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## A Material Question: Does Title VII Apply to Minor Employment Actions?

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**A MATERIAL QUESTION: DOES TITLE VII APPLY TO MINOR  
EMPLOYMENT ACTIONS?**

ROBERT A. KEARNEY\*

*As the Supreme Court recently stated, few federal laws can rank with Title VII of the Civil Rights Act of 1964. That makes it tempting to reserve the law for cases that are equally significant: a termination, for example, and not a shift change. Indeed, courts have been saving Title VII in this way for decades, principally by reading words into the statute that are not there and requiring a plaintiff to point to a “material, adverse employment action.” Creating a shadow statute is not legitimate, and it is also unnecessary because of four words already in the law: “compensation, terms, conditions, or privileges” of employment. Those are the only words that can be used to rule certain cases out. And if that means a minor case is ruled in? The beauty of a major law like Title VII is that there are no minor cases.*

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## INTRODUCTION

For years Title VII of the Civil Rights Act of 1964<sup>1</sup> has struggled to find its way. The blame is shared. Congress wrote a statute that is equal parts sublime for its simplicity and maddening for its elasticity. Some words that are in the statute—such as “because of . . . sex”<sup>2</sup>—appear unlikely sources of misinterpretation, and yet it was decades before the Supreme Court determined that sex included sexual orientation and not just one’s assigned or biological sex at birth.<sup>3</sup> The meaning of the words “because of” is still elusive, both in court decisions and in the minds of scholars.<sup>4</sup>

Other words—sexual harassment comes immediately to mind for most employment lawyers—are not in the statute at all,<sup>5</sup> and it is accurate to say that they are litigant and judicial interpretations of the “because of sex” words.<sup>6</sup> And in the category of harassment, the words that we now take for granted to connect to Black Letter harassment law—“hostile working environment,”<sup>7</sup> “severe or pervasive,”<sup>8</sup> and “tangible employment actions”<sup>9</sup>—remain in court opinions and briefs, but not in the law itself.

The compromise described above, where Congress has amended Title VII on some points but not on major ones<sup>10</sup> that have caused decades of

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1. Civil Rights Act of 1964, Pub. L. No. 88-353, § 701, 78 Stat. 241, 253.

2. 42 U.S.C. § 2000e-2(a)(1) (prohibiting discrimination “because of” race, color, religion, sex, or national origin).

3. See *Bostock v. Clayton County*, 140 S. Ct. 1731, 1740–41 (2020).

4. See *id.* at 1751–52 (noting that while Title VII’s principal terms have remained unchanged, its statutory breadth has allowed our understanding of it to evolve in ways Congress could not have anticipated); see also Cary Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 HARV. L. REV. 1307, 1318–19 (2012) (“Title VII seems particularly suited to a dynamic form of interpretation, which considers not only text and legislative history, but ‘also what [a statute] ought to mean in terms of the needs and goals of our present day society.’”) (quoting William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1480 (1987)).

5. 42 U.S.C. § 2000e-2.

6. See *Bostock*, 140 S. Ct. at 1752 (“Over time, though, the breadth of the statutory language proved too difficult to deny . . . . And by the late 1970s, courts began to recognize that sexual harassment can sometimes amount to sex discrimination.”); see also *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986) (noting that the Supreme Court was at the end of the wave, not the front, of federal courts to hold that “a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment”).

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

8. *Id.* at 67 (stating that sexual harassment “must be sufficiently severe or pervasive” to be actionable); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (“This standard, which we reaffirm today, takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury.”).

9. See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 64–66 (2006) (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998) (discussing appropriateness of using the term in some sexual harassment cases if the issue is vicarious liability but not endorsing its applicability to either retaliation cases or general discrimination cases)).

10. Two years after the Supreme Court issued its opinion in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), Congress enacted The Civil Rights Act of 1991, which amended the 1964 Act.

circuit conflicts and have required Supreme Court resolution,<sup>11</sup> is lamentable but not likely to change. There are other federal statutes that act as intentional torts in the way that Title VII does, but without nearly as much drama. There is no similar handwringing over what constitutes price fixing under the Sherman Antitrust Act<sup>12</sup> or what is trademark infringement under the Lanham Act.<sup>13</sup> Indeed, when it comes to business law, Title VII is distinctive for words and terms that are limiting to one set of eyes and limitless to another.<sup>14</sup>

Against this backdrop enters the latest source of dispute: What counts as an act of employment discrimination? Like the other questions that circled the circuit courts for decades before resolution, it is only a matter of time before the Supreme Court decides the matter. And when it does, though there is some evidence the Court will find a mess,<sup>15</sup> most likely its work will be practical and textual, and it pointedly will not seek to add any more words to a statute that can be both spare and straightforward at the same time.

Title VII's wording is expansive, and almost 60 years after its passage we are still surprised by its scope. It should be even more surprising what courts have been willing to do: read determinative words into the law that are not there. As explained below, Title VII does not distinguish between major or material employment actions and minor or immaterial ones.

## I. WHAT THE STATUTE SAYS

Under Title VII, “[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or

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Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. Among other changes, the 1991 Act added a motivating factor test to discrimination law but made no change to Title VII's substantive provision, § 703(a). *See id.* § 107, 105 Stat. at 1075–76 (codified at 42 U.S.C. § 2000e-2(m)).

11. *See, e.g., Bostock*, 140 S. Ct. at 1752 (holding that Title VII proscribes sexual orientation discrimination); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (holding that Title VII proscribes same-sex sex discrimination); *Harris*, 510 U.S. at 21 (holding that sexual harassment under Title VII does not require evidence of psychological harm or injury).

12. Sherman Act, 26 Stat. 209 (1890) (codified at 15 U.S.C. § 1).

13. Trademark Act, 60 Stat. 427 (1946); *see* 15 U.S.C. § 1114(1).

14. Actually, the same set of eyes may see Title VII one way and then another. *See Bostock*, 140 S. Ct. at 1757 (Alito, J., dissenting) (“[U]ntil 2017, every single Court of Appeals to consider the question interpreted Title VII's prohibition against sex discrimination to mean discrimination on the basis of biological sex.”).

15. Over 20 years ago, Judge Posner made an effort to categorize the “three groups” of reported cases in which courts agreed that an employment action was sufficiently tangible and even found a “variant” of one of those groups. *Herrnreiter v. Chi. Housing Auth.*, 315 F.3d 742, 744–45 (7th Cir. 2002); *see also* Ernest F. Lidge III, *What Types of Employer Actions Are Cognizable Under Title VII?: The Ramifications of Burlington Northern & Santa Fe Railroad Co. v. White*, 59 RUTGERS L. REV. 497 (2007); Rosalie Berger Levinson, *Parsing the Meaning of ‘Adverse Employment Action’ in Title VII Disparate Treatment, Sexual Harassment, and Retaliation Claims: What Should Be Actionable Wrongdoing?* 56 OKLA. L. REV. 623 (2003); Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L. J. 1121 (1998).

otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."<sup>16</sup> There is no need to struggle over the meaning of "employment practice," as that is the term defined.<sup>17</sup> Nor should there be much confusion over who is an employer, which the statute defines,<sup>18</sup> and what it means "to discriminate against"<sup>19</sup> another person, which the Supreme Court has explained.<sup>20</sup>

The four categories, "compensation, terms, conditions, or privileges of employment,"<sup>21</sup> are somewhat murky, but still unlikely to cause confusion. Compensation refers to pay.<sup>22</sup> Congress did not separately define "terms, conditions, or privileges of employment" as the phrase is to be taken as a whole and not spliced and diced. One's pay is both compensation and a likely term of employment, while work hours are simple terms. An employee's handbook undoubtedly captures many of the conditions of employment, such as arriving to work on time, which would also be a term, of course. The important point is that there is no definition of the phrase and no list of examples,<sup>23</sup> which has led the Supreme Court to state on several occasions that Congress intended the phrase to be read expansively.<sup>24</sup> Critically, the

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16. 42 U.S.C. § 2000e-2(a)(1).

17. Title VII has two main substantive provisions: Sections 703(a)(1) and (a)(2). Section 703(a) states that it is unlawful for employers:

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

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

42 U.S.C. § 2000e-2(a).

18. Under the statute, "[t]he term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person." *Id.* § 2000e-(b).

19. *See id.* § 2000e-2(a)(1) (making it unlawful "to discriminate against any individual" because of listed protected characteristics).

20. "No one doubts that the term 'discriminate against' refers to distinctions or differences in treatment that injure protected individuals." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 59 (2006).

21. *See* 42 U.S.C. § 2000e-2(a)(1) (stating that only discrimination "with respect to . . . compensation, terms, conditions, or privileges of employment" is unlawful).

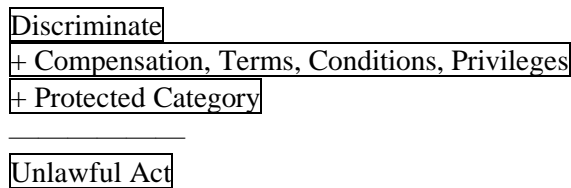
22. U.S. EQUAL EMP. OPPORTUNITIES COMM'N, EEOC-CVG-2001-3, EEOC COMPLIANCE MANUAL §10-III (2000) ("The term 'compensation' includes any payments made to, or on behalf of, an employee as remuneration for employment.").

23. *See* 42 U.S.C. § 2000e-2(a).

24. *See 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

words “with respect to” anticipate an employer decision that affects some part of the “compensation, terms, conditions, or privileges of employment,” as the “with respect to”<sup>25</sup> words are limiting in an important way: A difference in treatment must be tied to the phrase in order to be unlawful.<sup>26</sup> Put another way, a difference in treatment that is wrong,<sup>27</sup> but not tied to one’s compensation, terms, conditions, or privileges of employment, is not unlawful, though it is still worthy of scorn.<sup>28</sup>

In short, Title VII makes it unlawful for an employer (1) to discriminate; (2) with respect to compensation, terms, conditions, and privileges of employment; (3) because of a protected characteristic.<sup>29</sup> As a formula, it may be helpful to visualize what Title VII proscribes in this way:



## II. WHAT THE STATUTE DOES *NOT* SAY

Here are four words that do not appear anywhere in the “unlawful employment practices” section of Title VII: material, adverse employment

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spectrum of disparate treatment of men and women in employment.”) (internal quotation marks omitted); *see also* *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor*’s “standard, which we reaffirm today”). *Meritor*’s well-known “entire spectrum of disparate treatment” statement, 477 U.S. at 64, can be traced to *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971). Justice Stevens was a Circuit Judge on the Seventh Circuit and dissented from *Sprogis*. 444 F.3d at 1202. He wrote a concurring opinion in *Meritor*. 477 U.S. at 73. For its part, EEOC guidance states that the phrase “terms, conditions, or privileges of employment” should be “read in the broadest possible terms.” U.S. EQUAL EMP. OPPORTUNITY COMM’N, EEOC-CVG-1982-3, CM-613 TERMS, CONDITIONS, AND PRIVILEGES OF EMPLOYMENT (1982).

25. *See* 42 U.S.C. § 2000e-2(a).

26. *See* *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81 (1998) (“The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the ‘conditions’ of the victim’s employment.”); *see also* *Washington v. Ill. Dep’t of Revenue*, 420 F.3d 658, 660–61 (7th Cir. 2005) (“[O]nly a ‘severe or pervasive’ change in daily ‘conditions’ of employment ‘may be treated as discriminatory.’”).

27. Judge Easterbrook gives this example in *Washington*: “Suppose a supervisor regularly smiles or nods when a member of his own religious faith walks by, but does not change expression when an adherent of another faith passes through the office.” 420 F.3d at 660.

28. Or not tied to a protected category at all, as in the case of an employer who honestly fired an employee after determining on its own, without consulting the employee or her physician, or even the company’s physician, that its employee was lying about not being able to work. *See* *Kariotis v. Navistar Int’l Transp. Co.*, 131 F.3d 672, 675–77 (7th Cir. 1997) (agreeing that the employer’s investigation “hardly looks world-class”).

29. 42 U.S.C. § 2000e-2(a)(1).

action.<sup>30</sup> They are extra-textual additions or glosses on the statute,<sup>31</sup> and the problem is they are often included in a description of the plaintiff's burden to prove discrimination as if the requirement were part of the well-known, burden-shifting paradigm set out by the Supreme Court in *McDonnell Douglas v. Green*.<sup>32</sup> Taken singularly, the words do not appear to be offensive. To say that something must be material is simply to say that it must be more than a trifling, or something so insignificant that a reasonable person would not seek to make a federal case out of it, even if it was wrong.<sup>33</sup> The idea is that we all have to put up with some unfairness in life, even from employers with seemingly all the power, and courts are not builders of utopias.<sup>34</sup> Besides, materiality in this context is not unique to employment law. In the world of insider trading, not disclosing information that would hold no sway over a trader is not the same as withholding material

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30. *See id.* § 2000e-2(a).

31. *See Threat v. City of Cleveland*, 6 F.4th 672, 679 (6th Cir. 2021) (discussing how “shorthand characterizations of laws should not stray” or the law’s original message will be lost, like “the children’s game of telephone”); *Herrnreiter v. Chi. Housing Auth.*, 315 F.3d 742, 744 (7th Cir. 2002) (stating that the “language we have quoted from the statute and the case law” do not support the plaintiff’s proposed paraphrase).

32. 411 U.S. 792, 802 (1973). In *McDonnell Douglas*, Justice Powell detailed the now firmly established prima facie case for a plaintiff in a discrimination case:

The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.

*Id.*

If the plaintiff meets their initial burden, the employer has the opportunity to provide a non-discriminatory reason for its decision, followed by the plaintiff’s chance to show the reason is pretext, or a lie. *See id.*; *see also Brill v. Lante*, 119 F.3d 1266, 1270 (7th Cir. 1997) (“This is the relay confronting district courts each time they face a discrimination lawsuit brought under the *McDonnell Douglas* framework.”).

33. *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (stating that when determining what constitutes retaliation under Title VII, “[w]e speak of *material* adversity because we believe it is important to separate significant from trivial harms”); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (agreeing in a harassment case that Title VII should not be read as a “general civility code” and that “the statute does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex”); *see also Herrnreiter*, 315 F.3d at 745 (rejecting “trundling out the heavy artillery of federal antidiscrimination law” for “every trivial personnel action that an irritable, chip-on-the-shoulder employee did not like”).

34. *See Kariotis*, 131 F.3d at 678 (noting that an employer’s decision may be wrong, but “a federal court is not a court of industrial relations” and it “must observe its limitations and not ‘sit as a super-personnel department that reexamines an entity’s business decisions’” (quoting *McCoy v. WGN Cont’l Broad. Co.*, 957 F.2d 368, 373 (7th Cir. 1992))).

information.<sup>35</sup> It is still unwise not to disclose it and may well cost someone their job; but it's not unlawful to do so.<sup>36</sup> And, importantly in this context of materiality under Title VII, the notion that some disclosures and non-disclosures are not unlawful is so fundamental and important that materiality is included in the text of 10b-5 promulgated by the Securities and Exchange Commission.<sup>37</sup> Closer to employment law, courts typically require that a contracting party include certain material terms in order for the contract to survive judicial scrutiny.<sup>38</sup> And certainly lawyers are familiar with the term "genuine dispute as to any material fact," which is the summary judgment standard in federal court.<sup>39</sup> It rules out going to trial simply because the

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35. See, e.g., *List v. Fashion Park, Inc.*, 340 F.2d 457, 462 (2nd Cir. 1965) ("The basic test of 'materiality' . . . is whether 'a reasonable man would attach importance (to the fact misrepresented) in determining his choice of action in the transaction in question.'" (quoting AM. L. INST., RESTATEMENT (FIRST) OF TORTS § 538(2)(a) (1938))); see also *Rowe v. Maremont Corp.*, 850 F.2d 1226, 1233 (7th Cir. 1988) ("An omission or misstatement is material if a substantial likelihood exists that a reasonable investor would find the omitted or misstated fact significant in deciding whether to buy or sell a security, and on what terms to buy or sell.").

36. Among other reasons, it would not be unlawful because there is no intent or culpable state of mind on the part of the defendant. See *Aaron v. SEC*, 446 U.S. 680, 696 (1980) ("The language of § 17(a)(1), which makes it unlawful 'to employ any device, scheme, or artifice to defraud,' plainly evinces an intent on the part of Congress to proscribe only knowing or intentional misconduct.").

37. See 17 C.F.R. § 240.10b-5 ("It shall be unlawful for any person . . . [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading"); see also 15 U.S.C. § 78(j)(b) (prohibiting the use of "any manipulative or deceptive device" in connection with the purchase or sale of securities). The "animating purpose" of insider trading laws is to promote honest markets and "thereby promote investor confidence." *United States v. O'Hagan*, 521 U.S. 642, 658 (1997). But it remains a real question precisely what constitutes "material" information that must be disclosed to investors. See *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 38 (2011) ("[The] materiality requirement is satisfied when there is 'a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available'" (quoting *Basic, Inc. v. Levinson*, 485 U.S. 224, 231–32 (1988))); see also Cindy A. Schipani & H. Nejat Seyhun, *Defining "Material, Nonpublic": What Should Constitute Illegal Insider Information?*, 21 *FORDHAM J. CORP. & FIN. L.* 327, 329 (2016) ("We argue that the ambiguity of the term 'material, nonpublic information' enables corporate insiders to engage in problematic, profitable transactions without legal consequence.").

38. See *Bus. Sys. Eng'g, Inc. v. Int'l Bus. Machs., Corp.*, 547 F.3d 882, 888 (7th Cir. 2008) ("The principles of contract state that in order for a valid contract to be formed, an offer must be so definite as to its material terms or require such definite terms in the acceptance that the promises and performances to be rendered by each party are reasonably certain." (quoting *Acad. Chi. Publishers v. Cheever*, 578 N.E.2d 981, 983 (Ill. 1991))).

39. See *FED. R. CIV. P.* 56(a).



plaintiff can point to some areas of disagreement with the defendant.<sup>40</sup> Those areas must matter—in other words, they must be material.<sup>41</sup>

The word “adverse” is not in section 703(a)(1), either,<sup>42</sup> and it is an excellent example of courts straying from the plain text of a statute, though in this case it causes little harm. Title VII tells an employer it may not “discriminate against”<sup>43</sup> an individual, so naturally the action also would be adverse.<sup>44</sup> A termination, or non-hiring, or failure to promote, would each be adverse to an employee.<sup>45</sup> So too would a transfer under the right circumstances.<sup>46</sup> For example, a transfer from one department to another that is on paper only, and results in no change whatsoever to someone’s employment, may not qualify as adverse.<sup>47</sup> But a transfer from a generally preferred shift, such as a day shift that is favored by employees because it aligns with the rest of the world’s schedule, especially family and school life, to a night shift, could easily be accepted as an action “against” an employee.<sup>48</sup>

The word employment is more important than it appears. In the context of a typical disparate treatment case, it means that an individual cannot sue over an act done by an employer outside the employer-employee relationship. We are looking for job actions, in other words.<sup>49</sup> But in the retaliation context,

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40. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (“As to materiality . . . [o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.”).

41. See *id.*

42. As an adverb, the word does appear in the second substantive section of Title VII, Section 703(a)(2). See Civil Rights Act of 1965, Pub. L. No. 88-352, § 703(a)(2), 78 Stat. 241, 255 (codified at 42 U.S.C. § 2000e-2(a)(2)) (making it unlawful for an employer “to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin”).

43. *Id.* § 703(a)(1) (codified at 42 U.S.C. § 2000e-2(a)(1)).

44. Curiously, “Title VII does not define ‘discrimination,’” even though it is “the key term” in the statute’s substantive provision, Section 703(a). *Washington v. Ill. Dep’t of Revenue*, 420 F.3d 658, 660 (7th Cir. 2005). But the meaning of the term is “straightforward” as it refers to “differential treatment.” *Chambers v. District of Columbia*, 35 F.4th 870, 875 (D.C. Cir. 2022) (en banc) (quoting *Jackson v. Birmingham Bd. of Ed.*, 544 U.S. 167, 174 (2005)).

45. These are sometimes referred to as “ultimate employment decisions.” See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 60 (2006) (citing Fifth and Eighth Circuit decisions using an ultimate employment decision standard).

46. See *Herrnreiter v. Chi. Housing Auth.*, 315 F.3d 742, 744–45 (7th Cir. 2002).

47. See *id.* at 745 (“What remains are cases of purely subjective preference for one position over another—which is this case.”).

48. See *Threat v. City of Cleveland*, 6 F.4th 672, 679 (6th Cir. 2021) (“[E]mployer-required shift changes from a preferred day to another day or from day shifts to night shifts exceed any de minimis exception, any fair construction of the anchoring words of Title VII, and for that matter any Article III injury requirement.”).

49. The discriminatory conduct does not have to occur at work, however. Mechelle Vinson’s supervisor began his harassment when he “invited her out to dinner and, during the course of the

the Supreme Court has made it clear that any act, whether connected to someone's employment or not, can qualify as unlawful retaliation under the right circumstances.<sup>50</sup> And the word "action"? It appears to be a way of restating the word practices, and since a single act can constitute a practice under Title VII,<sup>51</sup> there is no reason to wrestle over whether action changes the meaning of the law. It is another word that does not appear in the "unlawful employment practice" part of Title VII<sup>52</sup> and therefore should not be used for these simple reasons: It seeks to replace what is already a simple word (practice); it is no more clarifying than the word it seeks to replace; and over time it can result in the kind of careless judicial work or even mischief that gives a statute an imagined life, straying further and further from its real one.<sup>53</sup>

Because the material adverse employment action phrase is a judicial gloss or rephrasing of words in Title VII that are simple and have straightforward meanings, it is unfortunate that it has been used by the circuit

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meal, suggested that they go to a motel to have sexual relations." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 60 (1986).

50. See *Burlington N.*, 548 U.S. at 60–61.

51. See 42 U.S.C. § 2000e-2(a).

52. See *id.*

53. See *Threat*, 6 F.4th at 679 (warning that shorthand characterizations of laws can stray from the actual law, which risks "converting the ultimate message into something quite different from the original message—indeed sometimes into the opposite message" (quoting *Sexton v. Panel Processing Inc.*, 754 F.3d 332, 337 (6th Cir. 2014))). A good example of this caselaw creep can be found in the Fifth Circuit's earliest decision embracing an "ultimate employment decision[]" in Title VII cases. In *Dollis v. Rubin*, the court of appeals determined that "Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions." 77 F.3d 777, 781–82 (5th Cir. 1995). It cited only one case in support of its determination, *Page v. Bolger*, and that case was outside the circuit. *Id.* at 782 (citing *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981) (en banc)).

Indeed, *Page* did suggest that quintessential Title VII cases involved "personnel actions" such as "hiring, granting leave, discharging, promoting, and compensating." 645 F.2d at 233. But there were several major problems with borrowing from *Page*. The first was that while *Dollis* was a retaliation case under Title VII's broader language in Section 704(a), *Page* was not. See *id.* at 228–29; *Dollis*, 77 F.3d at 779–81. So the courts were not dealing with the same type of case or even same statutory language. The second problem: *Page* did not, in fact, limit adverse employment actions to ultimate decisions. In fact, it left ample room for different types of decisions and intended only to give examples. See *Page*, 645 F.2d at 233. The court explained:

[W]e suggest no general test for defining those 'ultimate employment decisions' which alone should be held directly covered by . . . Title VII. Among the myriad of decisions constantly being taken at all levels and with all degrees of significance in the general employment contexts covered by Title VII there are certainly others than those we have so far specifically identified that may be so considered for example, entry into training programs.

*Id.*

In all events, the Supreme Court's opinion in *Burlington Northern* overruled *Dollis*' narrow understanding of what constitutes retaliation under Title VII. 548 U.S. at 53.

courts of appeal and lawyers. As explained below, it is time for them to stop.<sup>54</sup> But first it is helpful to understand how these courts use the term and how enough consensus exists that it serves as a significant limiting principle or constraint on the statute even if it is a judicially created one.<sup>55</sup>

### III. CIRCUIT COURT CONSENSUS OR CONFLICT?

For decades, employment cases at the circuit courts of appeal level have led to a mix of decisions that are noteworthy not because they are in conflict (they largely are not), but because they show great fealty to terms—adverse employment action and materiality—that do not appear in Title VII. In this case, a tour through the circuits is helpful not only for the sake of completeness, but also because it shows the gradual creep in this area of law. Like a game of telephone,<sup>56</sup> what emerges at the other end of these cases is not the statute that Congress wrote.

For example, the First Circuit concluded that “even if two female employees were permitted to take longer breaks” than the male plaintiff on account of their gender, the difference had no “material effect” on his employment and therefore could not constitute discrimination “within the meaning of the statute.”<sup>57</sup> Put simply: The plaintiff “suffered no material adverse employment action.”<sup>58</sup>

The Second Circuit has likewise embraced the notion that a plaintiff must prove an adverse action that is material.<sup>59</sup> An employee who complained about “various office moves” or the fact that her employer “assigned her a Jeep to use instead of a Ford” failed to show a “material adverse change” in her employment.<sup>60</sup> But if the same employee could prove that she was paid less than other department heads, all of whom were male, then that evidence would clear the bar of materiality.<sup>61</sup> So, too, would her non-promotion to another department.<sup>62</sup>

Some circuits put more emphasis on whether an employment decision is adverse rather than whether it is material. In the Third Circuit, a paid

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54. *See infra* Part VIII.

55. There is no “free floating” federal common law, though there is room for creating some common law within federal labor and employment law. *See Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 553 (7th Cir. 1997) (en banc) (Easterbrook, J., concurring in part and dissenting in part), *aff’d*, *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

56. *See Threat v. City of Cleveland*, 6 F.4th 672, 679 (6th Cir. 2021).

57. *Morales-Vallellanes v. Potter*, 605 F.3d 27, 37 (1st Cir. 2010).

58. *Id.* (adding that at most the plaintiff could point to a selective enforcement problem).

59. *Demoret v. Zegarelli*, 451 F.3d 140, 151 (2d Cir. 2006).

60. *Id.*

61. *Id.*

62. *Id.*

suspension pending an investigation is not an adverse employment action,<sup>63</sup> and under the facts presented, the Fourth Circuit agreed with a district court that the failure to hire a staff assistant for a drama teacher was not adverse.<sup>64</sup> The Fifth Circuit sets a particularly high bar in these cases: Typically only “ultimate employment decisions” like hiring, firing, demoting, and compensating are adverse employment actions,<sup>65</sup> though the Circuit recently sat *en banc* in a case that gives it the opportunity to soften its approach.<sup>66</sup>

The Sixth Circuit’s cases fully embrace the materiality requirement, which means a scattering of results. In one case, a professor who lost his graduate research assistant and his “mentor status” did not point to anything more than “mere inconvenience,”<sup>67</sup> while in a different and more recent case, an employee’s shift change qualified as a term of employment and therefore the change was material.<sup>68</sup> The Seventh Circuit sits next door to the Sixth, but it is characteristically idiosyncratic. In one case, Judge Posner set out three kinds of cases that would be material.<sup>69</sup> In a different case, Judge Easterbrook focused on the statutory term “discrimination” as the word that implies materiality.<sup>70</sup> The court stated that “discrimination” is close to coterminous with materiality, as discrimination “entails a requirement that the employer’s challenged action would have been material to a reasonable employee.”<sup>71</sup> In a routine set of facts, the court acknowledged that complaining about a shift change might not meet that standard, but what about a complaint from an employee, a secretary, who needed to start her shift at 7 a.m. and end it at 3 p.m. to care for a child with Down’s syndrome?<sup>72</sup> In that context, certainly a shift change from 3 p.m. to 5 p.m. was material. Accordingly, the standard is objective in the sense it takes into account how a reasonable person – not necessarily the plaintiff – would respond, but

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63. *Jones v. Se. Pa. Transp. Auth.*, 796 F.3d 323, 326 (3d Cir. 2015).

64. *Tabb v. Bd. of Ed.*, 29 F.4th 148, 157 (4th Cir. 2022).

65. *See Thompson v. City of Waco*, 764 F.3d 500, 503 (5th Cir. 2014) (noting that in the case before it, the plaintiff had claimed an adverse employment action by pointing to a transfer that made his job objectively worse and therefore it was like a demotion).

66. *See Hamilton v. Dallas County*, 42 F.4th 550, 557 (5th Cir. 2022), *vacated by order granting rehearing en banc*, 50 F.4th 1216 (5th Cir. 2022).

67. *Mitchell v. Vand. Univ.*, 389 F.3d 177, 182 (6th Cir. 2004).

68. *See Threat v. City of Cleveland*, 6 F.4th 672, 679 (6th Cir. 2021).

69. *See Herrnreiter v. Chi. Housing Auth.*, 315 F.3d 742, 744 (7th Cir. 2002). This is not the first time that Judge Posner determined to group kinds of cases in an effort to summarize highly fact-intensive employment law areas. In *Troup v. May Department Stores Co.*, he offered a similar tripartite grouping of sex discrimination cases. 20 F.3d 734, 736 (7th Cir. 1994) (“Three types of circumstantial evidence of intentional discrimination can be distinguished.”).

70. *Washington v. Ill. Dep’t of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005).

71. *Id.*

72. *Id.* at 662–63.

subjective in the sense that only the plaintiff's response is being measured in the case.<sup>73</sup>

The Eighth Circuit answers the question as to whether a promotion can ever be adverse and material.<sup>74</sup> The answer is yes, if the promotion is in name only, as in the case of an employee who became an “acting” manager with new responsibilities but without additional pay.<sup>75</sup> And a transfer case? In *Muldrow v. City of St. Louis*,<sup>76</sup> the Eighth Circuit added to the consensus among the circuits that context matters and that an employee's own personal opinion or perception of a new position is not enough.<sup>77</sup> In a case where a police officer challenged a transfer along with a separate failure to transfer and a revocation of her special task force status, the court held none were material or tangible enough principally because there had been no accompanying change in pay or rank.<sup>78</sup> There was not enough evidence that the plaintiff had lost out on opportunities that were genuinely more prestigious and better for her career.<sup>79</sup>

As a Ninth Circuit case illustrates, what may look immaterial from a high elevation can “unquestionably” qualify as an adverse employment action in the life of a plaintiff.<sup>80</sup> An office location can be a pleasant feature of work life, which means that an abrupt change could easily be annoying. But worthy of suing over? Yes, if the location is actually a university professor's lab and the change leads to other consequences, such as delayed work and lost funding.<sup>81</sup> The reverse is also true: What may look quite material from any elevation level can still fail to meet a circuit's test for materiality. In the Tenth Circuit, for example, a plaintiff challenged a

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73. See *id.* at 662 (explaining that a change in hours “would not be materially adverse for a normal employee—but Washington was *not* a normal employee” as she had “a vulnerability: her son's medical condition”); see also *Nichols v. S. Ill. Univ.*, 510 F.3d 772, 781 (7th Cir. 2008) (university police officers' reassignment to different campus was a “purely subjective preference for one position over another” and therefore not a “materially adverse employment action”) (quoting *O'Neal v. City of Chicago*, 392 F.3d 909, 913 (7th Cir. 2004)).

74. See *Ledbetter v. Alltel Corp. Servs., Inc.*, 437 F.3d 717, 724 (8th Cir. 2006).

75. See *id.*

76. 30 F.4th 680 (8th Cir. 2022), *cert. granted in part*, No. 22-193, 2023 WL 4278441 (U.S. June 30, 2023).

77. See *Muldrow*, 30 F.4th at 689 (“[Plaintiff] at most expresses a mere preference for one position over the other. In fact, she admitted as much in her deposition . . .” (citation omitted)). The Supreme Court limited its grant of certiorari in *Muldrow* to this question: “Does Title VII prohibit discrimination in transfer decisions absent a separate court determination that the transfer decision caused a significant disadvantage?” *Muldrow*, 2023 WL 4278441, at \*1.

78. See *Muldrow*, 30 F.4th at 688–89.

79. *Id.* at 690 (noting no “harm [to plaintiff's] career prospects”).

80. See *Chuang v. Univ. of Cal. Davis*, 225 F.3d 1115, 1125–26 (9th Cir. 2000).

81. *Id.* at 1125 (“[T]he forcible relocation of the [plaintiffs'] laboratory disrupted important, ongoing research projects. Due to the delay, experimental subjects were lost and research grants were withheld.”).

permanent assignment to a night dispatcher position after the employee had sought—and received one week of training on—an earlier shift.<sup>82</sup> The court found that this was not enough to constitute a materially adverse employment action, though it stated the undeniable: “We acknowledge that many employees would find working the day shift preferable to the night shift.”<sup>83</sup>

For its part, the Eleventh Circuit’s caselaw on the issue of materiality is thin, though it joins the Third Circuit and all other circuits in treating a simple paid suspension as not adverse.<sup>84</sup> The D.C. Circuit’s caselaw is decisive following its recent *en banc* rehearing of a case: The circuit now says that a discriminatory denial of a transfer is a job action and material enough to sue over.<sup>85</sup> In its decision, the court stripped away language that does not appear in Title VII, such as “objectively tangible harm,” which is another way of describing materiality.<sup>86</sup> Once there is proven discrimination regarding terms, conditions, or privileges of employment, “the analysis is complete.”<sup>87</sup>

The cases above may well influence the Supreme Court now that it has granted certiorari in *Muldrow v. St. Louis*.<sup>88</sup> The question before the Court is no different from the one posed in this article: whether Title VII applies to minor employment actions.<sup>89</sup> While the cases demonstrate some disagreement as to how material and adverse an action must be before it falls within Title VII, there is little disagreement that a limiting principle must exist. If a plaintiff needs a finding that a transfer, shift change, or even new office location caused a significant disadvantage, then it would mean that some cases are too minor. It would mean that a word not in the law, such as material, is as important as any word in the law, such as discriminate. That raises this question: Why do federal courts feel invited to reinterpret the plain statutory terms of federal employment law?

#### IV. COURTS AS GATEKEEPERS IN EMPLOYMENT LAW

It is an important question why federal courts have consistently felt the need to act as gatekeepers in employment law cases. The alternative approach, of course, is to simply let cases live or die on the pleadings—that

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82. *Daniels v. United Parcel Serv., Inc.*, 701 F.3d 620, 635 (10th Cir. 2012).

83. *See id.* The court did not say whether it would find a judge’s assignment to “night court” to be immaterial, too.

84. *See Davis v. Legal Servs., Inc.*, 19 F.4th 1261, 1266 (11th Cir. 2021) (“No Circuit has held that a simple paid suspension, in and of itself, constitutes an adverse employment action.”).

85. *See Chambers v. District of Columbia*, 35 F.4th 870 (D.C. Cir. 2022) (*en banc*) (overruling *Brown v. Brody*, 199 F.3d 446, 457 (D.C. Cir. 1999)).

86. *See id.* at 875.

87. *Id.*

88. 30 F.4th 680 (8th Cir. 2022), *cert. granted in part*, No. 22-193, 2023 WL 4278441 (U.S. June 30, 2023).

89. *See supra* note 77.

is, on the evidence.<sup>90</sup> But in the late twentieth century, when most of the gatekeeping employment law rules and presumptions were invented by courts, there was a concern that federal courts would be overrun by employment law cases if some extra-legislative common law parameters were not laid down.<sup>91</sup>

Some of this is Congress' fault in two ways. First, Congress passed a spare statute in Title VII but then waited years before amending it in any significant way to help courts and parties understand its meaning,<sup>92</sup> and to this day the statute itself does not contain the words "sexual harassment"<sup>93</sup> even though the EEOC says there are more sex discrimination charges filed every year than any other category except race.<sup>94</sup> Sexual harassment as a legal claim was partly borne in an academic laboratory<sup>95</sup> before it was blessed by lower federal courts,<sup>96</sup> and finally by the Supreme Court,<sup>97</sup> though the notion that a discriminatory hostile environment could be unlawful should not have been controversial. And yet if not controversial, at least as we approach the mid-twenty-first century, then why not amend the statute to say it? So, the fault is partly Congress' because it has invited courts to interpret a statute that did not define some of its most important terms, such as sex—or, for that matter, discriminate<sup>98</sup>—and has not queued up any meaningful clarifying

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90. Summary judgment is the ultimate gatekeeper, of course, and the Supreme Court's decision in *Anderson v. Liberty Lobby, Inc.* gave dispositive motions new energy. 477 U.S. 242, 249 (1986) ("[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.").

91. See *Herrnreiter v. Chi. Hous. Auth.*, 315 F.3d 742, 745 (7th Cir. 2002) (expressing concern for the workload of the EEOC because it was "already staggering under an avalanche of filings too heavy for it to cope with," and further worrying that "serious complaints would be lost among the trivial").

92. The Civil Rights Act of 1991 amended the 1964 Act in important and helpful ways, including the addition of a new subsection to § 2000e-2 that established the law's causation standard. See 42 U.S.C. § 2000e-2(m) (codifying that an employment practice is unlawful if race, color, religion, sex, or national origin is a "motivating factor" for the practice).

93. See 42 U.S.C. § 2000e-2(a).

94. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Charge Statistics (Charges Filed with EEOC) FY 1997 Through FY 2022*, <https://www.eeoc.gov/data/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2021> (last visited July 3, 2023).

95. See CATHERINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 57 (1979) ("Sexual harassment, the experience, is becoming 'sexual harassment,' the legal claim."). MacKinnon's book includes, as an appendix, a legal argument "meant to assist plaintiffs' attorneys in briefing responses to defendants' motions to dismiss for legal insufficiency, the usual procedural posture in which the challenge to sexual harassment as sex discrimination is posed." *Id.* at 233.

96. In *Meritor Sav. Bank v. Vinson*, the Supreme Court noted the EEOC's 1980 Guidelines endorsing a hostile environment harassment claim under Title VII "drew upon a substantial body of judicial decisions and EEOC precedent." 477 U.S. 57, 65 (1986).

97. See *id.* at 64 ("Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex.").

98. See 42 U.S.C. § 2000e.

legislation even to this day. In other words, if the criticism is that courts are engaging in mischief or imposing extra rules on Title VII plaintiffs, then there has been plenty of time for Congress to do more than merely acquiesce.

Congress is also to blame for the way it has treated the EEOC, which is the country's chief administrative agency charged with enforcing federal laws against discrimination.<sup>99</sup> The EEOC has been given limited resources and is underfunded,<sup>100</sup> even though it is responsible for investigating and trying to remedy bad acts in the workplace.<sup>101</sup> It is understandably more than happy not to investigate a charge and instead to accede to a plaintiff's request for a Right to Sue Letter,<sup>102</sup> which is a prerequisite to bringing suit in federal court.<sup>103</sup> Issuing Right to Sue Letters without any investigation is not consistent with the plain language of the statute, which instructs the EEOC to investigate every charge,<sup>104</sup> but who can blame the agency for issuing the right to sue if the alternative is putting a charge in a queue that would extend for years if the statute's mandate was followed? Of course, without the EEOC's investigation, along with its mediation and remedial work, a plaintiff is robbed of meaningful feedback on their claim and a court is left with a sizeable number of claims that lack merit.<sup>105</sup> Since the EEOC did not screen for these claims at the administrative stage, federal courts created a number of off-the-books rules and presumptions to brace against waves of filings alleging discrimination not only under Title VII's protected categories, but federal laws covering age<sup>106</sup> and disability<sup>107</sup> as well.

This much is certain: The off-the-books rules have been effective in cutting down cases. Sexual harassment cases, which were new to federal courts, were measured against hellish work environments and not just sexualized ones.<sup>108</sup> Working in hell is a high bar to clear, and it was a standard

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99. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Overview*, <https://www.eeoc.gov/overview> (last visited July 3, 2023).

100. The Commission's "insufficient funds and a shortage of staff" are longstanding issues. *See* H.R. Rep. No. 92-238, at 2147 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137; *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 362–63 (1977) (quoting H.R. Rep. No. 92-238 (1971)).

101. *See* 42 U.S.C. § 2000e-5(a)–(k) (giving power to EEOC to prevent unlawful employment practices and to investigate charges).

102. *See* 29 C.F.R. § 1601.28(a)(2).

103. *See id.*

104. *See* 42 U.S.C. § 2000e-5(b).

105. *See* *Longoria v. Via Metro. Transit*, No. SA-21-CV-01171-JKP, 2022 WL 1445396, at \*5 (W.D. Tex. May 6, 2022) (stating that "[Defendant] is correct in arguing the EEOC's practice of issuing early Right to Sue Letters creates this current situation which undermines Congress's intent for the administrative process" but "the Fifth Circuit tolerates this practice").

106. Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621–34.

107. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–213.

108. *See, e.g., Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1995) (stating that "[t]he concept of sexual harassment is designed to protect working women from the kind of male



not appearing in either the statute or the EEOC's own regulations. Similarly, because some courts ruled out same-sex discrimination cases in the 1980's and 1990's,<sup>109</sup> plaintiffs could not pursue sexual harassment cases involving the same sex,<sup>110</sup> and it took almost fifty years of dismissals against plaintiffs alleging sexual orientation discrimination before the Supreme Court announced those cases are actionable after all.<sup>111</sup>

The Supreme Court is also to blame for endorsing the role of federal court-as-gatekeeper in employment cases. In fact, it has occupied that role in curious ways. Fifty years ago, it announced a new framework for employment law plaintiffs to present their cases and get past summary judgment.<sup>112</sup> Rather than simply focusing on the sufficiency of a plaintiff's evidence and if there was a genuine issue as to whether the plaintiff experienced discrimination,<sup>113</sup> the Court in *McDonnell Douglas v. Green*<sup>114</sup> laid out a three-step dance between the plaintiff and the defendant-employer, complete with even more terms that do not appear anywhere in Title VII itself: a prima facie case, a nondiscriminatory reason, and pretext.<sup>115</sup> Since *McDonnell Douglas*, courts have consistently referred to the three steps as an indirect, burden-shifting method for a plaintiff to pursue,<sup>116</sup> and the prima facie case is intended to be elastic, too.<sup>117</sup>

But the Supreme Court has approved reining in other employment laws. Take the Age Discrimination in Employment Act, which sets the bar at age forty for an employee to sue.<sup>118</sup> That's about as straightforward as things go when it comes to statutory text, but what happens when an employee wants

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attentions that can make the workplace hellish for women," not "to purge the workplace of vulgarity").

109. *See, e.g., Goluszek v. H.P. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988) (finding that plaintiff "was a male in a male-dominated environment," and thus, "the defendant's conduct was not the type of conduct Congress intended to sanction when it enacted Title VII").

110. The Supreme Court ruled that same-sex sexual harassment is actionable under Title VII in 1998. *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

111. *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1740 (2020).

112. *See supra* note 32 and accompanying text.

113. *See* FED. R. CIV. P. 56(a).

114. 411 U.S. 792 (1973).

115. *See id.* at 802.

116. *See, e.g., Montgomery v. Chao*, 546 F.3d 703, 706 (D.C. Cir. 2008) (describing the burden-shifting and stating that "[w]here the plaintiff's evidence of discrimination (or retaliation) is circumstantial, the familiar *McDonnell Douglas* framework applies"); *Brill v. Lante*, 119 F.3d 1266, 1270 (7th Cir. 1997) (setting forth the burden-shifting and stating that "[t]his is the relay confronting district courts each time they face a discrimination lawsuit brought under the *McDonnell Douglas* framework").

117. *See McDonnell Douglas*, 411 U.S. at 802 n.13 ("The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.").

118. ADEA, 29 U.S.C. § 631(a).

to prove her case with circumstantial evidence by pointing to the more favorable treatment received by others?<sup>119</sup> It would not make much sense if she pointed to older workers.<sup>120</sup> And if she pointed to a comparator who was younger, but not by much? In that case, the Supreme Court took it upon itself to announce a new rule that appeared nowhere in the statute, even if it made abundant practical sense: An employee without direct evidence of age discrimination should compare herself to someone not “insignificantly younger” than herself.<sup>121</sup> It did not define how many years count as significant,<sup>122</sup> which has resulted in federal courts of appeals deciding the matter one circuit at a time.<sup>123</sup> The Seventh Circuit was one of the first to weigh in and determined that the number of years was ten.<sup>124</sup>

The Supreme Court and the Seventh Circuit (and the other circuits) did not say why any number of years was necessary, but at the time the need to protect trial courts from highly circumstantial, thin evidence cases was on their mind.<sup>125</sup> Circumstantial evidence is just as powerful as any other form of evidence, of course,<sup>126</sup> but plaintiffs and their lawyers filed weak and thin evidence cases because they often misinterpreted the kind of evidence they needed. If their comparator was only a few years younger than the plaintiff, then they needed evidence that the small difference was not as important as the plaintiff’s age.<sup>127</sup> If the same decision maker who fired the plaintiff was also the hirer, then they needed evidence, or at least good argument, that the decision maker was nonetheless capable of acting on discriminatory animus

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119. Circumstantial evidence is common in discrimination cases, as direct evidence of discrimination is rare. *See Troupe v. May Dep’t Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994) (discussing “[t]hree types of circumstantial evidence of intentional discrimination [that] can be distinguished”).

120. Indeed, the Supreme Court has ruled out so-called reverse age discrimination cases. *See Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) (“[T]he statute does not mean to stop an employer from favoring an older employee over a younger one.”).

121. *See O’Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 313 (1996) (“In the age-discrimination context, such an inference [of age discrimination] cannot be drawn from the replacement of one worker with another worker insignificantly younger.”).

122. *See id.*

123. *See Hartley v. Wisconsin Bell*, 124 F.3d 887, 892–93 (1997) (discussing different approaches from the courts of appeals).

124. *See id.* at 893.

125. *See, e.g., id.* (“In indirect cases like this one, the employee basically is relying on inferences, which *O’Connor* recognizes result in some cases being built on ‘very thin evidence.’” (quoting *O’Connor*, 540 U.S. at 312)).

126. *See Troupe v. May Dept. Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994) (“But circumstantial evidence is admissible too, to provide a basis for drawing an inference of intentional discrimination.”).

127. *See Hartley*, 124 F.3d at 893 (“In cases where the disparity is less, the plaintiff still may present a triable claim if she directs the court to evidence that her employer considered her age to be significant.”).

despite having previously chosen the same person for employment.<sup>128</sup> And if they were terminated for a rules violation or for poor performance, then they needed evidence that the reason was a sham and that their employer did not really believe it.<sup>129</sup> When they instead argued that their performance was good or that they did not break a rule, they ran head-first into the honest belief rule, which has ended many federal court cases.<sup>130</sup> Under the so-called rule, plaintiffs miss the point when they seek to clear their name as if a court were a super-personnel department remotely interested in whether they were actually falsifying an injury or were rude to an important client.<sup>131</sup> All that matters is whether the boss thinks those things are true.<sup>132</sup>

Against this historical backdrop, it is easy to see how presumptions and unofficial rules have crept into employment law and strangled plaintiffs' cases. The cases are doomed not because of unforgiving statutory text but on account of statutory sidecars whose purpose is to manage caseload and, yes, to save everyone, including juries, from cases that are so thin and perhaps even petty that they amount to time-wasters. Is it petty to sue over an adverse employment action that is not material? The next section seeks to frame that question.

#### V. HOW MINOR IS TOO DE MINIMIS?

It is natural to worry about de minimis litigation, as many of the circuit courts do. The notion of a federal court acting as a super-personnel department in employment cases was frightening to employers starting in the 1980s and 1990s, and in many respects it still is.<sup>133</sup> Imagine an employee who is not invited to a dinner party but takes offense to it. Or say the employee is invited to a dinner party, but not the one hosted by the boss. It sounds like a silly case already—claiming that a non-invitation could ever be an “adverse employment action,” let alone a “material” one—but only if we read those

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128. See *Herrnreiter v. Chi. Hous. Auth.*, 315 F.3d 742, 747 (7th Cir. 2002) (allowing that “[w]hen the same person hires and later fires the employee who claims that his firing was discriminatory, judges are skeptical,” but it is “just something for the trier of fact to consider,” not a rule).

129. This is the essence of proving pretext under the *McDonnell Douglas*, burden-shifting, scheme. *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973).

130. See, e.g., *Kariotis v. Navistar*, 131 F.3d 672, 677–80 (7th Cir. 1997) (discussing the informal rule and the reasons for it).

131. See *id.* at 679.

132. See *id.* (“Under Title VII, the ADA, the ADEA, and ERISA, an employer’s honest belief is critical; it is not liable under a disparate treatment framework because its decisions (and suspicions) happen to work to the disadvantage of a member of a protected group.”).

133. See *supra* Part V; see also *Chambers v. District of Columbia*, 35 F.4th 870, 878 (D.C. Cir. 2022) (en banc) (rejecting argument that keeping bad precedent was “necessary to shield employers from ‘judicial micromanagement of business practices’”).

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words into the statute. If a court reads words into a statute, then it is acting as a super-legislative department, which is equally frightening.

The employee who is at home instead of the dinner party likely has no case because the dinner is just that: a meal and nothing more. The result would be the same even if only some employees who are guests are treated to fine china place settings and those employees arguably are grouped into one protected category, say on the basis of religion. So far, the party is a disaster when it comes to morale and manners, but there is no evidence that the silverware or the china is a term or condition of employment any more than red or blue staplers at work are. In other words, if the same employees given china are distributed red staplers, while the employees given ordinary dinnerware find blue staplers at their desks, then without more evidence we have a discriminating employer who has made decisions “with respect to” dinners and office supplies alone. This is not to say that an employer would be free to use the dinners or the office supplies as proxies for terms, conditions, and privileges of employment, and certainly it is possible, though strange, to imagine a workplace where the color of one’s stapler matters. But if it matters, then it falls into the category of a privilege, no different from one’s parking space. Because privileges and pay are treated the same under the statute,<sup>134</sup> the stapler color would likewise be no different from one’s pay.

So dinners and the color of staplers—and, for that matter, how many pencils one gets at their workstation—are out unless they can be tied to a distinction the statute forbids. And perhaps it is not a stretch to say that a boss who would make distinctions about place settings and office supplies is also the kind of employer who would favor the same employees when it comes to training, opportunities for promotion, mentorship, and the like. After all, once one is proven to have discriminated on the basis of sex or race or, in the case above, religion, is it not reasonable to say they likely have discriminated in other matters, too?<sup>135</sup> At that point, perhaps the burden should shift to the boss to say, no, I draw the line at dinners and would never carry my bias into the workplace where it counts the most—which is another way to say that a case like this may be ill-suited for summary judgment, and a jury should be able to disbelieve the employer.

But if there are bad bosses out there, then it is fair to say there are sensitive employees, too. Sometimes a stapler is just a stapler, whatever its color, and a dinner snub is of no consequence at work. A case over a dinner or stapler likely fails not because of words that do not appear in the statute—materiality and “adverse employment action”—but because of the words that do. Still, there are practicalities at play: If circuit courts of appeal have been

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134. See 42 U.S.C. § 2000e-2(a)(1).

135. This is the opposite of the “common actor” defense. *Herrnreiter v. Chi. Hous. Auth.*, 315 F.3d 742, 747 (7th Cir. 2002).

grafting words onto Title VII for decades, the question remains whether the Supreme Court would approve of the statutory straying.

#### VI. WHAT THREE CASES IN THE SUPREME COURT'S PAST TELL US ABOUT ITS FUTURE

If the circuit courts of appeal generally require a plaintiff to point to material, adverse employment actions, is it likely that the Supreme Court would agree? Three cases from the high court may provide an early answer. First, in *Oncale v. Sundowner Offshore Services, Inc.*,<sup>136</sup> the Court determined that same-sex sexual harassment is actionable under Title VII.<sup>137</sup> In fact, the Court appeared surprised that the circuit courts had taken a “bewildering variety of stances”<sup>138</sup> when its own thinking on the issue did not even generate a single dissent.<sup>139</sup> At its core, the Court’s decision rejected any categorical rule when it came to interpreting Title VII, even going so far as to say that “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils.”<sup>140</sup>

But evil is not a matter of opinion under *Oncale*. In fact, at the same time it rejected a categorical rule, it embraced an objective standard to determine what violates Title VII.<sup>141</sup> Re-affirming the Court’s “reasonable person” standard found in *Harris v. Forklift Systems, Inc.*,<sup>142</sup> the Court stated that reasonableness was not only required, it was “crucial.”<sup>143</sup> Reasonableness also meant a healthy dollop of common sense by giving “careful consideration of the social context in which particular behavior

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136. 523 U.S. 75, 79 (1998).

137. *Id.*

138. *See id.*

139. As the Court noted, the Fifth Circuit in the underlying *Oncale* case held that same-sex sexual harassment cases were never actionable under Title VII. 83 F.3d 118, 120 (5th Cir. 1996), *rev'd*, 523 U.S. 75 (1998); *see also* Goluszek v. H.P. Smith, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988). Other decisions required a plaintiff “to prove that the harasser [was] homosexual (and thus presumably motivated by sexual desire).” *Oncale*, 523 U.S. at 79; *see also* McWilliams v. Fairfax Cnty. Bd. of Supervisors, 72 F.3d 1191, 1195 (4th Cir. 1996) (holding that plaintiff’s claim fails because hostile-environment claims do “not lie where both the alleged harassers and the victim are heterosexuals of the same sex”); Wrightson v. Pizza Hut of Am., 99 F.3d 138, 144 (4th Cir. 1996) (holding that a plaintiff’s claim may lie under Title VII when “the individual charged with the discrimination is homosexual”). At the time, the Seventh Circuit’s stance was the most expansive, as it suggested “workplace harassment that is sexual in context is always actionable, regardless of the harasser’s sex, sexual orientation, or motivation.” *Oncale*, 523 U.S. at 80; *see also* Doe v. Belleville, 119 F.3d 563 (7th Cir. 1997).

140. *See Oncale*, 523 U.S. at 79. It is noteworthy that *Oncale*’s “reasonably comparable” statutory standard was authored by famous textualist Justice Antonin Scalia.

141. *Id.* at 81.

142. 510 U.S. 17, 21 (1993).

143. *See Oncale*, 523 U.S. at 81.

occurs.”<sup>144</sup> In some contexts, for example, physicality is part of the job: A slap on the buttocks sounds bad until one learns that we are talking about a sport like football.<sup>145</sup>

If there ever was any doubt about the Supreme Court’s objective, “reasonable person” approach in Title VII cases, there could be none after its decision in *Burlington Northern & Santa Fe Railway Co. v. White*.<sup>146</sup> Though limited to Title VII’s anti-retaliation provision and not its substantive provision, the Court held that retaliatory acts under the statute can include non-employment acts taken by an employer.<sup>147</sup> But the acts, whether occurring at work or in some other context, still had to clear the bar of what a reasonable person would see as undermining or interfering with their right to file a charge of discrimination.<sup>148</sup> The Court again stated that what will be “material” in this context “will often depend upon the particular circumstances,”<sup>149</sup> and it used Judge Easterbrook’s opinion in *Washington v. Illinois Department of Revenue*<sup>150</sup> as an example: “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.”<sup>151</sup>

While *Oncale* and *Burlington Northern* are reminders that the Supreme Court’s primary compass in employment cases is the statute that Congress wrote,<sup>152</sup> the Court has also signaled that when it matters most, Title VII’s text is neither self-defining nor limiting. In *Meritor Savings Bank v. Vinson*,<sup>153</sup> the Court was squarely faced with an employment law landscape at a crossroads: Either the Court would recognize a claim for hostile environment sexual harassment as a form of sex discrimination under Title VII or, finding that type of claim to be non-tangible and non-economic, it would limit the statute’s phrasing of “terms, conditions, or privileges of

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144. *Id.*

145. *Id.*

146. 548 U.S. 53 (2006).

147. *See id.* at 67 (“The scope of the antiretaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm.”).

148. *See id.* at 68.

149. *See id.* at 68–69.

150. 420 F.3d 658, 662 (7th Cir. 2005).

151. *Burlington N.*, 548 U.S. at 69 (citing *Washington*, 420 F.3d at 662) (adding that a lunch snub may be a petty slight, unless it is also a weekly training lunch that ties into an employee’s advancement).

152. Both opinions are faithful to Title VII’s terms, though *Oncale* tilts in the direction of bare textualism while *Burlington Northern* folds the statute’s “purpose” into the statute’s terms. *See Oncale v. Sundowner Offshore Servs. Inc.*, 523 U.S. 75, 80 (1998) (grounding the decision in “the statutory language” and precedents); *Burlington N.*, 548 U.S. at 64 (“[P]urpose reinforces what language already indicates . . .”). Those directional pulls should not be surprising given the opinion authors: Justice Scalia (*Oncale*) and Justice Breyer (*Burlington N.*).

153. 477 U.S. 57 (1986).

employment”<sup>154</sup> as referencing concrete job actions and not one’s work environment.<sup>155</sup>

In choosing to recognize the claim, the Court was not only following the consensus among federal courts, but also the EEOC’s published Guidelines.<sup>156</sup> In fact, the Court relied heavily on the Guidelines and found it important that the EEOC did not define unlawful harassment as requiring economic injury.<sup>157</sup> The Guidelines were not controlling authority, but they certainly were persuasive and it was natural to look to them for exactly what they promised: guidance.<sup>158</sup> But *Meritor* is significant also for looking to agency law as a second source of extra-textual authority.<sup>159</sup> Like the Guidelines, agency principles grounded in common law and not codified law fell into the category of being a help to the Court. After all, while Congress’ decision to add “sex” to the list of protected categories in Title VII at the last minute meant that the Court had little legislative history or stated Congressional purpose to consider,<sup>160</sup> Congress did define “employer” to include any “agent” of the employer.<sup>161</sup> If breadcrumbs were all the Court had to follow to fully interpret the statute, so be it.

Taken together as relevant signposts, *Oncale*, *Burlington Northern*, and *Meritor* tell us a great deal about how the Court will likely treat the issue as to what kind of job action a plaintiff can sue over and whether the contested act must be “material” under either a subjective or objective standard. First, the Court is unlikely to read major limitations into Title VII that are not explicitly there. It refused to rule out same-sex discrimination cases in *Oncale*,<sup>162</sup> and it rejected any limitation of harassment cases to those causing economic injury in *Meritor*.<sup>163</sup> That does not bode well for any argument that a discrimination claim under Title VII must point to “ultimate employment decisions,”<sup>164</sup> such as promotions or terminations, or, for that matter, that a

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154. 42 U.S.C. § 2000e-2(a)(1).

155. *See Meritor*, 477 U.S. at 64 (“In support of this claim petitioner observes that in both the legislative history of Title VII and this Court’s Title VII decisions, the focus has been on tangible, economic barriers erected by discrimination.”).

156. *Id.* at 72 (citing Guidelines, 29 C.F.R. § 1604.11(a) (1985)).

157. *See id.* at 65–72 (referencing the Guidelines on at least five occasions).

158. *Id.* at 65.

159. *Id.* at 72 (“[W]e do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area . . .”).

160. *Id.* at 63.

161. *See id.* at 72 (citing 42 U.S.C. § 2000e(b)).

162. *Oncale v. Sundowner Offshore Servs. Inc.*, 523 U.S. 75, 79 (1998) (“We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII.”).

163. *Meritor*, 477 U.S. at 64 (“First, the language of Title VII is not limited to ‘economic’ or ‘tangible’ discrimination.”).

164. *See Thompson v. City of Waco*, 764 F.3d 500, 503 (5th Cir. 2014).

description of the employment action (transfer, shift change, office relocation, and the like) has much salience in these cases. Second, the Court is likely to again embrace its objective, reasonable person standard to determine whether the challenged job action is worthy of a federal case.<sup>165</sup> Context and facts will matter greatly, making the matter ill-suited for summary judgment.<sup>166</sup> As the Court noted in *Burlington Northern*, there can be two truths: In the abstract a two-hour shift difference may be inconsequential to a reasonable person, and yet quite consequential to a reasonable person in the shoes of the plaintiff.<sup>167</sup> Even if both are true, it is the second truth that spells out the plaintiff's burden to build the right record in these cases. In other words, a successful plaintiff can expect to bring their shoes to court.

Third, *Meritor* tells us that the Court is generally disinclined to swim against the tide in employment law cases. By the time *Meritor* was argued, there was strong consensus in the federal courts that hostile environment sexual harassment was a form of sex discrimination,<sup>168</sup> and *Meritor* itself generated no dissent from the justices.<sup>169</sup> If there is similar consensus among federal courts that the statute requires some level of materiality in terms of the challenged adverse employment action,<sup>170</sup> it suggests the Court may recognize a practical or pragmatic limiting principle<sup>171</sup> in these cases even if the statute does not rule out suing over the smallest term, condition, or privilege of employment.

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165. See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68–69 (2006) (“An objective standard is judicially administrable . . . We have emphasized the need for objective standards in other Title VII contexts, and those same concerns animate our decision here.”).

166. Contested material facts doom a motion for summary judgment. See FED. R. CIV. P. 56(a) (“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”).

167. See *Burlington N.*, 548 U.S. at 69 (citing *Washington v. Ill. Dept. of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005)).

168. See *Meritor*, 477 U.S. at 66 (“Since the Guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.”).

169. See *id.* at 58 (detailing that the Court issued a majority opinion and two separate concurrences).

170. There is such consensus. See *supra* Part IV.

171. Indeed, each of the Supreme Court cases cited here promise realism or simple common sense in harassment cases. See *Burlington N.*, 548 U.S. at 68 (noting that in retaliation claims under §704(a) of Title VII, “[w]e speak of *material* adversity because we believe it is important to separate significant from trivial harms”); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (“[T]he statute does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex.”); *Meritor*, 477 U.S. at 67 (“[N]ot all workplace conduct that may be described as ‘harassment’ affects a ‘term, condition, or privilege’ of employment within the meaning of Title VII.”).



## VII. MEASURING MATERIALITY: A WAY FORWARD

Imagine an employee who takes an entry level job at a bank; it is the employee's first job out of college. Naturally, the employee is excited. And if we travel with the employee over the first few years of employment, we can also imagine disappointment in three different circumstances. The question is whether there is enough to sue in any of them.<sup>172</sup>

During the employee's first few weeks on the job, it is clear that the bank manager is more comfortable around some new workers (the sex opposite the employee) than others (the employee's sex). The boss greets these workers in the morning with good-natured laughter and fun. The boss does not freeze out the employee, who is greeted, too. But it is the kind of greeting one might give an acquaintance in passing: friendly and short, but not exactly warm and certainly not extended.

Without question our employee might feel isolated and even less welcome. Someone should take the boss aside and offer a lesson in basic supervisory skills and maybe even manners. But there is no suggestion—yet—that the employee has been paid or treated differently from any opposite-sex colleagues in any other way than the way just described. The employee is not asked to work longer hours or with more productivity than the other workers (the terms of employment); the employee can spend as much time talking to colleagues as much as anyone else does, including the boss (conditions of employment); and when the boss has extra tickets to an event or game, the employee can claim them just as the other workers can and no one says a word (privileges of employment).

This first case is not written to be a close one under the statutory terms. The employee has been treated differently, but not with respect to categories that are sacrosanct in the law: compensation, terms, conditions, and privileges of employment.<sup>173</sup> At this point, the employee can point to something that happens at work that appears discriminatory, but not something discriminatory “with respect to” those things the statute forbids.

But what if the employee is, say, a teller and the direct supervisor evaluates the teller differently because of sex? The supervisor, who is the same sex in this case, is tough but fair on the employee when it comes to evaluating interaction with customers and whether the employee promotes bank products. But a new teller, who is the opposite sex, gets different treatment: The new teller's evaluations are rosy even though there is no

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172. The notion of suing one's employer cannot be taken lightly, of course. Certainly it is a weighty decision, and it would be reasonable to expect facts that reflect that weight. But whether one should actually sue is another matter. Here, it is enough to know whether a lawsuit can be brought in the first place.

173. See 42 U.S.C. § 2000e-2(a)(1).

evidence the teller is better than the employee. Say the supervisor explains in this case that the bank did not want to lose the new teller, that the new teller's sex is hard to recruit into teller positions, and that the boss was not worried about our employee finding another job and leaving the bank. So the boss inflated the new teller's performance ratings precisely because of sex, and the boss graded the employee's performance in a different way because of sex, too.

Whether our employee in this second example has a case of sex discrimination under Title VII would be a close call in several circuits under their existing "discrimination plus adverse employment action" approach.<sup>174</sup> On the one hand, the employee will not be able to say that the boss' evaluation is inaccurate. But the evaluation may be accurate and yet also out of alignment with the way the boss evaluates others in a different protected category, which is the essence of discrimination or a disparate treatment case.<sup>175</sup> If there is a thumb on the scale when it comes to one person's work performance, then the problem is the thumb, not the scale. On the other hand, there is no evidence—yet—that the difference in evaluations has affected the employee's own opportunity for advancement or promotion or pay.

But the employee in this second example can make a reasonable case that evaluations are a condition of employment, as certainly it would be reasonable for an employer to terminate an employee who refused to be evaluated, just as it would an employee who refused to show up on time. And the employee can certainly establish a difference in treatment on the basis of sex. It is doubtful that we would let an employer get a pass if one protected category enjoyed different hours of employment because of that category. But what of the argument that under these facts an employee has yet to point to actual injury in terms of lost pay or a non-promotion on account of the evaluation? Two answers: First, the statute does not require injury beyond pointing to an affected term, condition, or privilege of employment.<sup>176</sup> Second, the purpose of the statute and the entire administrative machinery supporting it is equal opportunity. Unless the bank can establish that it never reads its own evaluations, the employee's terms and conditions of

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174. See *supra* Part IV.

175. Focusing on how an employer treated comparable employees in a different protected category can be crucial in discrimination cases. For example, in *Kariotis v. Navistar*, the plaintiff, suing for age and disability discrimination, could point to no "facts suggesting that the company investigated her differently because she was an older employee . . . or because she was on disability leave," and she offered "no comparative evidence suggesting that the company would have been more careful before firing a younger employee or one not on leave though suspected of fraudulent activity." 131 F.3d 672, 677 (7th Cir. 1997).

176. Once the statute's language is satisfied, there is no separate or additional de minimis requirement. On this basis, even a court of appeals that gets it mostly right still gets it wrong. See *Threat v. City of Cleveland*, 6 F.4th 672, 678 (6th Cir. 2021) ("At the same time, our approach honors a de minimis exception that forms the backdrop of all laws.").

employment, including how the employee is evaluated, differ because of the employee's sex. In fact, it may not even be enough for the bank to say that it never reads them, as the point is that they exist and can be used by one set of employees to their advantage and to make their own opportunities whether the bank believes in the evaluations or not.

A third example is intended to push even further. Say the employee is moved from the first teller station to the second teller station. The stations are adjacent and from the customer's perspective there is no difference. It sounds silly to complain about the station assignment, but say the employee can establish that the assignment was, in fact, made because of sex: The bank has decided that it wanted customers to know that it hired the other sex, too, and putting the new teller at the first station was more visible and accomplished that purpose. For completeness, the employee cannot point to any other change in employment: The station assignment does not impact pay, opportunities for promotion, or really even contact with customers, which one could imagine might tie into one's conditions of employment. But there remains this problem: Whether or not it would matter to a customer or even to a randomly assigned employee is not the question. The issue is whether it would matter to a reasonable person in the employee's position, and the answer to that question may be yes—because it plainly mattered to the employer here, the bank. It is easy to see the teller station assignment as a privilege of employment if it is a privilege doled out by one's employer.

In that case, once an employer makes an assignment or decision on the basis of a protected category, is it always the case that it is “with respect to” a term, condition, or privilege of employment? The answer is *likely* so, though, without more, the first example of a boss' morning greeting is both sex-based and unconnected to those categories. The truth is that once an employer discriminates on the basis of a protected category, it should be more difficult for it to be able to say it did not matter in any meaningful or “material” way. If true, then why discriminate in the first place?

This much should be clear about a path forward: Title VII is difficult enough to apply and interpret,<sup>177</sup> and that task is made significantly more challenging by grafting words and principles onto the statute that are meant to rebalance it like a ship's ballast and help it achieve some sort of equilibrium. The four words courts typically add to the statute—material, adverse employment action—do not appear in Section 703(a)(1).<sup>178</sup> The four words that do count are the words that do appear in the statute: compensation, terms, conditions, or privileges of employment. While some job actions will

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177. See *Bostock v. Clayton County*, 140 S. Ct. 1731, 1753 (2020) (stating that Title VII “is written in starkly broad terms” and “has repeatedly produced unexpected applications, at least in the view of those on the receiving end of them”).

178. See 42 U.S.C. § 2000e-2(a)(1).

easily qualify, it is not the action itself in the abstract that is decisive, whether the action is the assignment of a teller station or even which pencils an employer doles out. If a particular station assignment or office location or window versus interior office—or even the type of pencil—is a scarlet letter at a person’s work, then some enjoy a privilege but not others. If the reason is a person’s sex or some other protected characteristic, then the plaintiff is entitled to judgment because the elements of a Title VII claim are satisfied, whether the rest of the world is or not.

#### CONCLUSION

Not far from the federal courthouse in Chicago sits a large steel sculpture that Chicagoans—and the rest of the world—simply refer to as “The Picasso.” It is tall, expansive, and magnificent. But what is it? Picasso gave it to the city but never explained. So ever since it appeared downtown, generations have looked up at the Picasso and decided for themselves.<sup>179</sup>

Around the same time of Picasso’s unveiling, Congress passed Title VII, and ever since generations of lawyers and judges have read words and limitations into it that are not there. True, some of these imaginings have made abundant sense and even may have improved the statute in ways that are hard not to welcome. Adding four words—material, adverse employment action—may seem harmless and may also save everyone from complaints that are trivial and wasteful. But the words have taken on the significance of a shadow statute, and because they are not in the statute, they should not be used.

Four words actually in the statute—compensation, terms, conditions, and privileges—are all we need, and all courts should use, to rule some cases in and others out. And if we use only the words in the statute, then we remember something else that is important, too: Title VII is a law, and while it is magnificent, it is not a Picasso.

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179. This is Chicago’s official version of the story behind its iconic landmark. See CHICAGO, “*The Picasso*” (*Untitled Sculpture*), [https://www.chicago.gov/city/en/depts/dca/supp\\_info/chicago\\_s\\_publicartthepicassountitledsculpture.html](https://www.chicago.gov/city/en/depts/dca/supp_info/chicago_s_publicartthepicassountitledsculpture.html) (last visited July 4, 2023).