explained that Congress did not express a greater intent to preclude retaliation under § 2000e-3 than for precluding discrimination under § 2000e-2.[125] As such, the Fourth Circuit acknowledged that absent strong policy considerations to the contrary, the courts should construe the provisions of Title VII uniformly.[126]

Next, the Fourth Circuit addressed the issues of how to define adverse employment action, and whether MDE's actions constituted such conduct.[127] Von Gunten and the EEOC argued that the lower court's definition of adverse employment action as an "'ultimate employment decision' involving hiring, granting leave, discharging, promoting, or compensating" was far too narrow.[128] MDE rejected this interpretation of the lower court's analysis, arguing that the court did not adopt such a narrow interpretation of adverse employment action.[129] Instead, MDE argued that the district court properly defined adverse employment action as employer conduct that alters the "terms, conditions, or benefits of employment" in a discriminatory manner.[130]

The Fourth Circuit next stated that differentiating between the two standards is difficult.[131] To illustrate this contention, the Fourth Circuit pointed out that despite most circuits' rejection of the restrictive approach in Title VII retaliation cases, these courts still "recognize[ ] that 'there is some threshold level of substantiality that must be met for unlawful discrimination to be cognizable under the anti-retaliation clause.'"[132] Moreover, the Fourth Circuit observed that the similarity between the two standards is exemplified by the fact that although the Eighth Circuit has formally adopted the restrictive approach, it continually applies a broader standard.[133] Further, the Fourth Circuit observed that if strictly applied, the restrictive approach, may be outcome determinative in that its application would prevent von Gunten from making out a prima facie case, as none of MDE's acts

125. *Id.* (quoting *Ross*, 759 F.2d at 366).
126. *Id.* (quoting *Ross*, 759 F.2d at 366).
127. *Id.* at 863.
128. *Id.* at 863-64.
129. *Id.* at 864.
130. *Id.*
131. *Id.*
132. *Id.* (quoting Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1456 (11th Cir. 1998)).
133. *Id.* (citing Manning v. Metro. Life Ins. Co., 127 F.3d 686, 692 (8th Cir. 1997) (holding that working conditions that constitute a material employment disadvantage and tangible changes in working conditions would be ultimate employment decisions)); Kim v. Nash Finch Co., 123 F.3d 1046, 1060 (8th Cir. 1997) (holding that ultimate employment decisions include reducing employee duties, actions that disadvantage or interfere with an employee's ability to perform job functions, "papering" employment files with negative reports and reprimands despite the employee not being discharged, demoted, or suspended).

amounted to an ultimate employment decision (such as hiring, firing, refusal to promote, etc.).[134]

Thus, because the Fourth Circuit had already expressed preference for conformity between § 2000e-2 and § 2000e-3[135] and implicitly rejected the view that "nothing less than an 'ultimate employment decision' can constitute adverse employment action under § 2000e-3,"[136] the *Von Gunten* court adopted the intermediate approach, which defines adverse employment action as "any retaliatory act or harassment if, but only if, that act or harassment results in an adverse effect on the 'terms, conditions, or benefits' of employment."[137] The Fourth Circuit then applied the intermediate approach to von Gunten's claims that MDE unlawfully retaliated against her by: (1) withdrawing her use of a state vehicle, (2) "downgrading" her end of the year performance review, (3) reassigning her to shoreline survey work, (4) improperly treating a variety of administrative matters, and (5) retaliating against her by creating a hostile work environment.[138]

First, the *Von Gunten* court held that MDE's decision to deny von Gunten the use of a state vehicle was not an adverse employment action sufficient to support a Title VII retaliation claim because it was unclear that use of the car was a benefit of employment, and because von Gunten could not have expected to use the vehicle permanently.[139] Second, the *Von Gunten* court held that MDE's decision to downgrade von Gunten's end-of-the-year evaluation was not an adverse employment action because, at the time of the review, MDE was in the process of changing to a different evaluation form and von Gunten received negative ratings under both forms.[140] Third, the *Von*

134. *Von Gunten*, 243 F.3d at 864 (citing Mattern v. Eastman Kodak Co., 104 F.3d 702, 705-08 (5th Cir. 1997) (holding that negative reviews requiring an employee to lose pay increases, requiring an employee to wear an unsafe fire protection suit, verbally threatening to fire an employee, improperly placing in jeopardy an employee's continuation in an apprenticeship program, and committing numerous other acts of harassment causing an employee to suffer depression and panic attacks, did not reach the level of adverse employment action)).

135. *Id.* at 865 (quoting Ross v. Communications Satellite Corp., 759 F.2d 355, 366 (4th Cir. 1985)).

136. *Id.* (citing *Ross*, 759 F.2d at 363) (holding that actions such as reducing job responsibilities and professional status, denying performance reviews and annual salary and benefit increases, and providing false information to potential employers, if proven, could rise to adverse employment action); Munday v. Waste Mgmt. of N. Am., Inc., 126 F.3d 239, 242 (4th Cir. 1997) (observing that "[i]n 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 affected*") (emphasis added)).

137. *Von Gunten*, 243 F.3d at 866.

138. *Id.* at 867-70.

139. *Id.* at 867.

140. *Id.* at 867-68.

Gunten court held that MDE's decision to postpone von Gunten's end-of-the-year evaluation by one month was not an adverse employment action in violation of Title VII because there was no indication that the postponement adversely affected von Gunten.[141] Fourth, the *Von Gunten* court held that MDE's decision to reassign von Gunten from boat work to shoreline survey work did not rise to unlawful retaliation because the change was not truly significant.[142] Fifth, even after considering all of MDE's acts, the *Von Gunten* court concluded that the totality of the actions did not constitute "retaliatory harassment creating a hostile work environment."[143] For these reasons, the Fourth Circuit affirmed the judgment of the district court.[144]

C. Restrictive Approach

A third group of circuits has adopted a restrictive approach, holding that only ultimate employment actions (such as hiring, termination, promotion, and demotion) constitute adverse employment actions.[145] An example of this approach is the Fifth Circuit case of *Mattern v. Eastman Kodak Co.*[146]

In *Mattern*, the plaintiff, Jean Mattern, was an employee with Eastman Kodak Co. and was enrolled in Eastman's mechanic's apprenticeship program.[147] The program's two components consisted of on-the-job training and classroom instruction.[148] To complete the program, apprentices were required to successfully complete fourteen "review cycles."[149] Adequate performance through each cycle resulted in pay increases.[150] "Major Skills Tests" were also part of the program.[151] An apprentice could be removed from the program for receiving three unsatisfactory "review cycle" assessments or failing three Major Skills Tests.[152]

In March 1993, Mattern filed a Title VII charge with the EEOC.[153] In her filed charge, Mattern alleged that she was sexually harassed by two members of her on-the-job training crew, Godwin and Roberts.[154] She further alleged that the harassment created a hostile work envi-

141. *Id.* at 867 n.5.
142. *Id.*
143. *Id.* at 869-70.
144. *Id.* at 870.
145. *See supra* note 23 and accompanying text.
146. 104 F.3d 702 (5th Cir. 1997).
147. *Id.* at 703.
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.* at 703-04.
153. *Id.* at 704.
154. *Id.*

ronment, and that her supervisors not only knew of the harassment, but condoned it.[155]

Eastman had become aware of and began investigating Mattern's claims in early March.[156] Although no action was taken against Roberts, Eastman allowed Godwin to retire early.[157] Mattern was then transferred to a different crew in the same department; thus, she worked under another supervisor, while she retained the same departmental managers.[158]

Mattern continued to encounter difficulties on the job, which she believed to be unlawful retaliation, and which led to her resignation in July 1993.[159] Mattern sued Eastman in November 1993, alleging that Eastman retaliated against her, and that Eastman allowed employees to retaliate against her for her report of harassment to the EEOC.[160]

Mattern's retaliation claim was based on five events.[161] First, Eastman began disciplinary proceedings against Godwin on the same day that Mattern informed Drennan that she suffered from a work-related illness.[162] Mattern was directed by Drennan to report her work-related illness to Eastman's medical department.[163] Mattern, however, decided to take a vacation day and left for home.[164] Eastman then sent Drennan, and another one of Mattern's supervisors, Holstead, to Mattern's house to direct her to report to Eastman's medical department.[165]

Second, in March 1993, Mattern was disciplined for failing to be at her workstation when her supervisors were trying to find her.[166] She was not there because she was reporting the hostility she believed she was receiving to Eastman's Human Resources Department.[167]

Third, Mattern alleged that her co-workers became antagonistic toward her following Godwin's departure.[168] Specifically, her co-workers did not say "hello" to her, muttered that "accidents happen," and stole tools out of her locker.[169] Mattern alleged that Eastman took no steps to remedy the situation, despite its knowledge of the hostility.[170]

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155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.* at 705.
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.* (internal quotations omitted).
170. *Id.*

Fourth, Mattern claimed that Eastman failed to respond to Mattern's doctor's concerns that her illnesses and anxiety were attributable to the hostility that she was receiving at Eastman.[171]

Fifth, Mattern received a negative review following her EEOC charge, which prevented her from receiving a raise, and she was placed on "final warning of discharge from the apprenticeship program."[172] Notably, Mattern received negative evaluations from supervisors who previously had commended her work.[173] Many of these poor reviews were the result of Mattern's failure to restore centrifugal pumps.[174] Additionally, Mattern failed two of her Major Skills Tests.[175]

A jury found that Eastman had retaliated against Mattern and awarded her $50,000 in damages.[176] Eastman then appealed to the Fifth Circuit.[177]

The Fifth Circuit began by acknowledging that it had already held 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."[178] According to the Fifth Circuit, hiring, leave, discharge, promotion, and compensation decisions constitute ultimate employment decisions.[179] The Fifth Circuit then concluded that co-worker hostility, stolen tools, and the resultant anxiety, alone, do not amount to adverse employment actions.[180] Similarly, the Fifth Circuit held Drennan's visit to Mattern's home, the verbal threat of discharge, the warning for being away from her workstation, a lost increase in pay, and Mattern's placement on "final warning" was not tantamount to adverse employment actions because none of the acts complained of had demonstrable consequences.[181] Specifically, the *Mattern* court held that the actions Mattern complained of "were at most 'tangential' to future decisions that might be ultimate employment decisions."[182]

To illustrate, the Fifth Circuit stated that although the future possibility of discharge from the apprenticeship program existed for Mattern, that is quite distinct from actual discharge.[183] Additionally, the *Mattern* court held that although the acts Mattern complained of may

171. *Id.* at 706.
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.* at 704.
177. *See id.*
178. *Id.* at 707 (quoting Dollis v. Rubin, 77 F.3d 777, 781-82 (5th Cir. 1995)).
179. *Id.*
180. *Id.*
181. *Id.* at 708.
182. *Id.*
183. *Id.*

have increased the chance of eventual adverse employment actions, the acts themselves were not ultimate employer decisions, and they had merely a tangential effect on speculative future ultimate employer decisions.[184]

The Fifth Circuit continued, stating that another rule would improperly enlarge the scope of adverse employment action to include "disciplinary filings, supervisor's reprimands, and even poor performance by the employee—anything which *might* jeopardize employment in the future."[185] Accordingly, the Fifth Circuit held that adverse employment action refers only to ultimate employment decisions—not decisions that may lead to ultimate employment decisions.[186]

The *Mattern* court found support for this rule in the language of Title VII.[187] In particular, the Fifth Circuit examined the differences between Title VII's anti-retaliation provision, 42 U.S.C. § 2000e-3, and Title VII's general anti-discrimination provision, 42 U.S.C. § 2000e-2.[188] The *Mattern* court first noted that the general anti-discrimination provision precludes employers from limiting, segregating, or classifying employees in ways that deprive or might deprive any individual's employment opportunities or would adversely affect his status as an employee.[189] In contrast, the Fifth Circuit noted that Title VII's anti-retaliation simply forbids employers from discriminating against employees for taking protected action.[190]

The Fifth Circuit concluded: "The anti-retaliation provision speaks only of 'discrimination'; there is no mention of the vague harms contemplated in § 2000e-2(a)(2). Therefore, [the anti-retaliation] provision can only be read to exclude such vague harms, and to include only ultimate employment decisions."[191] For these reasons, the Fifth Circuit reversed the jury's conclusion that Eastman unlawfully retaliated against Mattern.[192]

IV. ANALYSIS AND PROPOSAL

A. *Intermediate Approach*

Under the intermediate approach, adverse employment action is defined as "discriminatory acts or harassment [that] adversely [affect] 'the terms, conditions, or benefits' of the plaintiff's employment."[193]

184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.* at 708-09; *see also* 42 U.S.C. §§ 2000e-2 through 3 (2003).
189. *Mattern*, 104 F.3d at 709 (quoting 42 U.S.C. § 2000e-2(a) (2003)).
190. *Id.* at 708 (citing 42 U.S.C. § 2000e-3 (2003)).
191. *Id.* at 709.
192. *Id.* at 710.
193. *See, e.g.*, Von Gunten v. Maryland, 243 F.3d 858, 865 (4th Cir. 2001) (quoting Munday v. Waste Mgmt. of N. Am., 126 F.3d 239, 243 (4th Cir. 1997)).

The intermediate framework is a good approach because it sets out a threshold level of substantiality that must be met before unlawful discrimination can be cognizable under the anti-retaliation clause. As with the expansive approach, adverse employment decisions, under the intermediate approach, include ultimate employment decisions, reducing job responsibilities and professional status, denying performance reviews and annual salary and benefit increases, as well as providing false information to potential employers. Because of this threshold, not every offensive remark made by a co-worker will constitute an adverse employment action warranting a retaliation claim. Thus, employers need not worry about trivial utterances resulting in liability.

Despite this strength, the intermediate approach is inferior to the expansive approach. Unlike the expansive approach, discriminatory acts alone, such as supervisor ostracism, spying on employees, pranks against employees, and creating an overall hostile work environment, do not rise to the level of adverse employment actions. A cause of action for retaliation will arise only if this discrimination affects the "terms, conditions, or benefits" of employment. Thus, under the intermediate approach, an employer who retaliates against an employee for filing a complaint with the EEOC by verbally abusing the employee, and/or encouraging other employees to harass the employee, is not subject to liability for unlawful retaliation because such activity does not affect "the 'terms, conditions, or benefits' of employment."[194]

This hypothetical illustrates that the intermediate approach is overly restrictive because it allows employers to retaliate against employees and/or harass employees in ways that fall short of constituting ultimate employment decisions, or resulting in an adverse effect on "the 'terms, conditions, or benefits of employment.'"[195] Accordingly, the intermediate approach is not the best policy approach because it does not provide employees with complete protection from employer retaliation.

B. Restrictive Approach

Under the restrictive approach, only ultimate employment decisions, such as hiring, termination, promotion, and demotion, constitute adverse employment actions.[196] The circuits that have adopted the expansive and intermediate approaches correctly agree that the restrictive approach is not the best approach for three reasons. First, the restrictive approach severely limits an employee's ability to seek recourse when he or she is retaliated against or harassed for engaging

194. *See id.*
195. *See id.*
196. *See, e.g.*, Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997).

in protected activity. Section 2000e-3 prohibits employers from retaliating against employees for engaging in protected behavior.[197] The restrictive approach, however, only recognizes a cause of action for retaliation, in violation of Title VII, where the adverse employment action concerned hiring, termination, promotion, or demotion.[198] Thus, under the restrictive approach, employers can avoid the consequences of 2000e-3, while still retaliating against an employee, by implementing a number of tactics that fall short of ultimate employment actions. For example, under the restrictive approach, after an employee files a complaint with the EEOC, an employer could increase that employee's workload and shorten the amount of time the employee has to complete the work.[199] Similarly, the employer could create a hostile work environment by encouraging other employees to verbally abuse that employee and/or steal things from the employee, without the employer subjecting itself to liability for unlawful retaliation because these adverse employment actions were not ultimate employment decisions.[200]

Second, as observed by the *Von Gunten* court, the restrictive approach is outcome determinative if strictly applied.[201] Consequently, if none of an employer's acts amount to ultimate employment decisions, employees are automatically precluded from proving a prima facie retaliation case.[202] Thus, in a circuit that utilizes the restrictive approach, the employee in the example immediately above could not make out a prima facie case of retaliation because verbal abuse and creating a hostile work environment are not ultimate employment decisions.

Third, circuits that utilize the restrictive approach incorrectly draw distinctions between Title VII's anti-retaliation provision, 42 U.S.C. § 2000e-3, and Title VII's general anti-discrimination provision, 42 U.S.C. § 2000e-2.[203] However, both § 2000e-3 and § 2000e-2 claims "require proof of 'adverse employment action.'"[204] Accordingly, as the Fourth Circuit has explained, Congress has not expressed a greater intent to preclude retaliation under § 2000e-3 than for precluding discrimination under § 2000e-2.[205] Therefore, conformity between § 2000e-3 and § 2000e-2 is preferred.[206]

197. *See* 42 U.S.C. § 2000e-3 (2003).
198. *Mattern*, 104 F.3d at 707.
199. *See, e.g.*, Ray v. Henderson, 217 F.3d 1234, 1238 (9th Cir. 2000).
200. *See Mattern*, 104 F.3d at 707.
201. Von Gunten v. Maryland, 243 F.3d 858, 864 (4th Cir. 2001).
202. *See id.*
203. *See, e.g., Mattern*, 104 F.3d at 707.
204. *Von Gunten*, 243 F.3d at 863 n.1 (citing Ross v. Communications Satellite Corp., 759 F.2d 355, 365 (4th Cir. 1985)).
205. *Id.* (quoting *Ross*, 759 F.2d at 366).
206. *Id.* (quoting *Ross*, 759 F.2d at 366).

C. Expansive Approach

Under the expansive approach, adverse employment action encompasses any action that is likely to deter the alleged victim or others from engaging in protected activity.[207] This interpretation, however, does not extend to every insult made by a co-worker because such statements do not "deter employees from engaging in protected activity."[208] The circuits should adopt the expansive approach for five reasons.

First, its broad definition of adverse employment action provides employees more complete protection against unlawful retaliation.[209] The intermediate and restrictive approaches expose employees to potential retaliation because they allow employers to retaliate against employees and/or harass employees in ways that fall short of constituting ultimate employment decisions, or result in an "adverse effect on the 'terms, conditions, or benefits of employment.'"[210] Thus, under the expansive approach, an employer who eliminates an employee's lunch break,[211] or deprives an employee of previously available support services,[212] may be subject to liability for unlawful retaliation, even though such activities do not involve ultimate employment decisions, and do not adversely affect the "terms, benefits, or conditions" of employment.

Second, this standard establishes a threshold level of substantiality that must be met for unlawful discrimination to be cognizable under the anti-retaliation clause. In particular, the expansive approach does not encompass every insult made by employees.[213] Instead, it precludes only those activities reasonably likely to "deter employees from engaging in protected activity."[214] For example, unlawful retaliation will occur when a supervisor instructs employees to harass another employee because that employee filed a complaint with the EEOC. On the other hand, one employee's off-handed derogatory remark to another employee, who previously filed a complaint with the EEOC, will not subject an employer to liability for retaliation. Thus, this objective standard gives employers guidance as to what type of behavior rises to the level of unlawful retaliation, and protects employers from liability for every trivial utterance that offends an employee or every trivial employment decision that an employee does not like.

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207. *See, e.g.*, Ray v. Henderson, 217 F.3d 1234, 1243 (9th Cir. 2000).
208. *Id.*
209. *See supra* Part III.A (discussing the expansive approach).
210. *See supra* Part III.A-B (discussing the intermediate and restrictive approaches).
211. *See, e.g.*, Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1455, 1456 (11th Cir. 1998).
212. *See, e.g.*, Knox v. Indiana, 93 F.3d 1327, 1334 (7th Cir. 1996).
213. *Ray*, 217 F.3d at 1243.
214. *Id.*

Third, as the EEOC and the circuits that have adopted the expansive approach have recognized, this broad definition of adverse employment action "effectuates the letter and purpose of Title VII."[215] Section 2000e-3(a) states that it is unlawful "for an employer to discriminate against an employee because he engaged in protected activity."[216] This language in no way limits the severity of an employment action's ultimate impact on an employee.[217] Rather, this language is focused on preventing employers from taking *any* discriminatory action against an employee because that employee engaged in protected activity. As such, discrimination in violation of § 2000e-3 should include ultimate employment decisions (termination, promotion, and demotion), retaliatory acts or harassment that adversely affects the terms, conditions, or benefits of employment (reducing job responsibilities and professional status, denying performance reviews and annual salary and benefit increases, unfavorable job references, lateral transfers, and changes in work schedules), as well as ostracism, spying, and pranks.[218] In fact, such actions "are all reasonably likely to deter employees from engaging in protected activity"[219] because such activity may intimidate employees to the point that they are reluctant to file charges of discrimination.[220]

Fourth, the expansive approach is not outcome determinative. Under this framework, even if an employer's action does not rise to the level of ultimate employment decisions, or retaliatory acts or harassment that adversely affect the terms, conditions, or benefits of employment, an employee can still make out a prima facie case of retaliation.[221] For example, an employee who is moved from a well-lit, spacious office to a small, dark office, can still make out a prima facie case of retaliation, even though this employment decision is not an ultimate employment decision, and does not adversely affect the terms, conditions, or benefits of employment.[222]

Fifth, the expansive approach does not incorrectly draw distinctions between § 2000e-3 and § 2000e-2. Both § 2000e-3 and § 2000e-2 claims "require proof of an 'adverse employment action.'"[223] Accordingly, it is clear from the face of the statute that Congress did not express a greater intent to preclude retaliation under § 2000e-3 than for precluding discrimination under § 2000e-2.[224] The expansive ap-

215. *See, e.g., id.*
216. 42 U.S.C. § 2000e-3(a) (2003).
217. *Ray*, 217 F.3d at 1243.
218. *See, e.g., id.*
219. *Id.*
220. *Wideman*, 141 F.3d at 1456.
221. *See id.*
222. *See Knox*, 93 F.3d at 1334.
223. Von Gunten v. Maryland, 243 F.3d 858, 863 n.1 (4th Cir. 2001) (quoting Ross v. Communications Satellite Corp., 759 F.2d 355, 365 (4th Cir. 1985)).
224. *Id.* (citing *Ross*, 759 F.2d at 366).

proach facilitates the preferred conformity between § 2000e-3 and § 2000e-2 by not making distinctions between the two provisions.[225]

V. CONCLUSION

The circuits are split three ways as to what constitutes an adverse employment action in order for an employee to establish a prima facie case of retaliation under § 704(a) of Title VII. One group of circuits, as well as the EEOC, adopts an expansive approach, defining adverse employment action broadly to include any action that is reasonably likely to deter alleged victims or others from engaging in future protected activity.[226] A second group of circuits adopts an intermediate approach, holding that adverse employment action includes any decision that materially affects the terms, conditions or benefits of employment.[227] A third group of circuits adopts a restrictive approach, holding that only ultimate employment actions, such as hiring, firing, promoting, and demoting constitute actionable adverse employment actions.[228]

In light of this inconsistency, the circuits should universally adopt the expansive approach for five reasons.[229] First, its broad definition of adverse employment action provides employees complete protection against unlawful retaliation, which the intermediate and restrictive approaches fail to do. Second, this standard establishes a threshold level of substantiality that must be met for unlawful discrimination to be cognizable under the anti-retaliation clause. As such, this objective standard gives employers guidance as to what type of behavior rises to the level of unlawful retaliation, as well as protects employers from liability for every trivial utterance that offended an employee or every trivial employment decision that an employee did not like. Third, this broad definition of adverse employment action effectuates the letter and purpose of Title VII by preventing employers from taking *any* discriminatory action against an employee because that employee engaged in protected activity. Fourth, the expansive approach is not outcome determinative because it does not immediately preclude employees from making out a prima facie case of retaliation where the employer's behavior falls short of an ultimate employment decision or retaliatory acts or harassment that adversely affect the terms, conditions, or benefits of employment. Fifth, the expansive approach facilitates the preferred conformity between § 2000e-3 and § 2000e-2 by not making distinctions between the two provisions.

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225. *Id.* (quoting *Ross*, 759 F.2d at 366).
226. *See supra* note 21 and accompanying text.
227. *See supra* note 22 and accompanying text.
228. *See supra* note 23 and accompanying text.
229. *See supra* Part IV.C and accompanying text.

For these reasons, it is clear that the expansive approach is the best way to protect employees from unlawful retaliation, protect employers from frivolous claims, and give employers guidance as to what kinds of behavior will constitute retaliation in violation of § 704(a) of Title VII.