Fordham Law Review

Volume 91 | Issue 4 Article 14

2023

The Reality of Materiality: Why a Heightened Adversity Standard Has No Place in Title VII Discrimination Claims

Abigail McCabe
Fordham University School of Law

NOTES

THE REALITY OF MATERIALITY: WHY A HEIGHTENED ADVERSITY STANDARD HAS NO PLACE IN TITLE VII DISCRIMINATION CLAIMS

*Abigail McCabe**

Title VII of the Civil Rights Act of 1964 forbids discrimination in the workplace. Except, according to certain lower courts' limiting interpretations, for when it does not. Circuit courts have spent decades imposing an extratextual materiality requirement onto Title VII in contravention of its broad remedial purpose. Accordingly, countless victims of discrimination are unable to seek recourse because their alleged harm was purportedly too insignificant to constitute actionable discrimination under Title VII. This materiality requirement not only presents an additional substantive hurdle for plaintiffs, but also leads to inconsistency and unpredictability, as each circuit fumbles to define what conduct is too "de minimis" to qualify as discrimination. However, several circuit courts recently acknowledged the problems that this materiality requirement poses, suggesting that an interpretive shift in favor of plaintiffs bringing discrimination claims may be on the horizon.

This Note argues that reading a significance requirement into Title VII flies in the face of its statutory purpose, clear congressional intent, and its liberal interpretation by the U.S. Supreme Court. Any showing of objective harm, regardless of whether a court deems such harm material, should suffice to allow a Title VII plaintiff to seek relief without fear of immediate dismissal. Although eliminating the need to allege a materially adverse action will broaden the scope of actionable discrimination claims, this Note argues that this will not overwhelm the courts as proponents of the materiality requirement fear. Because the statute expressly limits its reach to discrimination that relates to the "terms, conditions, and privileges of employment," concerns about unlimited employer liability in the absence of a significance requirement are unfounded. Moreover, eliminating this obstacle would protect victims of discrimination from the additional injustice

* J.D. Candidate, 2024, Fordham University School of Law; B.A., 2018, Stony Brook University. I would like to thank Professor James Brudney for his insight and guidance. I would also like to thank the editors and staff of the *Fordham Law Review*—especially Isabelle Leipziger and John Tsimis—for their diligence and support. Finally, thank you to my parents, my grandparents, and my friends for their constant love and encouragement.

and humiliation of being told that their experience was too "de minimis" to merit judicial intervention.

> [D]e minimis means de minimis, and shorthand characterizations of laws should not stray. Else, "like the children's game of telephone," we risk "converting the ultimate message into something quite different from the original message—indeed sometimes into the opposite message."[1]

INTRODUCTION

"To say I can't have the weekends off because I'm a woman is degrading."[2] Debbie Stoxstell, a detention officer at Dallas County Jail, expressed this feeling of indignation in response to Dallas County's recent change in scheduling policy.[3] Until April 2019, most detention officers who had worked at Dallas County Jail for over two decades—like Stoxstell—could choose to take their weekends off.[4] This benefit, which is particularly salient given the significant mental and physical health risks associated with a detention officer's position,[5] was previously tied to seniority.[6] In fact, employees considered gaining the right to weekends off a "rite of passage."[7] Therefore, when Dallas County abandoned this system for an explicitly sex-based scheduling system that required female employees—but not male employees—to work weekends, veteran female employees at the jail were understandably irate.[8]

However, when Stoxstell and eight other female officers attempted to oppose this expressly sex-based disparate treatment in court, the result was not what they had hoped.[9] Despite acknowledging the uncontested existence of discriminatory intent and the resulting injustice,[10] the court essentially

---

1. Threat v. City of Cleveland, 6 F.4th 672, 679 (6th Cir. 2021) (quoting Sexton v. Panel Processing, Inc., 754 F.3d 332, 337 (6th Cir. 2014)).

2. Jason Whitely, *Women Must Work Weekends at the Dallas County Jail, Lawsuit Alleges*, WFAA (Feb. 28, 2020, 10:24 PM), https://www.wfaa.com/article/news/women-must-work-weekends-at-the-dallas-county-jail-lawsuit-alleges/287-482f5006-6be2-4582-8e84-4257e3fa5dcd [https://perma.cc/K9RW-VLQQ].

3. *See id.*; *see also* Hamilton v. Dallas County, 42 F.4th 550 (5th Cir.), *reh'g en banc granted, opinion vacated*, 50 F.4th 1216 (5th Cir. 2022).

4. *See* Whitely, *supra* note 2.

5. *See* Brief of *Amici Curiae* American Federation of State, County and Municipal Employees, AFSCME Texas Correctional Employees Council, and AFSCME Council 17 at 9–12, Hamilton v. Dallas County, 42 F.4th 550 (5th Cir. 2022) (No. 21-10133), ECF No. 00515872686. The long shifts and inherent danger of the position, as well as the tension that having to supervise potentially violent inmates creates, lead to abnormally high rates of physical problems such as chronic neck and back injuries, heart disease, diabetes, high cholesterol, and hypertension. *See id.* at 9–11. The position also involves increased rates of mental health conditions like insomnia and post-traumatic stress disorder. *See id.* at 10. Thus, officers consider consecutive days off to distance themselves and decompress critical to long-term employment. *See id.* at 11. Moreover, the ability to schedule days off on weekends allows officers to "de-stress and build healthy and constructive family lives," which is especially important considering the disconnect between work and family environments that the job can cause. *See id.* at 11–12.

6. *See* Whitely, *supra* note 2.

7. *Id.*

8. *See id.*

9. *See* Hamilton v. Dallas County, 42 F.4th 550, 556 (5th Cir.), *reh'g en banc granted, opinion vacated*, 50 F.4th 1216 (5th Cir. 2022).

10. *See id.* at 553.

held that the women's dilemma was not significant enough to trigger the protections of Title VII of the Civil Rights Act of 1964.[11] The court's conclusion was grounded not in the statutory language of Title VII, but in the precedential requirement of demonstrating a sufficiently "adverse employment action" to state a disparate treatment claim.[12]

Andrew Harris, a Black landscaping foreman, faced a similar result when he brought a Title VII claim alleging that his employer, the Federal Bureau of Prisons, subjected him to discriminatory treatment.[13] Harris claimed that the bureau forced him to work outside in heat reaching over 100 degrees while his white counterparts were allowed to discontinue their outdoor work.[14] After unsuccessfully asking multiple supervisors for permission to stop for the day, Harris eventually lost consciousness from the heat and needed to be hospitalized.[15]

When Harris's discrimination claim reached the U.S. Court of Appeals for the Third Circuit, the court made it clear that it did not wish to minimize Harris's injury or contest his description of the intense heat.[16] Still, the court dismissed the claim for failure to allege what the Third Circuit considers an "adverse employment action."[17] Because outdoor work was one of Harris's regular job duties, the court held that the alleged disparate treatment fell outside of Title VII's purview, regardless of whether white employees were spared from having to continue working under the same dangerous conditions.[18]

These results exemplify a series of decisions that added a distinctive "adverse action" requirement to Title VII.[19] Title VII makes it unlawful for employers "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."[20] Although facially comprehensive, the somewhat vague and open-ended wording of Title VII has left much room for interpretive differences.[21]

Throughout the evolution of Title VII disparate treatment[22] cases in the lower courts, there has been dissonance among circuits concerning which

11. 42 U.S.C. §§ 2000e to 2000e-17; *see also Hamilton*, 42 F.4th at 556.
12. *See Hamilton*, 42 F.4th at 554.
13. *See* Harris v. Att'y Gen. U.S. of Am., 687 F. App'x 167, 169 (3d Cir. 2017).
14. *See id.* at 168.
15. *See id.*
16. *See id.* at 169.
17. *See id.*
18. *See id.*
19. *See infra* Part II.
20. 42 U.S.C. § 2000e-2(a)(1).
21. *See* Lisa M. Durham Taylor, *Adding Subjective Fuel to the Vague-Standard Fire: A Proposal for Congressional Intervention After* Burlington Northern & Santa Fe Railway Co. v. White, 9 U. PA. J. LAB. & EMP. L. 533, 544 (2007).
22. The Supreme Court has described "disparate treatment" as "the most easily understood type of discrimination." Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). "Disparate treatment" cases involve claims alleging that an employer treated an employee less favorably based on their membership in a protected class. *See id.* Unlike so-called "disparate impact" claims, which involve facially neutral practices that

types of employer actions constitute discrimination as to the "terms, conditions, or privileges of employment."[23] Often without so much as a reference to the actual language of the statute, judges have deemed cases involving certain noneconomic harms, such as paid suspensions and lateral transfers, unworthy of progressing to trial.[24] These dismissals result from circuit courts' insistence that a Title VII plaintiff show a sufficiently "adverse employment action" to assert a discrimination claim.[25] Although this term initially began as a shorthand to describe the requirement that the alleged discrimination relate to the "terms, conditions, or privileges of employment," it has progressively transformed into an additional substantive mandate.[26] Moreover, what constitutes an adverse employment action differs among circuits.[27] Several recent circuit court decisions have highlighted this inconsistency and the challenges it can pose for both Title VII plaintiffs and employers, demonstrating the need for U.S. Supreme Court clarification.[28]

This Note examines the meaning of the "adverse employment action" that courts require for Title VII disparate treatment claims and the variations in the application of this standard among circuits. Part I provides background on Title VII, including Supreme Court cases that impacted lower courts' adverse employment action jurisprudence. Part II addresses the development of the adverse action into a heightened substantive requirement and circuits' different approaches to this adversity element, particularly in light of recent cases that demonstrate an analytical shift in favor of Title VII plaintiffs. Finally, Part III concludes that, although it is appropriate—and likely necessary—to mandate some objective showing of adversity for plaintiffs asserting disparate treatment claims, courts should take the distinctive circumstances of the plaintiff into account when deciding whether an action can reasonably be considered to be adverse. Moreover, any additional significance or materiality requirement is an unsupported judicial gloss that has no place in Title VII jurisprudence, and courts should instead focus on

---

disproportionately affect members of a protected class, disparate treatment claims require a showing of discriminatory intent. *See id.* This Note focuses on the adverse action requirement that has developed as a requirement in disparate treatment claims.

23. *See infra* Part II. *See generally* Autumn George, Comment, *"Adverse Employment Action"—How Much Harm Must Be Shown to Sustain a Claim of Discrimination Under Title VII?*, 60 MERCER L. REV. 1075 (2009).

24. *See* George, *supra* note 23, at 1083–84; *see also* Davis v. Legal Servs. Ala., Inc., 19 F.4th 1261, 1267 (11th Cir. 2021) (holding that paid suspension was not actionable); Oguejiofo v. Bank of Tokyo Mitsubishi UFJ Ltd., 704 F. App'x 164, 168 (3d Cir. 2017) (holding that lateral transfer was not actionable).

25. *See infra* Part II.

26. *See* Ernest F. Lidge III, *The Meaning of Discrimination: Why Courts Have Erred in Requiring Employment Discrimination Plaintiffs to Prove That the Employer's Action Was Materially Adverse or Ultimate*, 47 U. KAN. L. REV. 333, 348–50 (1999).

27. *See infra* Part II.

28. *Compare* Hamilton v. Dallas County, 42 F.4th 550, 556 (5th Cir.) (holding that a plaintiff must allege an "ultimate" employment decision to state a cognizable claim), *reh'g en banc granted, opinion vacated*, 50 F.4th 1216 (5th Cir. 2022), *with* Chambers v. District of Columbia, 35 F.4th 870, 879 (D.C. Cir. 2022) (holding that any decision affecting the terms and conditions of employment is barred by Title VII if motivated by a protected characteristic).

whether the action is tied to the terms, conditions, or privileges of the plaintiff's employment.

I. SETTING THE STAGE: THE CIVIL RIGHTS ACT AND ITS EVOLUTION

The Civil Rights Act of 1964[29] was a long-awaited congressional response to the civil rights movement.[30] Even after the Supreme Court's seminal decision in *Brown v. Board of Education*,[31] which declared racial segregation in public education to be unconstitutional, the nation remained divided between civil rights activists and those who resisted racial equality.[32] After years of protests, political lobbying, and the murders of multiple well-known civil rights activists,[33] Congress finally took steps to actualize the constitutional right to freedom from discrimination.[34] In an address to a joint session of Congress, President Lyndon B. Johnson stressed the need for national legislation to "eliminate from this Nation every trace of discrimination and oppression that is based upon race or color."[35]

Title VII, the provision of the Civil Rights Act addressing employment, was intended as a comprehensive mandate to eradicate discrimination in the workplace.[36] Because of this remedial purpose, courts have recognized that the text of Title VII must not be "diluted" to promote judicial economy.[37] However, the Supreme Court has made clear that Title VII is not designed to function as "a general civility code for the American workplace."[38] Accordingly, employer conduct such as teasing and making offhand comments does not fall within the purview of Title VII.[39] Thus, courts addressing disparate treatment claims have required plaintiffs to point to some adverse employment action to show that the alleged discrimination actually altered the "terms, conditions, or privileges" of their employment.[40]

Although the Supreme Court has not expressly addressed the adverse employment action requirement in the context of disparate treatment claims, its previous cases interpreting Title VII provide insight into how the language of the statute should be interpreted. Part I.A addresses how the Court has allowed disparate treatment claims to proceed without direct evidence of

29. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 5, 42, and 52 U.S.C.).

30. *See* Eric S. Dreiband, *Celebration of Title VII at Forty*, 36 U. MEM. L. REV. 5, 5 (2005).

31. 347 U.S. 483 (1954).

32. *See* Dreiband, *supra* note 30, at 5.

33. *See id.* at 5–8.

34. *See generally* H.R. REP. NO. 88-914 (1963).

35. Address Before a Joint Session of Congress, 1 PUB. PAPERS 8, 9 (Nov. 27, 1963).

36. *See* Craig J. Ortner, Note, *Adapting Title VII to Modern Employment Realities: The Case for the Unpaid Intern*, 66 FORDHAM L. REV. 2613, 2623 (1998).

37. *See id.* (citing Tomkins v. Pub. Serv. Elec. & Gas Co., 568 F.2d 1044, 1049 (3d Cir. 1977)).

38. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998).

39. *See id.* at 82.

40. *See* Davis v. Town of Lake Park, 245 F.3d 1232, 1238 (11th Cir. 2001) (quoting 42 U.S.C. § 2000e-2(a)) (explaining that courts have "uniformly" interpreted Title VII's antidiscrimination provision to require plaintiffs to show an adverse employment action), *overruled on other grounds by* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006).

discriminatory intent and analyzes how the language from these cases and the subsequent congressional amendments to Title VII[41] bear on the development of the adverse action requirement. Part I.B summarizes cases that demonstrate the Court's tendency toward an expansive reading of the antidiscrimination provision, suggesting that an interpretation limiting the statute's scope is inappropriate. Part I.C discusses cases that set the standard for imposing vicarious liability on employers under Title VII, as well as how lower courts' selective adoption of language from these cases contravenes the Court's insistence on reading the statute purposively. Finally, Part I.D focuses on the Court's explanation of the materiality standard for Title VII retaliation claims and to what extent this reasoning applies to the antidiscrimination provision.

A. Pretext, Mixed-Motives, and Congressional Intervention: Deciphering the Intent Requirement When the Action Is Clear

Certain employer actions, such as firing or failing to hire, are undeniably covered by Title VII if they are motivated by discrimination against a protected class.[42] However, proving discriminatory intent is often a difficult task for plaintiffs bringing Title VII claims.[43] The Supreme Court's treatment of this issue, as well as Congress's subsequent amendments to Title VII, shed light on both the development of the adverse action requirement and the focus of the antidiscrimination provision.

1. *McDonnell Douglas*: When the Action Supplies the Inference

Soon after the enactment of Title VII, the Supreme Court provided a framework for how to prove Title VII discrimination absent direct evidence of discriminatory intent in *McDonnell Douglas Corp. v. Green*.[44] This case involved a Black employee, Percy Green, who was discharged by his employer during a general workforce reduction.[45] After his termination, Green participated in unlawful protests against the company,[46] claiming that his discharge was racially motivated.[47] When the employer later publicized an open position, Green applied and was rejected.[48] Green alleged that this

41. 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B).

42. *See* Lidge, *supra* note 26, at 335.

43. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 271 (1989) (White, J., concurring) ("[D]irect evidence of intentional discrimination is hard to come by.").

44. 411 U.S. 792 (1973); *see also* Esperanza N. Sanchez, Note, *Analytical Nightmare: The Materially Adverse Action Requirement in Disparate Treatment Cases*, 67 CATH. U. L. REV. 575, 581 (2018) (referring to *McDonnell Douglas* as "the Supreme Court's first articulated legal standard for disparate treatment cases").

45. *See McDonnell Douglas*, 411 U.S. at 794.

46. These protests involved both a "stall-in," during which Green and other protestors blocked traffic to prevent access to the company's plant, and a "lock-in," during which a padlock was placed on the front door of a building to prevent some of the company's employees from leaving. *See id.* at 794–95.

47. *See id.*

48. *See id.* at 796.

failure to rehire was based on racial animus in violation of Title VII.[49] The employer insisted that its decision was based solely on Green's participation in the unlawful protests, rather than any discriminatory motive.[50]

In light of conflicting evidence as to the employer's intent, the Court set forth a burden-shifting test that has become a bedrock of modern employment discrimination jurisprudence.[51] Under this test, the plaintiff must first establish a prima facie case of discrimination, which they can accomplish by demonstrating that (1) they were a member of a protected class, (2) they applied to a position they were qualified for and for which the employer was seeking applicants, (3) they were rejected, and (4) the employer continued to seek applications from similarly qualified applicants after rejecting the plaintiff.[52] Once the plaintiff has established this prima facie case, the court assumes a discriminatory motive, and the burden shifts to the employer to produce a legitimate, nondiscriminatory reason for the rejection.[53] Once the employer has asserted such a reason, the burden shifts back to the plaintiff to demonstrate that the given reason is actually a pretext for discrimination.[54] As the Court explained in a later case, the reasoning behind this framework is that certain employer actions against employees of a protected class, in the absence of an alternative explanation, are more likely than not motivated by impermissible considerations.[55] Accordingly, rather than using plaintiffs' inability to provide affirmative evidence of discriminatory intent as a justification for dismissal, the Court opened the door for discrimination victims to effectively seek redress.

This solution allowed the Court to strike a balance between the societal and personal interests of employers and employees.[56] Although it acknowledged that Title VII never requires employers to hire unqualified individuals, the Court stated that the purpose of Title VII was to "assure equality of employment opportunities" and rid workplace environments of practices that fostered racial stratification and disadvantaged employees of protected classes.[57] Importantly, the Court also noted that what constitutes a prima facie case will vary based on the alleged discriminatory conduct.[58]

---

49. *See id.* at 796–97. Initially, Green also brought a claim under Title VII's antiretaliation provision. *See id.* However, he did not seek review of this issue after the U.S. Court of Appeals for the Eighth Circuit affirmed the district court's conclusion that participation in unlawful protests cannot be a protected activity for purposes of a Title VII retaliation claim. *See id.* at 797 & n.6.

50. *See id.* at 801.

51. *See* Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L.J. 1121, 1133 (1998).

52. *See McDonnell Douglas*, 411 U.S. at 802.

53. *See id.*

54. *See id.* at 804.

55. *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978); *see also* Price Waterhouse v. Hopkins, 490 U.S. 228, 271 (1989) (White, J., concurring) (explaining that the Court created the *McDonnell Douglas* test because direct evidence of discrimination is rare).

56. *McDonnell Douglas*, 411 U.S. at 801.

57. *Id.* at 800.

58. *See id.* at 802 n.13.

Previous legal scholarship has suggested that the *McDonnell Douglas* framework and its implementation in diverse factual circumstances may have influenced the evolution of the adverse action requirement.[59] As courts applied this test to various cases involving other employer actions besides failure to hire, such as discriminatory terminations or demotions, they began to replace the third prong ("rejection" in the initial *McDonnell Douglas* case) with the broader phrase "adverse action."[60] Because there are a wide range of employer actions that could affect the terms and conditions of a worker's employment short of termination or rejection, the phrase "adverse action" can often be a helpful generalization. However, many courts have superimposed a distinctive adverse action requirement onto all Title VII claims, even those in which direct evidence exists, making *McDonnell Douglas* inapplicable.[61] Moreover, most circuits have made this requirement even more difficult to satisfy by requiring that the alleged discrimination reach a certain level of objective significance to constitute an adverse action, whether or not in the context of a *McDonnell Douglas* prima facie case.[62] Therefore, a mechanism designed to make it less onerous for a plaintiff to prove unlawful discrimination by creating a legal presumption of discriminatory intent has arguably been transformed into an additional substantive hurdle.[63]

2. Mixed-Motives and Liability for Intent: *Price Waterhouse* and Congress's Response

Additional support for an expansive reading of Title VII can be gleaned from another Supreme Court case addressing the intent requirement of disparate treatment claims, *Price Waterhouse v. Hopkins*,[64] as well as the 1991 statutory amendments following the case that effectively superseded part of the Court's holding.[65] *Price Waterhouse* addressed a situation in which the employer's given reason for the contested conduct was not merely a pretext for discrimination, but the employer nevertheless took a protected

59. *See* Lidge, *supra* note 26, at 368–72; White, *supra* note 51, at 1180–81.

60. *See* White, *supra* note 51, at 1179–80. These courts then replaced the fourth element, which involved continuing to seek applications from similarly qualified applicants in *McDonnell Douglas*, with the more general requirement that nonminority comparator employees were treated more favorably with regard to the relevant employment action. *See, e.g.*, Wilson v. City of Chesapeake, 290 F. Supp. 3d 444, 456 (E.D. Va.), *aff'd*, 738 F. App'x 169 (4th Cir. 2018). Because comparators are not always available, courts will sometimes consider the fourth element to be met so long as the circumstances give rise to an inference of discriminatory motive. *See, e.g.*, Thomas v. Runyon, 108 F.3d 957, 959 (8th Cir. 1997).

61. *See* White, *supra* note 51, at 1181 (asserting that courts have erroneously mandated showing an adverse action as a prerequisite to bringing any Title VII claim rather than as a means of proving discriminatory intent); *see also* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) ("[T]he *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination.").

62. *See infra* Part II.

63. *See* Lidge, *supra* note 26, at 372–73.

64. 490 U.S. 228 (1989).

65. *See* 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B).

characteristic into account in conjunction with its stated reason.[66] In *Price Waterhouse*, the plaintiff, Ann Hopkins, was a female senior manager at the accounting firm Price Waterhouse who had allegedly been denied partnership status because of her sex.[67] At the time the case was decided, the Court had already made it clear that denial of a promotion based on discriminatory motivations was actionable under Title VII.[68] However, the defendant claimed that the denial of partnership was based on Hopkins's "rough" demeanor and what the partners deemed "poor interpersonal skills" rather than because she was a woman.[69]

The Court acknowledged the "clear signs" that these negative evaluations of Hopkins's personality stemmed at least partially from the fact that she was a woman.[70] Furthermore, the firm did not deny that it had relied on these gendered comments when deciding to reject Hopkins's candidacy.[71] Thus, even if some of the firm's reasons for failing to promote Hopkins were legitimate and unrelated to any protected characteristic, the firm had clearly considered gender as a factor in its failure to promote.[72] However, the Court held that Price Waterhouse could avoid liability by demonstrating that it would have made the same decision absent consideration of Hopkins's gender.[73] The Court stressed that a plaintiff does not have the initial burden of proving that the employer would not have taken the contested action but for consideration of a protected characteristic.[74] At the same time, an affirmative defense to liability was available if the defendant could show the lack of such but-for causation.[75]

In establishing that the plaintiff does not have the burden of establishing discriminatory motive as a but-for cause, the Court referenced a statement from the Senate floor managers regarding the meaning and scope of Title VII.[76] The language explains that "to discriminate is to make a distinction, to make a difference in treatment or favor," and that Title VII prohibits such

66. *See* 490 U.S. at 236–37. These cases are referred to as "mixed-motive" cases. *See id.* at 252; Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 77–78 (2011).

67. *See Price Waterhouse*, 490 U.S. at 231–32.

68. *See* Hishon v. King & Spalding, 467 U.S. 69 (1984); *see also* discussion *infra* Part I.B.

69. *See Price Waterhouse*, 490 U.S. at 234–35.

70. *See id.* at 235. Several partners at the firm had made overtly sexualized suggestions to Hopkins about her demeanor, including comments that she should take "a course at charm school," that it was offensive for her to curse "because it's a lady using foul language," and that she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" to improve her chances at promotion to partnership. *See id.*

71. *See id.* at 237.

72. *See id.*

73. *See id.* at 258. The defendant needed to prove this by a preponderance of the evidence. *See id.* at 253.

74. *See id.* at 248.

75. *See id.* at 246, 258; *see also* Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1017 (2020) (explaining that *Price Waterhouse* transformed but-for causation from an evidentiary standard for the plaintiff to an affirmative defense for the defendant).

76. *Price Waterhouse*, 490 U.S. at 244 (citing 110 CONG. REC. 7213 (1964)).

distinctions based on the protected characteristics listed in the statute.[77] The Court explained that the result of this was that "an employer may not take gender into account in making an employment decision."[78] Although permitting employers an affirmative defense to screen out cases in which gender played no actual role in the ultimate decision, the burden to justify this decision rested on the employer.[79]

The availability of this affirmative defense to liability, however, was short-lived.[80] Two years after the Court's decision in *Price Waterhouse*, Congress passed the Civil Rights Act of 1991,[81] which included amendments to Title VII clarifying that a plaintiff was entitled to prevail on their claim if a protected characteristic "was a motivating factor for any employment practice, even though other factors also motivated the practice."[82] A defendant may still assert lack of but-for causation as an affirmative defense to having to pay damages or reverse the contested action (such as by hiring or reinstating the plaintiff).[83] However, as long as the plaintiff shows that a protected characteristic was a factor, a court may grant declaratory relief, certain injunctive relief, and attorneys' fees, regardless of whether the employer would have made the same decision absent the impermissible consideration.[84]

Although these amendments do not bear directly on the type of adverse employer action that Title VII prohibits, they indicate Congress's assumption that the core of what Title VII forbids is discriminatory motive, rather than the precise nature of that motive's employment consequence.[85] By allowing some relief even if the challenged employer action would not have been any different, the amendments suggest that, when discriminatory motive is clear, the relevance of the employer's adverse action arises in the remedies phase of the litigation, not in determining whether the claim has statutory merit.[86]

B. Expanding the Scope of "Terms, Conditions, and Privileges of Employment"

Several of the Supreme Court's cases directly analyzing the scope of Title VII's antidiscrimination provision demonstrate a tendency toward allowing

77. 110 CONG. REC. 7218 (1964) (statement of Sen. Joseph S. Clark).

78. *Price Waterhouse*, 490 U.S. at 244. The Court did acknowledge that Congress included an exception for "bona fide occupational qualification[s]," but reasoned that this delineated exception implies that employers may not consider protected characteristics when making employment decisions under any other circumstances. *See id.* at 242.

79. *See id.* at 248.

80. *See Comcast Corp.*, 140 S. Ct. at 1017 (stating that the framework set forth in *Price Waterhouse* "didn't last long" due to subsequent congressional amendments).

81. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of the U.S.C.).

82. 42 U.S.C. § 2000e-2(m).

83. *See id.* § 2000e-5(g)(2)(B).

84. *See id.*

85. *See* discussion *infra* Part III.B.

86. *See* discussion *infra* Part III.B.

plaintiffs to pursue their claims in court. In *Hishon v. King & Spalding*,[87] the Court rejected the notion that discrimination under Title VII is limited to those "terms, conditions, or privileges of employment" that are specifically included in an employment contract.[88] This case was brought by a female plaintiff, Elizabeth Anderson Hishon, who alleged that her law firm employer failed to promote her from associate to partner because of her sex, despite the fact that promotion to partnership was a "matter of course" for associates who spent several years performing satisfactorily at the firm.[89] Although consideration for partnership was not a feature of Hishon's employment contract, the Court nevertheless held that Title VII forbade the firm from granting such consideration on a discriminatory basis.[90] Benefits that are incidental to employment or part of the standard relationship between the employer and employees, the Court reasoned, may not be granted in a manner contrary to Title VII.[91] Importantly, by confirming that a discriminatory failure to promote was actionable, the Court demonstrated that discrimination as to the "terms, conditions, or privileges of employment" covered more than just direct and immediate economic harms such as hiring and firing.[92]

The Court further expanded the scope of Title VII's antidiscrimination provision in *Meritor Savings Bank v. Vinson*.[93] This case involved a female bank employee, Mechelle Vinson, who alleged that her supervisor subjected her to ongoing and unwelcome sexual advances.[94] By holding that such a hostile work environment could constitute discrimination, the Court made it clear that Title VII covered more than simply tangible and/or economic harms.[95] In fact, the Court encouraged a broad reading of the statute, explaining that the phrase "terms, conditions, or privileges of employment" indicates that Congress wished to eliminate the "entire spectrum of disparate treatment of men and women" in the workplace.[96] Although only severe or pervasive sexual harassment rises to the level of creating a hostile work environment, the Court explained that this sort of environment affects the "conditions" of a workplace, and thus falls within the ambit of Title VII's antidiscrimination provision.[97]

Lower courts sometimes suggest that hostile work environment claims are distinct from claims involving a change in the concrete terms and conditions of employment.[98] However, because *Meritor* demonstrates that

87. 467 U.S. 69 (1984).
88. *See id.* at 74–75.
89. *See id.* at 71–72.
90. *See id.* at 75–76.
91. *See id.*
92. *See* George, *supra* note 23, at 1078.
93. 477 U.S. 57 (1986).
94. *See id.* at 59–61.
95. *See id.* at 64.
96. *See id.* (quoting L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).
97. *See id.* at 67.
98. *See, e.g.*, Baldwin v. Blue Cross/Blue Shield of Ala., 480 F.3d 1287, 1300 (11th Cir. 2007) (stating that the alteration in terms and conditions of employment can arise either

discrimination as to the conditions of employment is not limited to direct economic losses but extends to environmental and emotional harms,[99] its analysis is relevant when defining the scope of the statute.

C. "Tangible" Employment Actions: The Standard for Vicarious Liability

Because Title VII makes it unlawful for an "employer" to engage in employment discrimination, it was initially unclear when supervisor actions could lead to Title VII liability.[100] In *Burlington Industries, Inc. v. Ellerth*[101] and *Faragher v. City of Boca Raton*,[102] which were decided on the same day, the Court addressed when employers could be held vicariously liable under Title VII for the acts of their employees.[103] Although these opinions reiterate the Court's expansive attitude toward the scope of Title VII,[104] several courts have used fragments of the Court's language in these decisions as a justification for imposing a heightened adversity requirement.[105]

In both of these cases, supervisors had subjected the plaintiffs to pervasive sexual harassment but took no tangible action related to their employment status.[106] The Court explained that, to hold an employer vicariously liable for the torts of an employee—such as a supervisor—on an agency theory, the employee must have been aided by the agency relationship in the commission of the tort.[107] The Court therefore stated that vicarious liability would *always* be appropriate when a supervisor takes a "*tangible employment action*" against an employee,[108] which it defined as "a *significant* change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[109]

Unlike claims involving supervisors' sexual harassment, vicarious liability for tangible employment actions is automatic.[110] This is because a supervisor only has the power to take tangible employment actions against an employee

through a tangible employment action or sexual harassment that is severe or pervasive); *see also* Eberhardt v. First Centrum, LLC, No. 05-71518, 2007 WL 518896, at *7 (E.D. Mich. Feb. 15, 2007) (stating that disparate treatment and hostile work environment are separate claims, and a hostile work environment cannot be equated with an adverse action).

99. *See Meritor*, 477 U.S. at 64.

100. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 751 (1998).

101. 524 U.S. 742 (1998).

102. 524 U.S. 775 (1998).

103. *See* David Sherwyn, Michael Heise & Zev J. Eigen, *Don't Train Your Employees and Cancel Your "1-800" Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 FORDHAM L. REV. 1265, 1267 (2001).

104. *See, e.g.*, *Faragher*, 524 U.S. at 786.

105. *See, e.g.*, Betts v. Summit Oaks Hosp., 687 F. App'x 206, 207 (3d Cir. 2017); Watson v. Potter, 23 F. App'x 560, 563 (7th Cir. 2001).

106. *See Faragher*, 524 U.S. at 780–81; *Ellerth*, 524 U.S. at 747–48.

107. *See Ellerth*, 524 U.S. at 760.

108. *See id.* at 753 (emphasis added).

109. *See id.* at 761 (emphasis added).

110. *See id.* at 762 ("[A] tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer.").

through the agency relationship, whereas this is not always the case in instances of harassment, even when the harassment rises to the level of creating a hostile work environment.[111] With that distinction in mind, the Court created an affirmative defense available to employers faced with hostile work environment claims on a vicarious liability theory.[112] This defense requires employers to show that (1) they exercised reasonable care to prevent and promptly remedy any harassment, and (2) the employee bringing the claim had unreasonably failed to take advantage of such preventative or corrective measures or otherwise avoid the alleged harm.[113] In creating this defense, the Court emphasized that the primary purpose of Title VII was not to simply provide redress for plaintiffs who suffered discrimination, but to prevent the harm from occurring in the first place.[114]

Certain circuits have used the language set forth in *Ellerth* and *Faragher* describing "tangible" employment actions to qualify what constitutes an adverse action for any Title VII disparate treatment claim.[115] Under this view, the antidiscrimination provision of Title VII covers only two types of claims: (1) tangible actions that could subject employers to automatic vicarious liability and (2) hostile work environment claims that would allow employers to assert the affirmative defense described in *Faragher* and *Ellerth*.[116] Accordingly, these courts require that, outside of claims involving a hostile work environment, the contested action must be "significant" to be actionable, regardless of whether the action was undertaken by the employer directly.[117] However, the Court's opinion in *Burlington Northern & Santa Fe Railway Co. v. White*[118] has cast doubt on this interpretation.[119]

D. Burlington Northern*: The Materially Adverse Standard for Retaliation Claims*

Although it focused on the retaliation provision of Title VII, the Supreme Court's decision in *Burlington Northern* has played an important role in lower courts' analyses of disparate treatment claims.[120] The language of the

111. *See id.* at 763 (explaining that both coemployees and supervisors are capable of making harassing comments); *see also* White, *supra* note 51, at 1191 (explaining that tangible employment actions are those that only supervisors are capable of inflicting because of their supervisory status).

112. *See Ellerth*, 524 U.S. at 764–65; Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).

113. *See Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

114. *See Ellerth*, 524 U.S. at 764; *Faragher*, 524 U.S. at 806.

115. *See, e.g.*, Stewart v. Union Cnty. Bd. of Educ., 655 F. App'x 151, 155 (3d Cir. 2016); Watson v. Potter, 23 F. App'x 560, 563 (7th Cir. 2001).

116. *See* Baldwin v. Blue Cross/Blue Shield of Ala., 480 F.3d 1287, 1300 (11th Cir. 2007).

117. *See* Oguejiofo v. Bank of Tokyo Mitsubishi UFJ Ltd., 704 F. App'x 164, 168 (3d Cir. 2017); Lewis v. City of Chicago, 496 F.3d 645, 653 (7th Cir. 2007).

118. 548 U.S. 53 (2006).

119. *See infra* Part I.D.

120. *See* George, *supra* note 23, at 1076 ("Since the seminal decision by the United States Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. White* . . . the circuits have become even more divided on how much harm must be alleged to sustain an action of discrimination under Title VII." (footnotes omitted)).

retaliation provision makes it unlawful for employers to "discriminate against" employees or applicants for opposing an unlawful employment practice or participating in a related investigation.[121] *Burlington Northern* involved a female plaintiff, Sheila White, who alleged that her supervisor changed her job responsibilities and suspended her without pay in retaliation for reporting his discriminatory comments.[122] Resolving a split among the circuits, the Court held that a plaintiff need not allege that the retaliatory action was related to their employment or the workplace, but only that it would have "dissuaded a reasonable worker from making or supporting a charge of discrimination."[123]

To justify this holding, the Court emphasized the important textual differences between the antidiscrimination and antiretaliation provisions.[124] In particular, the language in the antidiscrimination provision, such as the requirement that the discrimination relate to the "terms, conditions, or privileges of employment," limited the scope of the provision to actions affecting employment or altering conditions of the workplace.[125] As this language is absent from the antiretaliation provision, the Court found that this limitation does not apply to retaliation claims.[126]

In addition to the semantic differences, the Court also addressed the different purposes underlying the antiretaliation provision and the antidiscrimination provision.[127] The antidiscrimination provision, the Court explained, was designed to prevent injury against employees based on "*who they are*," while the antiretaliation provision protects employees from being injured for "*what they do*."[128] Thus, although Congress could fully attain the objective of the antidiscrimination provision by prohibiting employment-related discrimination based on protected characteristics, the reach of the antiretaliation provision would need to extend beyond the confines of the workplace to be effective.[129] This is because employers are capable of effectively retaliating against employees for a protected activity without taking any actions immediately connected to or within the workplace.[130]

The Court in *Burlington Northern* also addressed the decision in *Ellerth* and its ramifications on Title VII's scope.[131] The Court made it clear that the "tangible employment action" requirement was meant to identify when

121. 42 U.S.C. § 2000e-3(a).
122. *Burlington Northern*, 548 U.S. at 57–58.
123. *See id.* at 68 (quoting Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).
124. *See id.* at 61.
125. *See id.* at 62.
126. *See id.* at 62–64.
127. *See id.* at 63.
128. *Id.* (emphasis added).
129. *See id.*
130. *See id.* The Court gave several examples of how an employer could effectively retaliate against an employee outside of the workplace, such as by filing false criminal charges against an employee for reporting discrimination. *See id.* at 63–64 (citing Berry v. Stevinson Chevrolet, 74 F.3d 980, 984, 986 (10th Cir. 1996)).
131. *See id.* at 64–65.

employers could be subject to vicarious liability and that "*Ellerth* did not discuss the scope of the general antidiscrimination provision."[132]

Although not requiring a direct connection to employment, the Court expressed that the allegedly retaliatory action must be "materially adverse" before Title VII liability can attach.[133] This requirement is not expressly stated in the antiretaliation provision—just as it is absent from the antidiscrimination provision.[134] The Court justified this requirement by highlighting the importance of distinguishing between "significant" harms and "trivial" ones, such as "petty slights or minor annoyances."[135]

The Court also established that the harm must be evaluated objectively, reasoning that a subjective approach would lead to "uncertainties and unfair discrepancies."[136] Accordingly, the Court defined a "materially adverse" action as an action that might have dissuaded a reasonable worker from participating in the protected conduct.[137] However, the Court emphasized that, although objective, this inquiry should be undertaken with the specific circumstances of the plaintiff in mind.[138] This ensures that employees can seek relief for harms that are material *to them*, even if identical harms would be immaterial to others.[139]

The Supreme Court's language when analyzing Title VII repeatedly indicates that its terms should not be construed narrowly.[140] By making it clear that the antidiscrimination provision covers more than the express and implied terms of the employment contract[141] and tangible economic harm,[142] as well as by allowing claims to proceed even when there is no direct proof of discriminatory intent[143] or firsthand employer action,[144] the Court has

132. *See id.* The Court also emphasized that "*Ellerth* did not mention Title VII's antiretaliation provision at all." *Id.* at 65.

133. *See id.* at 67–68.

134. *See* 42 U.S.C. §§ 2000e-2(a)(1), 2000e-3(a).

135. *See Burlington Northern*, 548 U.S. at 68.

136. *See id.*

137. *Id.* (quoting Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).

138. *See id.* at 69 ("[T]he significance of any given act of retaliation will often depend upon the particular circumstances. Context matters . . . . A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school-age children.").

139. *See id.*

140. *See, e.g.*, Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) ("The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment." (quoting L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978))); Hishon v. King & Spalding, 467 U.S. 69, 75–76 (1984) ("Those benefits that comprise the 'incidents of employment,' or that form 'an aspect of the relationship between the employer and employees,' may not be afforded in a manner contrary to Title VII." (footnotes omitted) (first quoting S. REP. NO. 88-867, at 11 (1964); and then quoting Chem. & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 178 (1971))); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973) ("[I]t is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise.").

141. *See Hishon*, 467 U.S. at 75; *see also supra* note 88 and accompanying text.

142. *See Meritor*, 477 U.S. at 64; *see also supra* notes 95–96 and accompanying text.

143. *See supra* Part I.A.

144. *See supra* Part I.C.

evinced a disposition toward allowing discrimination plaintiffs to have their day in court. *Burlington Northern* further supports a purposive reading of Title VII through its expansion of the antiretaliation provision to harms outside of the workplace and its attention to the individual circumstances of retaliation victims.[145] Both the holdings of these cases and the language that the Court used to expound on them reflect a desire to interpret Title VII in accordance with its purpose—promoting complete equality in the workplace and condemning all disparate treatment motivated by bigotry.[146]

II. THE DEVELOPMENT AND CURRENT STATE OF THE HEIGHTENED "ADVERSE ACTION" REQUIREMENT

In contrast to the Supreme Court's expansive interpretation of Title VII, lower courts continue to systematically discard certain discrimination claims by concluding that they are not significant or material enough to merit remediation. Part II.A examines the development of the heightened adverse action requirement and explains how it can negatively impact victims of discrimination. Part II.B discusses the current state of the adverse action requirement by analyzing intercircuit conflicts and novel developments arising from recent circuit court decisions.

A. The Heightened "Adverse Action" Requirement: Where It Came From and Why It Presents a Problem

Despite the apparent breadth of Title VII's purview, circuit courts have limited discrimination victims' ability to seek redress by imposing a substantive adversity requirement.[147] By seizing on the "adverse action" language that arose in subsequent applications of *McDonnell Douglas*,[148] the definition of "tangible employment action" used to incur automatic vicarious liability in *Ellerth*,[149] and the "materially adverse" standard used for retaliation claims in *Burlington Northern*,[150] circuit courts have created a heightened qualification that functions as an additional obstacle for discrimination plaintiffs.[151]

The adverse action requirement mandates that a plaintiff show not only that they were a victim of employment discrimination, but also that the contested action was sufficiently adverse.[152] This requirement developed as courts adopted the language of earlier cases that used the phrase "adverse employment action" as a shorthand for discrimination as to the terms,

145. *See* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 69 (2006).
146. *See supra* notes 140–45 and accompanying text.
147. *See* Lidge, *supra* note 26, at 346.
148. *See* White, *supra* note 51, at 1179 n.316 (collecting cases).
149. *See, e.g.*, Stewart v. Union Cnty. Bd. of Educ., 655 F. App'x 151, 155 (3d Cir. 2016); Watson v. Potter, 23 F. App'x 560, 563 (7th Cir. 2001).
150. *See, e.g.*, Fletcher v. ABM Bldg. Value, 775 F. App'x 8, 12 (2d Cir. 2019) (requiring a "materially adverse" action for discrimination claims); Whigum v. Keller Crescent Co., 260 F. App'x 910, 913 (7th Cir. 2008) (same).
151. *See* George, *supra* note 23, at 1083; Lidge, *supra* note 26, at 346.
152. *See* Lidge, *supra* note 26, at 346 n.73.

conditions, and privileges of employment.[153] However, these later courts construed the language "adverse action" as a distinctive prerequisite to relief, rather than as a stand-in for the statutory text.[154] The use of this phrase as a catchall generalization throughout the evolution of the *McDonnell Douglas* prima facie test further solidified its prevalence in disparate treatment cases.[155]

As the distinctive adverse action requirement became increasingly ubiquitous, circuit courts began to infuse it with a significance component.[156] Courts have justified this gravity requirement in several ways, such as by asserting that a materiality threshold is built into the word "discrimination,"[157] by pointing to concerns of judicial economy,[158] or by invoking the canon de minimis non curat lex to discard ostensibly minor claims.[159] Nonetheless, the imposition of this heightened standard has resulted in the immediate dismissal of claims that fall squarely within the text of the statute.[160]

The large number of Title VII discrimination cases filed annually, and the frequency with which these claims are challenged or discarded in a pretrial setting, demonstrates the importance of clarifying what conduct is

153. *See id.* at 346–47.

154. *See id.* at 347–48 (citing Ferguson v. E.I. DuPont de Nemours & Co., 560 F. Supp. 1172, 1201 (D. Del. 1983)).

155. *See* discussion *supra* Part I.A.1.

156. *See* Lidge, *supra* note 26, at 350–52 (explaining that *Spring v. Sheboygan Area School District*, 865 F.2d 883 (7th Cir. 1989), a Seventh Circuit case analyzing a claim under the Age Discrimination in Employment Act of 1967, was the first to apply the "materially adverse" test, prompting subsequent courts to impose the same requirement without drawing from the statutory language); White, *supra* note 51, at 1143 ("The *Spring* court thus used the term 'materially adverse employment action' . . . as an interpretation of the level of employer decision making that is actionable under employment discrimination statutes.").

157. *See* Threat v. City of Cleveland, 6 F.4th 672, 678 (6th Cir. 2021) ("To 'discriminate' reasonably sweeps in some form of an adversity and a materiality threshold."); Washington v. Ill. Dep't of Revenue, 420 F.3d 658, 661 (7th Cir. 2005) ("The materiality requirement is built into the word 'discrimination.'").

158. *See Washington*, 420 F.3d at 661 (refusing to interpret "discrimination" to force judges to oversee the "minutiae of personnel management"); Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996) (insisting that, absent a materiality requirement, the U.S. Equal Employment Opportunity Commission would be "crushed" beneath an "avalanche of filings too heavy for it to cope with"); *see also* Sanchez, *supra* note 44, at 599 ("[P]roponents of the adverse employment action argue that without a sustainability threshold, discrimination claims based on 'every workplace slight' would overwhelm the courts." (quoting Taylor v. FDIC, 132 F.3d 753, 765 (D.C. Cir. 1997))).

159. *See* EEOC v. C.R. Eng., Inc., 644 F.3d 1028, 1040 (10th Cir. 2011) ("[A] plaintiff must show that the alleged adverse action caused more than '*de minimis* harm' to or a '*de minimis* impact' upon an employee's job opportunities or status." (quoting Hillig v. Rumsfeld, 381 F.3d 1028, 1033 (10th Cir. 2004))); *see also Threat*, 6 F.4th at 678 (asserting that Congress gave no indication that it meant to disregard the de minimis exception when enacting Title VII). The Supreme Court has stated that this interpretive bedrock, translating to "the law cares not for trifles," is part of an "established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept." Wis. Dep't of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214, 231 (1992).

160. *See infra* Part II.B; *see also* Cox v. Am. Cast Iron Pipe Co., 784 F.2d 1546, 1561 (11th Cir. 1986) ("Title VII gives us no license to decide that any injury, however insignificant, may be regarded as de minimis.").

actionable.[161] According to U.S. Equal Employment Opportunity Commission (EEOC) statistics, over 13,000 plaintiffs filed Title VII charges alleging discrimination in the terms and conditions of their employment in the fiscal year 2021 alone.[162] This number has been even higher in previous years, spanning between 13,000 and nearly 19,000 annually over the past decade.[163] Moreover, the majority of employment discrimination cases never proceed to trial, as most are either settled during pretrial phases, discarded on a motion to dismiss, or resolved on summary judgment.[164] Legal scholarship has suggested that this trend results not from plaintiffs bringing meritless claims, but from judicial bias and hostility to discrimination plaintiffs.[165] This negative attitude toward discrimination plaintiffs is apparent in several of the cases championing a heightened adversity requirement.[166] The lack of clarity as to what conduct is actionable under Title VII and the potential for hostile courts to use this uncertainty to discard thousands of discrimination claims demonstrate that the adverse action requirement merits Supreme Court attention.

B. How Bad Is Bad Enough?: The Varying Requirements Among Circuit Courts

Although every circuit has instituted some adverse action requirement, their standards are inconsistent.[167] To constitute actionable discrimination, most circuits require a showing that the challenged action resulted in

161. *See* Yina Cabrera, Comment, *The "Ultimate" Question: Are Ultimate Employment Decisions Required to Succeed on a Discrimination Claim Under Section 703(a) of Title VII?*, 15 FIU L. REV. 97, 115 (2021) (arguing that the recurring confusion over what is actionable discrimination under Title VII's antidiscrimination provision merits Supreme Court guidance).

162. *Statutes by Issue (Charges Filed with EEOC) FY 2010-FY 2021*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://go.usa.gov/xdBBu [https://perma.cc/ADJ7-QPNT] (last visited Feb. 6, 2023).

163. *Id.*

164. *See* Deborah A. Widiss, *Proving Discrimination by the Text*, 106 MINN. L. REV. 353, 378 (2021) (explaining that only about 6 percent of employment discrimination cases go to trial); Courtney Vice, Note, *The Rainbow Connection: Revisiting the Mixed-Motive Summary Judgment Standard in* Bostock*'s Afterglow*, 49 FORDHAM URB. L.J. 915, 929 (2022) (stating that, of the few employment cases that are not subject to mandatory arbitration, the majority are decided at summary judgment).

165. *See* Marcia L. McCormick, *Let's Pretend That Federal Courts Aren't Hostile to Discrimination Claims*, 76 OHIO ST. L.J. FURTHERMORE 22, 23 (2015); Sanchez, *supra* note 44, at 585; Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 561–62 (2001).

166. *See, e.g.*, Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996) (asserting that a plaintiff must demonstrate a materially adverse action, "[o]therwise every trivial personnel action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit"); *see also* Palasti v. Fed. Exp. Corp., No. 02 C 1888, 2003 WL 21003693, at *5 (N.D. Ill. May 1, 2003) (claiming that allowing employment decisions such as refusal of a voluntary hardship transfer to be actionable would flood federal courts with "trivial" complaints).

167. *See* Sandra F. Sperino, *Into the Weeds: Modern Discrimination Law*, 95 NOTRE DAME L. REV. 1077, 1093 (2020).

objectively significant or material employment consequences.[168] However, recent decisions by the U.S. Courts of Appeals for the Sixth[169] and District of Columbia[170] Circuits suggest that adverse action jurisprudence may be beginning to shift in favor of Title VII plaintiffs. The U.S. Court of Appeals for the Fifth Circuit currently stands alone in its use of an "ultimate employment decision" standard, which only allows claims based on final decisions "such as hiring, granting leave, discharging, promoting, or compensating."[171] Nevertheless, the Fifth Circuit's recent acknowledgment that its "ultimate employment decision" standard may merit revisitation reflects the potential trend toward expanding liability for employers under Title VII.[172]

Part II.B.1 summarizes how most circuits apply the adverse action requirement, highlighting how a similar standard of objective significance can lead to inconsistent holdings and allow employers to engage in certain types of discrimination with impunity. Part II.B.2 discusses two recent cases that departed from precedent in allowing relief for claims that otherwise would have been deemed too insignificant to qualify as an adverse action.[173] Part II.B.3 addresses the particularly stringent "ultimate employment decision" requirement deployed by the Fifth Circuit, which the en banc court may soon eliminate pending the recent en banc rehearing of *Hamilton v. Dallas County*.[174]

1. Defining Adversity as Objective Significance or Materiality

In analyzing what constitutes an adverse action for the purposes of a discrimination claim, every circuit has at one point indicated that the adversity must be either "significant"[175] or "material."[176] These

168. *See infra* Part II.B.1.

169. Threat v. City of Cleveland, 6 F.4th 672 (6th Cir. 2021).

170. Chambers v. District of Columbia, 35 F.4th 870 (D.C. Cir. 2022).

171. *See* McCoy v. City of Shreveport, 492 F.3d 551, 559 (5th Cir. 2007).

172. *See* Hamilton v. Dallas County, 42 F.4th 550, 557 (5th Cir.), *reh'g en banc granted, opinion vacated*, 50 F.4th 1216 (5th Cir. 2022).

173. *See Chambers*, 35 F.4th 870; *Threat*, 6 F.4th 672.

174. 42 F.4th 550, 557 (5th Cir.), *reh'g en banc granted, opinion vacated*, 50 F.4th 1216 (5th Cir. 2022).

175. *See, e.g.*, Oguejiofo v. Bank of Tokyo Mitsubishi UFJ Ltd., 704 F. App'x 164, 168 (3d Cir. 2017) ("To qualify as an adverse employment action in the discrimination context, an action must create 'a *significant* change in employment status, such as hiring, firing, failing to promote, reassignment with *significantly* different responsibilities, or a decision causing a significant change in benefits.'" (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998))); Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (requiring some "significant detrimental effect" before decision is actionable); Sanchez v. Denver Pub. Sch., 164 F.3d 527, 532 & n.6 (10th Cir. 1998) (transfer was not actionable because it involved "no significant changes in an employee's conditions of employment").

176. *See* Fletcher v. ABM Bldg. Value, 775 F. App'x 8, 12 (2d Cir. 2019) ("An adverse employment action is one that results in a 'materially adverse change in the terms and conditions of employment.'" (quoting Sanders v. N.Y.C. Hum. Res. Admin., 361 F.3d 749, 755 (2d Cir. 2004))); Morales-Vallellanes v. Potter, 605 F.3d 27, 35 (1st Cir. 2010) (noting that only materially adverse employment actions are actionable under Title VII); Hyde v. K.B. Home, Inc., 355 F. App'x 266, 270 (11th Cir. 2009) ("[A]ny adversity must be material; it is

qualifications are designed to discourage potential plaintiffs from turning to the "heavy artillery of . . . antidiscrimination law" over minor inconveniences, embarrassments, or disappointments.[177]

Cases from the U.S. Court of Appeals for the Seventh Circuit present examples of the extratextual materiality standard. The Seventh Circuit has expressly acknowledged that the language "adverse employment action," although present in "hundreds if not thousands" of decisions, is drawn neither from the statutory text nor Supreme Court precedent.[178] However, deeming the materially adverse action standard to be a useful proxy for the term "discrimination" in light of the importance of screening out insignificant harms, the Seventh Circuit still requires that any differential treatment be material to make out a Title VII discrimination claim.[179] This standard encompasses claims involving, for example, extra work[180] or "significantly negative alteration" in workplace environment.[181] However, discriminatory treatment that does not cause a material detrimental effect on employment, such as a lateral transfer with no impact on compensation or job prospects, is insufficient under this threshold.[182]

Although circuits that require a significant or materially adverse employment action appear to rely on a similar standard, they often produce inconsistent results.[183] For example, the U.S. Court of Appeals for the Eighth Circuit held in *Sellers v. Deere & Co.*[184] that the discriminatory assignment

---

not enough that a transfer imposes some *de minimis* inconvenience or alteration of responsibilities." (quoting Doe v. Dekalb Cnty. Sch. Dist., 145 F.3d 1441, 1453 (11th Cir. 1998))); Davis v. Team Elec. Co., 520 F.3d 1080, 1089 (9th Cir. 2008) ("[A]n adverse employment action is one that 'materially affects the compensation, terms, conditions, or privileges of . . . employment.'" (quoting Chuang v. Univ. of Cal. Davis, 225 F.3d 1115, 1126 (9th Cir. 2000))); Clegg v. Ark. Dep't of Corr., 496 F.3d 922, 926 (8th Cir. 2007) ("An adverse employment action is a tangible change in working conditions that produces a material employment disadvantage." (quoting Thomas v. Corwin, 483 F.3d 516, 528 (8th Cir. 2007))); O'Neal v. City of Chicago, 392 F.3d 909, 911–12 (7th Cir. 2004) (stating that only "materially adverse" actions are cognizable under Title VII).

177. *See Oguejiofo*, 704 F. App'x at 169 (alteration in original) (quoting O'Neal v. City of Chicago, 392 F.3d 909, 913 (7th Cir. 2004)).

178. *See* Minor v. Centocor, Inc., 457 F.3d 632, 634 (7th Cir. 2006).

179. *See id.* ("[I]t is essential to distinguish between material differences and the many day-to-day travails and disappointments that, although frustrating, are not so central to the employment relation that they amount to discriminatory terms or conditions.").

180. *See id.*

181. *See* Herrnreiter v. Chi. Hous. Auth., 315 F.3d 742, 744 (7th Cir. 2002).

182. *See* Washington v. Ill. Dep't of Revenue, 420 F.3d 658, 661 (7th Cir. 2005) (explaining that "a lateral transfer that does not affect pay (or significantly affect working conditions) cannot be called discriminatory").

183. *See* Lidge, *supra* note 26, at 399–400 (explaining how the materially adverse test increases potential for judicial subjectivity and inconsistent applications of discrimination laws); *see also* Sperino, *supra* note 167, at 1093 (listing types of employer actions that certain courts consider adverse actions but other courts do not).

184. 791 F.3d 938 (8th Cir. 2015). The plaintiff in this case brought claims of age and disability discrimination under other federal and state discrimination statutes, as well as retaliation claims under Title VII. *See id.* at 940. However, the court employed the same adverse action standard that the circuit applies to Title VII antidiscrimination claims. *See id.* at 942 (citing Thomas v. Corwin, 483 F.3d 516, 528 (8th Cir.2007)).

of additional job responsibilities was not an adverse employment action.[185] Without addressing the likelihood that these additional responsibilities were disproportionately assigned to the plaintiff, Michael Seller, for discriminatory reasons, the court reasoned that the responsibilities were characteristic of the job that Seller had "signed up for."[186] Consequently, the court concluded that there was no materially adverse impact on the substance of Seller's job responsibilities and that Seller had thus failed to state a cognizable discrimination claim.[187]

Conversely, although it applied a similar materiality inquiry, the U.S. Court of Appeals for the Ninth Circuit asserted in *Davis v. Team Electric Co.*[188] that requiring an employee to work more based on a protected characteristic is a material difference in conditions of employment.[189] The court in this case expressly stated that "assigning more, or more burdensome, work responsibilities is an adverse employment action."[190] Thus, the court held that the plaintiff, Christie Davis, had established a prima facie case of sex discrimination by alleging that she had been disproportionately assigned more burdensome job responsibilities than her male coworkers, regardless of whether these responsibilities were included in her job description.[191] This intercircuit inconsistency illustrates how the fate of a meritorious discrimination claim may depend entirely on the circuit in which the claim is brought.

Additionally, the material or significant adversity requirement can also lead to seemingly inconsistent results even within circuits.[192] For example, the U.S. Court of Appeals for the Tenth Circuit requires "*significant* changes in an employee's conditions of employment" for a plaintiff to prevail under Title VII.[193] Applying this standard, the Tenth Circuit found that a policy preventing female employees from transferring to a facility with less difficult work was actionable, while the same employer's sex-based shift-assignment policy was not.[194] Although the shift-assignment policy forced female

185. *See id.* at 944.
186. *See id.*
187. *See id.*
188. 520 F.3d 1080 (9th Cir. 2008).
189. *See id.* at 1089.
190. *See id.*
191. *See id.* at 1091; *see also* Minor v. Centocor, Inc., 457 F.3d 632, 634–35 (7th Cir. 2006) ("Extra work can be a material difference in the terms and conditions of employment.").
192. Petition for a Writ of Certiorari at 21–22, Muldrow v. City of St. Louis, No. 22-193 (U.S. filed Aug. 29, 2022), 2022 WL 3999807. The plaintiff in *Muldrow v. City of St. Louis* has petitioned for a writ of certiorari, asking the Supreme Court to reject the heightened adverse action standard. *See id.* at 3. The Court has not yet decided whether to grant the petition but has invited the solicitor general to file a brief expressing the views of the United States. *See* Muldrow v. City of St. Louis, No. 22-193, 2023 WL 124008, at *1 (U.S. Jan. 9, 2023) (mem.). The Court also invited a brief from the solicitor general in an Eleventh Circuit case with a pending certiorari petition that similarly brought the adverse action requirement into question. *See* Davis v. Legal Servs. Ala., Inc., No. 22-231, 2023 WL 124009, at *1 (U.S. Jan. 9, 2023) (mem.).
193. *See* Petition for a Writ of Certiorari, *supra* note 192, at 21–22 (quoting Sanchez v. Denver Pub. Schs., 164 F.3d 527, 532 n.6 (10th Cir. 1998)).
194. *See id.* (citing Piercy v. Maketa, 480 F.3d 1192 (10th Cir. 2007)).

employees to work objectively less desirable shifts, the court concluded that it did not affect the substance of the employees' work like a transfer resulting in less onerous responsibilities would.[195] Accordingly, the court held that the shift-assignment policy did not lead to any significant disparities in employment conditions between men and women, and thus could not support a discrimination claim.[196]

Circuits requiring material or significant adverse actions also tend to highlight that these actions must be assessed objectively.[197] In applying this objective standard, courts often refuse to acknowledge plaintiffs' personal preferences or disappointments when analyzing whether an employment action caused a sufficiently adverse impact.[198] Thus, even when it is clear that a particular employment decision adversely affected an employee due to their individual circumstances, courts will dismiss the claim if the plaintiff cannot show any objective negative impact on their employment.[199] For example, the U.S Court of Appeals for the Second Circuit held in *Williams v. R.H. Donnelley, Corp.*[200] that, regardless of discriminatory motive, an employer's denial of an employee's requested transfer was not actionable because she had not sought to be transferred to an objectively better position, and therefore the denial could not have disadvantaged her.[201] The plaintiff, Charlina Williams, preferred to work in the area to which she had requested to be transferred because she had a home there.[202] Because this preference was based on personal reasons rather than, for example, an increase in compensation or prestige, the court stated that "such subjective, personal disappointments do not meet the objective indicia of an adverse employment action."[203]

2. Recent Expansions

Although the materially adverse action requirement has been a hallmark of Title VII jurisprudence for decades, some recent decisions reflect a

195. *See id.*
196. *See id.*
197. *See* Hinson v. Clinch Cnty. Bd. of Educ., 231 F.3d 821, 829 (11th Cir. 2000) ("We use an objective test, asking whether 'a reasonable person in [the plaintiff's] position would view the employment action in question as adverse.'" (quoting Doe v. Dekalb Cnty. Sch. Dist., 145 F.3d 1441, 1449 (11th Cir. 1998))); Pegram v. Honeywell, Inc., 361 F.3d 272, 283 (5th Cir. 2004) ("[U]nder Title VII principles, an employment transfer may qualify as an 'adverse employment action' if the change makes the job 'objectively worse.'" (quoting Hunt v. Rapides Healthcare Sys. LLC, 277 F.3d 757, 770 (5th Cir. 2001))).
198. *See* Sanchez v. Denver Pub. Schs., 164 F.3d 527, 532 n.6 (10th Cir. 1998) (stating that an employee's negative perception of a transfer does not render it an adverse action); O'Neal v. City of Chicago, 392 F.3d 909, 913 (7th Cir. 2004) (explaining that subjective preference is insufficient to render a change in position an adverse action).
199. *See, e.g.*, Grube v. Lau Indus., Inc., 257 F.3d 723, 726, 728 (7th Cir. 2001) (holding that a shift change did not constitute adverse action even though the new hours interfered with the employee's ability to care for her husband, who was suffering from leukemia).
200. 368 F.3d 123 (2d Cir. 2004).
201. *See id.* at 128.
202. *See id.*
203. *See id.*

newfound realization that this requirement is neither required by Title VII nor consistent with its statutory purpose.

The Sixth Circuit recently revisited its approach to Title VII actionability in *Threat v. City of Cleveland*.[204] In this case, the Sixth Circuit confirmed that it read a de minimis exception into Title VII's antidiscrimination provision to screen out truly minor claims, but it found that a discriminatory schedule change fell outside of this exception.[205] The claim at issue was brought by several captains of the city of Cleveland Division of Emergency Medical Service (EMS).[206] The plaintiffs alleged that the city's EMS commissioner had rescheduled a Black captain to the night shift, replacing his slot in the day shift with a white captain to "diversify the shift."[207] Consistent with prior cases, the district court held that shift changes did not satisfy the Sixth Circuit's requirement of a "materially adverse employment action" in Title VII antidiscrimination claims.[208] Relying on a textualist analysis of Title VII, the circuit court reversed, labeling the conclusion that scheduling is a term of employment "straightforward."[209] The court concluded that the materiality requirement included in both Sixth Circuit and other circuit cases was not meant to be a heightened threshold for Title VII plaintiffs to overcome, but rather a shorthand for the "operative words in the statute" that should be read in the context of a de minimis requirement.[210]

In another recently decided case, *Chambers v. District of Columbia*,[211] the D.C. Circuit discarded altogether the "objectively tangible harm" standard that it had previously imposed on Title VII discrimination plaintiffs.[212] Mary Chambers, a female employee for the Office of the Attorney General for the District of Columbia, claimed that she had requested multiple transfers to other units within the office and been denied, whereas similarly situated male employees' transfer requests were granted.[213] The district court held that, regardless of whether Chambers's employer refused her transfer requests because she was a woman, Chambers could not claim that the denial of a transfer constituted "objectively tangible harm" as required by the circuit's precedent.[214] After a panel of the circuit court affirmed, the full court reviewed the decision en banc and overruled this precedent.[215]

In its opinion, the court observed that this additional requirement not only lacked textual support, but also contravened the "objectives of Title VII's antidiscrimination provision."[216] Although the court acknowledged that

204. 6 F.4th 672 (6th Cir. 2021).
205. *See id.* at 678–80.
206. *See id.* at 675–76.
207. *See id.* at 676.
208. *See id.* at 677.
209. *See id.*
210. *See id.* at 679.
211. 35 F.4th 870 (D.C. Cir. 2022).
212. *See id.* at 872.
213. *See id.* at 873.
214. *See id.* (quoting Brown v. Brody, 199 F.3d 446, 457 (D.C. Cir. 1999)).
215. *See id.* at 878.
216. *See id.*

other circuits require an additional showing of tangible harm in the context of discrimination claims predicated on job transfers, it emphasized the lack of clarity as to what that showing requires.[217] Interestingly, the court explicitly declined to decide whether Title VII incorporates a de minimis exception at all, explaining that a discriminatory transfer would surpass a de minimis standard regardless.[218]

The *Chambers* court expressly exempted the antidiscrimination provision from the "materially adverse" requirement that the Supreme Court applied to the antiretaliation provision in *Burlington Northern*.[219] The court explained that this requirement provided a limitation that was warranted for the antiretaliation provision but unnecessary for the antidiscrimination provision.[220] By extending the scope of the antiretaliation provision to nonworkplace harms in *Burlington Northern*, the Court eliminated the need for retaliation plaintiffs to prove that the challenged conduct was tied to the "terms, conditions, or privileges of employment."[221] Thus, the *Chambers* court reasoned, the Supreme Court in *Burlington Northern* needed to apply some other objective constraint to the antiretaliation provision to ensure that it was judicially administrable and did not allow claims predicated on trivial harms.[222] The "materially adverse" standard, which the Supreme Court defined as employer actions that would deter a reasonable employee from participating in protected conduct,[223] provided such a limiting principle.[224]

Conversely, the antidiscrimination provision expressly mandates that the challenged action relate to the "terms, conditions, or privileges of employment."[225] Accordingly, the *Chambers* court concluded, this provision already includes the necessary limiting principle.[226] Because judges are capable of objectively analyzing whether the alleged discrimination pertained to the terms, conditions, or privileges of employment, no additional constraint is necessary to avoid an influx of superfluous litigation.[227] The court acknowledged the argument that suits based on minor personnel decisions could lead to employer liability under this approach.[228] However, the court rebutted this argument by recognizing that, under Title VII, employers are free to make employment decisions for

217. *See id.* at 880 ("[W]e acknowledge that the other circuits that have addressed the question have held that a plaintiff challenging the denial of a transfer under Title VII's antidiscrimination provision must make some additional showing of tangible harm. Those circuits, however, speak with discordant voices.").
218. *See id.* at 875.
219. *See id.* at 876–77.
220. *See id.*
221. *See id.* at 876 (citing Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006)).
222. *See id.* at 876–77.
223. *See supra* Part I.D.
224. *See Chambers*, 35 F.4th at 876–77.
225. *See id.* at 877.
226. *See id.*
227. *See id.*
228. *See id.* at 878.

any reason—or even no reason at all—so long as the reason is not the employee's "race, color, religion, sex, or national origin."[229]

3. The "Ultimate Employment Decision" Requirement

In stark contrast to circuits that have reduced the limiting power of the adverse action requirement, the Fifth Circuit recently reaffirmed precedent holding that only "ultimate employment decisions," such as "hiring, granting leave, discharging, promoting, or compensating," qualify as adverse employment actions in the Title VII context.[230] However, the Fifth Circuit then granted rehearing en banc to reevaluate this decision, suggesting that the ultimate employment decision requirement may soon be overturned.[231]

Hamilton v. Dallas County involved a claim brought by nine female detention officers at the Dallas County Jail.[232] Their employment agreements allowed them two days off per week.[233] As most employees preferred to schedule their days off on weekends, Dallas County used a seniority-based system for scheduling preferences.[234] However, in 2019, Dallas County discarded this system and replaced it with a system based entirely on gender.[235] Although the male and female officers performed the same tasks, and the number of inmates was no different on the weekends,[236] the sergeant claimed that giving the male officers weekends off was "safer."[237]

Despite acknowledging that the policy was facially discriminatory and may make the female officers' jobs "objectively worse," the district court dismissed the complaint based on the plaintiffs' failure to plead what qualifies as an "adverse employment action" under Fifth Circuit precedent.[238] On appeal, a panel of the Fifth Circuit conceded that the system clearly involved discrimination with respect to the terms and conditions of the women's employment and was thus unlawful according to the plain text of Title VII.[239] Nonetheless, the Fifth Circuit affirmed the dismissal.[240]

In its opinion, the Fifth Circuit recognized that the "ultimate employment decision" requirement was both divorced from Title VII's statutory text[241]

229. *See id.*
230. Hamilton v. Dallas County, 42 F.4th 550, 557 (5th Cir.) (quoting Welsh v. Fort Bend Indep. Sch. Dist., 941 F.3d 818, 824 (5th Cir. 2019)), *reh'g en banc granted, opinion vacated*, 50 F.4th 1216 (5th Cir. 2022).
231. *See* Hamilton v. Dallas County, 50 F.4th 1216 (5th Cir. 2022).
232. *See Hamilton*, 42 F.4th at 552.
233. *See id.*
234. *See id.*
235. *See id.*
236. *See id.* at 552 n.2.
237. *Id.* at 552. The employer did not provide any explanation or justification for this assertion. *See id.*
238. *See id.* at 553.
239. *See id.*
240. *See id.* at 557.
241. *See id.* (referring to the ultimate employment decision requirement as a "deviation from the text of Title VII").

and inconsistent with the decisions of its sister circuits.[242] However, because the Fifth Circuit's rule of orderliness permits overruling precedent only when there is an intervening change in the law or through the ruling of an en banc court,[243] the court was bound to adhere to this requirement.[244] At the same time, the court referred to this case as an "ideal vehicle" for reevaluating the ultimate employment decision requirement.[245] A majority of Fifth Circuit judges recently voted to heed the panel's call, deciding to vacate the decision in *Hamilton* and rehear the case en banc.[246]

Because the defendant directly conceded that the policy was based on a protected characteristic,[247] *Hamilton* is a salient example of the injustice caused by imposing an additional substantive requirement for Title VII claims. Although this example may be especially striking, it is not unique. The Fifth Circuit has rejected a host of other discrimination claims that were not predicated on ultimate employment decisions. To name a few—claims brought by employees who were allegedly subjected to substantially more unpleasant working conditions,[248] given far more work to do,[249] and laterally transferred[250] all did not survive dismissal.

Considering the strong language disapproving of the ultimate employment decision requirement in *Hamilton*,[251] it seems likely that the en banc court will discard this stringent standard. However, it is less clear what level of materiality, if any, the court will choose as a replacement.

III. REPLACING THE MATERIALITY REQUIREMENT WITH MINIMAL OBJECTIVE ADVERSITY AND A NEXUS TO EMPLOYMENT

The heightened adverse action requirement obligates discrimination victims to overcome a substantive hurdle that is disconnected from both the text of Title VII and the Supreme Court's expansive interpretations of the

242. *See id.* (highlighting the persuasiveness of decisions that reject the ultimate employment decision requirement).

243. *See* Jacobs v. Nat'l Drug Intel. Ctr., 548 F.3d 375, 378 (5th Cir. 2008).

244. *See Hamilton*, 42 F.4th at 557.

245. *See id.*

246. *See* Hamilton v. Dallas County, 50 F.4th 1216 (5th Cir. 2022). The en banc court heard oral arguments on January 24, 2023. *See Court and Special Hearings Calendars*, U.S. CT. OF APPEALS FOR THE FIFTH CIR., http://www.ca5.uscourts.gov/oral-argument-information/court-calendars/Details/1632/ [https://perma.cc/A5BC-D9HZ] (Dec. 5, 2022).

247. *See Hamilton*, 42 F.4th at 555 ("[T]his court rarely encounters direct evidence cases because employers seldom admit to a discriminatory motive as the sergeant did here.").

248. *See* Peterson v. Linear Controls, Inc., 757 F. App'x 370, 373 (5th Cir. 2019) (finding no adverse employment action in case in which Black employees were forced to work outside in the heat without access to water while white employees worked inside in the air conditioning).

249. *See* Ellis v. Compass Grp. USA, Inc., 426 F. App'x 292, 296 (5th Cir. 2011) ("Imposing a higher workload than that given to other employees is not an adverse employment action under title VII.").

250. *See* Alvarado v. Tex. Rangers, 492 F.3d 605, 611–12, 612 n.4 (5th Cir. 2007) (dismissing claim predicated on lateral transfer, although it was "undisputed" that plaintiff was the member of a protected class and treated less favorably than employees outside of the protected class).

251. *See Hamilton*, 42 F.4th at 557.

statute.[252] Furthermore, allowing judges to dismiss claims that they deem to be insufficiently material opens the door for inconsistency,[253] bias, and prejudice to discrimination plaintiffs.[254] The substantial number of Title VII discrimination claims brought annually,[255] and the infrequency with which such claims successfully proceed to trial,[256] demonstrate that circuits must clarify what qualifies as discrimination under Title VII. Further, the current confusion among circuits[257] and recent progressions in favor of discrimination plaintiffs[258] suggest that Supreme Court intervention is warranted.[259]

Part III of this Note contends that courts should adopt a standard of minimal objective adversity, and that any additional significance requirement is both unneeded in the context of discrimination claims and contrary to the purpose of Title VII. Part III.A argues that a minimal showing of objective adversity, measured by whether a reasonable employee would consider the action to be harmful, suffices to trigger the protections of Title VII. Part III.B asserts that any additional requirement of materiality is neither necessary nor reconcilable with congressional intent. Finally, Part III.C explains that eliminating the materiality requirement would not overwhelm the courts as the requirement's proponents fear, and that any additional claims that would proceed absent this standard legitimately merit judicial intervention, regardless of their apparent insignificance.

A. Requiring Minimal Objective Adversity

To assert a discrimination claim under Title VII, a plaintiff must show that, at least to some minimal degree, they experienced an injury or harm.[260] Some legal scholars suggest that mandating any showing of adversity as a prerequisite to maintaining a cause of action under Title VII is more than what the language of the statute requires.[261] However, although the word "adverse" may not appear in the statute, the phrase "discriminate *against*"[262] indicates that some injury is needed to invoke the protections of Title VII.[263] This also comports with Article III's requirement that a plaintiff assert a

252. *See supra* notes 178, 216, 241 and accompanying text.
253. *See supra* notes 183–96 and accompanying text.
254. *See supra* notes 165–66 and accompanying text.
255. *See supra* notes 161–63 and accompanying text.
256. *See supra* note 164 and accompanying text.
257. *See supra* Part II.B.
258. *See supra* Part II.B.2.
259. *See supra* note 192. Although *Muldrow v. City of St. Louis* would present one occasion for the Supreme Court to address the heightened adverse action requirement, the wealth of circuit court cases applying this requirement provides ample opportunity for the Court to clarify the appropriate standard.
260. *See infra* note 263 and accompanying text.
261. *See, e.g.*, Lidge, *supra* note 26, at 347; White, *supra* note 51, at 1186.
262. 42 U.S.C. § 2000e-2(a)(1) (emphasis added).
263. *See* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 59 (2006) ("[T]he term 'discriminate against' refers to distinctions or differences in treatment that injure protected individuals.").

legally cognizable injury to have standing in federal court.[264] Thus, differential treatment that objectively benefits the employee—or an action that an employee requested—should not be actionable as discrimination under Title VII.[265]

An objective evaluation of adversity is also necessary. In *Burlington Northern*, the Supreme Court required an objective analysis to avoid requiring judges to decipher individual plaintiffs' subjective feelings, reasoning that that would likely lead to injustice and inconsistency.[266] Thus, an objectively positive or neutral action that irrationally upsets an employee would not suffice. This standard allows employers to continue making certain rational and commonplace differentiations between employees based on protected characteristics without violating Title VII.[267]

At the same time, this objective standard should take into account the circumstances of each plaintiff, asking whether a reasonable employee in the plaintiff's situation would consider the action to be harmful. Thus, although an action could be neutral—or even beneficial—to certain employees, it should still be actionable if it harms a plaintiff because of their distinctive circumstances.[268] The Supreme Court has already adopted this method when analyzing whether an action was materially adverse in the context of retaliation claims.[269] This approach would avoid requiring judges to inquire into how each plaintiff subjectively feels, while still recognizing that significant harm can result from actions that may not initially appear to be unfavorable.[270]

Moreover, this approach would also permit claims to proceed even if the underlying injury was only dignitary, so long as a reasonable employee would consider such an action to be harmful. Therefore, certain claims with no further concrete employment consequences following the contested action would suffice. For example, even if a sex-based assignment system does not

264. *See* Threat v. City of Cleveland, 6 F.4th 672, 678 (6th Cir. 2021) (citing TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2200 (2021)).

265. *See id.*

266. *See supra* note 136 and accompanying text.

267. Gendered bathroom facilities are a typical example of an employment condition that involves differentiation between employees based on a protected characteristic but does not violate Title VII. *See* Brief for the United States as Amicus Curiae at 11, Peterson v. Linear Controls, Inc., 140 S. Ct. 2841 (2020) (mem.) (No. 18-1401), 2020 WL 1433451. The erosion of the gender binary and the plight of transgender employees makes this analysis more complex. *See* Sarah Bacot, *How Bathrooms Enforce the Gender Binary*, POINT FOUND. (Mar. 23, 2017), https://pointfoundation.org/community/blog/bathrooms-gender-binary [https://perma.cc/HPZ5-PWNY]. Although these developments are beyond the scope of this Note, the nuances they highlight demonstrate the importance of analyzing objective adversity on a case-by-case basis.

268. *Cf. supra* notes 200–03 and accompanying text (discussing the application of an objective standard that does not consider a plaintiff's personal circumstances).

269. *See supra* note 138 and accompanying text; *see also* Washington v. Ill. Dep't of Revenue, 420 F.3d 658, 662 (7th Cir. 2005) (explaining that a schedule change that may not be materially adverse for a normal employee could be materially adverse for a plaintiff who required flex-time to care for her son with Down syndrome).

270. *See, e.g.*, *supra* note 5 (explaining the harmful effects that could accompany being denied weekends off as a detention officer).

subsequently lead to employment consequences like a pay reduction or change in responsibilities, a reasonable employee would still likely consider this system to be harmful due to the indignity it causes and the stereotypes that it can entrench.[271] In other words, so long as the contested action pertained to the terms and conditions of employment and reasonably caused some harm to the plaintiff, it should not matter that the nature of the resulting harm is personal, dignitary, or similarly removed from the workplace.[272] If the action itself was employment-related, and a reasonable employee would agree that some harm resulted, no further inquiry is needed.

B. Replacing the Heightened Materiality Standard with a Nexus to Employment

Further, although a plaintiff must show some objective harm to bring a discrimination claim under Title VII, any additional requirement that this harm rise to a heightened level of significance must be eliminated. Disappointingly, even circuits that have recently shifted in favor of Title VII plaintiffs have shied away from holding that all discriminatory conduct is actionable, regardless of the supposed significance of the alleged harm.[273] The Sixth Circuit in *Threat* reaffirmed that it read a de minimis exception into Title VII,[274] and the D.C. Circuit in *Chambers* expressly declined to answer whether this exception exists.[275] However, the Supreme Court has acknowledged that, despite the foundational nature of the de minimis exception in statutory construction, it should not be applied in the face of a "contrary indication."[276] Congress has amply supplied such a contrary indication through the broad wording and legislative history of Title VII,[277] as well through the 1991 amendments.[278]

The assertion that Title VII includes a de minimis exception does not align with Congress's decision to allow liability even when an employer would have taken the same contested action absent consideration of a protected characteristic.[279] If courts were meant to adhere to the de minimis exception

271. *See* Cox v. Am. Cast Iron Pipe Co., 784 F.2d 1546, 1561 (11th Cir. 1986) ("[W]hat is small in principal is often large in principle." (quoting Jenkins v. United Gas Corp., 400 F.2d 28, 32–33 (5th Cir. 1968))); Brief of Amicus Curiae, National Employment Lawyers Association, in Support of Petitioner at 10, Muldrow v. City of St. Louis, No. 22-193 (U.S. filed Aug. 21, 2022) (asserting that the humiliation and indignity suffered by victims of intentional discrimination is the injury that Title VII was enacted to redress); *see also* Whitely, *supra* note 2 (explaining that plaintiffs found the sex-based scheduling system "degrading").

272. *See* discussion *supra* Part II.B (addressing how *Meritor* clarified that emotional or environmental harms can trigger Title VII protections); *cf. supra* notes 13–18 and accompanying text (discussing the Third Circuit's conclusion that disproportionately assigned outdoor work in intense heat was not an adverse action because it did not change the plaintiff's underlying employment responsibilities).

273. *See supra* Part II.B.

274. *See* Threat v. City of Cleveland, 6 F.4th 672, 678 (6th Cir. 2021).

275. *See* Chambers v. District of Columbia, 35 F.4th 870, 875 (D.C. Cir. 2022).

276. *See supra* note 159.

277. *See supra* Part I.

278. *See supra* notes 82–84 and accompanying text.

279. *See* discussion *supra* Part I.A.2.

when interpreting the antidiscrimination provision, it would mean that an employer could permissibly base an employment decision *entirely* on a protected characteristic and still avoid liability so long as the action was seemingly minor. However, pursuant to the 1991 amendments, the same employer could be held liable for considering protected characteristics in an employment decision even if this consideration ultimately played no concrete role (because the employer would have taken the same action regardless).[280] By including a de minimis exception for cases of proven discriminatory intent, courts are improperly focusing only on the *results* of impermissible discrimination rather than on the fact that discrimination occurred.

Moreover, although the Court indicated that showing material harm is necessary to allege an actionable retaliation claim under Title VII,[281] any significance threshold beyond a minimal showing of adversity is both unnecessary and inappropriate in the context of discrimination claims. As the court acknowledged in *Chambers*, *Burlington Northern* held that retaliatory conduct does not necessarily need to be employment-related.[282] Because the Court eliminated the limiting principle that the action be tied to the workplace, it was necessary to include a materiality standard in the context of the antiretaliation provision.[283] Otherwise, the potential that courts would be flooded with claims based on "snubs" or a "lack of good manners" would be too great, and Title VII's protections could be invoked for every slight or insensitive comment.[284] However, unlike the antiretaliation provision, the potentially limitless scope of the word "discrimination" is cabined by the remaining language of the antidiscrimination provision—i.e., that the discrimination must be "with respect to [the employee's] compensation, terms, conditions, or privileges of employment."[285]

The concern that employer liability under Title VII in the absence of a de minimis exception would be unlimited disregards the inherent limitations in the requirement that the alleged discrimination relate to the terms, conditions, or privileges of the plaintiff's employment.[286] In the examples of de minimis conduct that the Court listed as support for a materiality requirement in *Burlington Northern*, a common thread is apparent: the actions lack any substantial nexus to employment.[287] For example, although slights and

280. *See supra* notes 81–84 and accompanying text.

281. *See supra* note 133 and accompanying text.

282. *See* Chambers v. District of Columbia, 35 F.4th 870, 876–77 (D.C. Cir. 2022); *supra* note 123 and accompanying text.

283. *See Chambers*, 35 F.4th at 877; *supra* notes 133–35, 220–24 and accompanying text.

284. *See* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006) (highlighting the need to prevent "petty slights" and "minor annoyances" from becoming actionable as federal retaliation claims).

285. 42 U.S.C. § 2000e-2(a)(1); *see supra* notes 225–27 and accompanying text.

286. *See supra* notes 225–27 and accompanying text.

287. *See Burlington Northern*, 548 U.S. at 68 (listing the sort of "trivial harms" that the materiality requirement aims to filter out, including "the sporadic use of abusive language," teasing, insensitive jokes, petty slights, minor annoyances, personality conflicts, snubbing, and bad manners).

insensitive comments are understandably upsetting, insensitivity and pettiness bear no relation to an individual's employment in a particular workplace. Accordingly, such affronts cannot be said to alter the terms or conditions of employment unless they are sufficiently pervasive to create a hostile work environment.[288] As *Meritor* describes, pervasive discriminatory comments or harassment in the workplace fall under Title VII, but stray comments or slights do not.[289] One way to understand this distinction is that these sorts of stray comments can occur anywhere, and it is only once they are commonplace or particularly egregious that they actually alter the conditions of employment and are thus inextricably tied to the workplace.[290]

On the other hand, explicit alterations such as discriminatory lateral transfers[291] and discriminatory shift changes[292] are inseparable from the employment relationship,[293] regardless of whether the victim of discrimination can show material harm as a result. Therefore, the de minimis standard is not necessary to weed out claims involving slights and annoyances that do not rise to the level of a hostile work environment—the terms of the statute are capable of doing this without an extratextual requirement of materiality. Thus, the relevant query should not be whether a particular action is sufficiently significant or material, but whether it actually bears a nexus to the terms, conditions, or privileges of the plaintiff's employment.

Additionally, as the Supreme Court made clear in *Faragher*, the primary purpose of Title VII is to avoid harm entirely, not simply to provide redress.[294] Thus, regardless of the materiality of the contested action, it is appropriate to place the burden on the employer to ensure that they are not making job-related decisions based on protected characteristics.[295] If an employer wants to avoid liability under Title VII's antidiscrimination provision, the solution is simple: do not make decisions with employees' race, color, religion, sex, or national origin in mind.

---

288. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 752 (1998) (explaining that "Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment" and that constructive alterations must be severe or pervasive to be actionable).

289. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986).

290. *See supra* note 97 and accompanying text.

291. *See, e.g.*, *supra* notes 24, 182 and accompanying text.

292. Hamilton v. Dallas County, 42 F.4th 550, 553 (5th Cir.), *reh'g en banc granted, opinion vacated*, 50 F.4th 1216 (5th Cir. 2022).

293. *See* En Banc Brief for Appellee the District of Columbia at 8, Chambers v. District of Columbia, 35 F.4th 870 (D.C. Cir. 2022) (No. 19-7098), 2021 WL 4234225 ("It is difficult to imagine a term of employment more fundamental than the position itself."); *see also Section 15 Race and Color Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Apr. 19, 2006), https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination [https://perma.cc/S7GQ-69YX] ("Work assignments are part-and-parcel of employees' everyday terms and conditions of employment.").

294. Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998).

295. *See supra* note 78 and accompanying text (discussing how the Court in *Price Waterhouse* made it clear that Title VII forbids employers from taking protected characteristics into account when making employment decisions).

C. Eliminating the Materiality Requirement Would Not Needlessly Overwhelm the Courts

Eliminating the extratextual materiality requirement and grounding Title VII analysis in the statutory text would allow many of the claims that circuit courts have dismissed as insufficiently material or adverse to proceed.[296] Although this may increase the number of claims that judges would need to handle, deterrents such as the cost of litigation[297] and the limited remedies available for minor claims[298] would ensure that the courts would not be overwhelmed.[299]

There are also various procedural mechanisms in place to protect employers from unmeritorious suits. If a plaintiff's complaint does not plead sufficient factual matter to be plausible on its face, it will be dismissed before the plaintiff is even allowed discovery.[300] Additionally, in claims based on circumstantial evidence, the *McDonnell Douglas* framework both requires plaintiffs to allege that the circumstances give rise to an inference of discrimination and allows defendants to assert a nondiscriminatory reason for the action.[301] Relying on these protections rather than requiring an additional showing of materiality refocuses Title VII analysis back on what the statute is designed to determine: whether an employer has participated in impermissible discrimination.

More importantly, although the limited remedies that would be available for supposedly "trivial" harms would discourage plaintiffs from bringing petty suits, allowing suits to proceed regardless of whether the harm seems insignificant would eliminate the "license to discriminate"[302] that the adverse

296. *See supra* note 228 and accompanying text.

297. The assumption that discrimination plaintiffs will be incentivized to assert frivolous claims ignores many of the realities of the legal system, including the high costs, time expended, and emotional drain involved in bringing suit. *See* White, *supra* note 51, at 1163 n.230.

298. *See* Lidge, *supra* note 26, at 408. Professor Ernest F. Lidge III also points out that if an action was not "materially adverse" when it was taken, then injunctive relief reversing the action is also unlikely to be "material" for the employer. *See id.*

299. The approach of the National Labor Relations Board (NLRB) with regard to antiunion discrimination is also instructive here. The NLRB has acknowledged that seemingly insignificant harms can constitute actionable discrimination under the National Labor Relations Act of 1935. *See* 29 U.S.C. § 158(a)(3). Purporting to cover all "nontrivial" actions, the NLRB has granted relief for employer actions that federal courts would be unlikely to recognize. *See* Lidge, *supra* note 26, at 404 (listing ostensibly minor actions that the NLRB had found to constitute violations when motivated by antiunion animus, including the halting of free coffee, a single-day transfer, and the elimination of a free parking space). Professor Lidge argues that all nontrivial actions, like those covered by the NLRA, should be actionable under Title VII. *Id.* Although this approach still imposes a significance requirement that, however minimal, is more than what the language of Title VII requires, this analogy is a useful tool for demonstrating how remedying discrimination that is less than materially adverse will not necessarily clog the courts.

300. *See* Chambers v. District of Columbia, 35 F.4th 870, 878 (D.C. Cir. 2022).

301. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); *see also supra* note 60 and accompanying text.

302. Lewis v. City of Chicago, 496 F.3d 645, 654 (7th Cir. 2007) (quoting Farrell v. Butler Univ., 421 F.3d 609, 614 (7th Cir. 2005)).

action requirement has created. This approach would allow victims of discrimination to have their day in court, thus ensuring that no employee is disadvantaged in the workplace based solely on who they are.[303] It would also avoid the pitfalls of subjective judicial determinations of materiality, which often ignore the psychological[304] or dignitary[305] harms that can arise from a seemingly unimportant employment decision. Considering such factors, it is unlikely that any injury arising from a discriminatory employment decision can ever accurately be labeled de minimis.[306]

CONCLUSION

Congress designed Title VII to eradicate workplace discrimination. The statutory language does not qualify this remedial goal, and neither should the courts. By encouraging subjective judicial determinations as to what kinds of discrimination are sufficiently significant, the materially adverse action requirement has impermissibly limited recovery for discrimination plaintiffs and exposed them to judicial inconsistency and further inequity. As certain circuit courts are finally beginning to recognize, shielding employers from liability for certain categories of discriminatory acts reflects artificial judicial limitations on Title VII's scope rather than any legitimate statutory constraints. In light of the wide range of employer actions that the Supreme Court has found to violate Title VII, and clear congressional intent for an expansive reading of the statute, the materiality requirement must be eliminated. Instead, courts should inquire whether a reasonable employee would consider an employment action to be harmful with the circumstances of the plaintiff in mind. If this minimal adversity standard is met and the contested action involved the terms, conditions, or privileges of employment, Title VII has been violated, regardless of the apparent significance of the harm.

The recent decisions in *Threat* and *Chambers* demonstrate progress in the right direction. Similarly, the Fifth Circuit's decision to grant en banc review of the *Hamilton* decision suggests that other circuits may also begin to alleviate the burden on discrimination plaintiffs to prove that their harm was material. However, rather than hedging around the question of whether a de minimis exception is ever appropriate, courts should clarify that an extratextual materiality requirement has no place in Title VII jurisprudence. Because Congress explicitly limited the statute's scope to the terms, conditions, and privileges of employment, any additional stricture is unnecessary. If lower courts continue to insist on imposing this additional obstacle, the Supreme Court must intervene to eliminate it. A judicial gloss that gives employers a free pass to discriminate is irreconcilable with the

303. *See* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 63 (2006) (explaining that the purpose of the antidiscrimination provision is to forbid injury to employees based on who they are).

304. *See supra* note 5.

305. *See supra* note 271 and accompanying text.

306. *Cf. supra* note 1.

history and goals of Title VII, and it is time that courts recognize this blatant interpretive dissonance.