ARTICLE

A FAREWELL TO HARMS: RETHINKING THE INJURY REQUIREMENTS OF TITLE VII

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ABSTRACT

Title VII of the 1964 Civil Rights Act makes employment discrimination against a member of a protected class unlawful. A majority of federal courts require a plaintiff alleging discrimination to prove an "adverse" or "ultimate" employment action. Examples of adverse employment actions are the refusal to hire, the denial of a promotion, and discharge. Less significant actions such as lateral transfers, the failure to provide administrative support, and reprimands are not considered adverse employment actions. An adverse employment action, however, is not a statutory requirement. There are two principal provisions of Title VII that prohibit employment discrimination: sections 2000e-2(a)(1) and (2). Section 2000e-2(a)(1) applies to the "terms, conditions, compensation, or privileges of employment" encompassing every conceivable aspect of the employment relationship. To violate this section, an employment practice need not affect the employment relationship, for the section makes it unlawful to discriminate with respect to any aspect of that relationship. After the opening phrase, which prohibits discrimination in hiring and firing, section 2000e-2(a)(1) goes on to make it unlawful "otherwise to discriminate." Thus, the language of section 2000e-2(a)(1) prohibits any discriminatory words or conduct absent an adverse employment action or any action at all. Section 2000e-2(a)(2) also expresses an expansive prohibition of employment discrimination. That section makes it unlawful to "limit…employees or applicants in any way" that "would…tend to deprive [them] of employment opportunities" or "adversely affect" their employment "status." Like section 2000e-2(a)(1), this section does not expressly require an adverse employment action. In hostile-work-environment cases, the Supreme Court requires plaintiffs to prove, as a proxy for adverse employment actions, severe or pervasive harassment that renders the employment environment abusive. There is no statutory justification for this proxy because the adverse-employment-action requirement is a judicial invention. Promoting a literal reading of Title VII, this Article analyzes three areas of employment discrimination: disparate treatment, disparate impact, and hostile-work-environment harassment. The Article criticizes the courts for misapplying Title VII by adding harm requirements to these three theories. By misapplying Title VII, the courts have frustrated its purpose, which is categorically to prohibit workplace discrimination.

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I. Introduction

Consider Clara, a second-year associate of Dillinger, Nelson, Floyd & Barrow, a midsize law firm. Fidgeting with a pencil, Clara awaits her annual performance review. Mr. Dillinger, the firm's managing partner, summons Clara, who troops into his plush five-window office. Dillinger greets her from behind a polished mahogany desk. Perusing an open file folder, Mr. Nelson is seated beside him. Clara takes a deep breath as Dillinger begins his appraisal of her performance. Amiable and upbeat, he commends Clara for her "energy, commitment, and fine work product." He compliments the "clarity of her writing" and "the persuasiveness of her oral advocacy." He lauds her for bringing a new client to the firm, an unprecedented achievement for a second-year associate. Nelson nods agreement while Clara soaks in the praise. She knew she was good, but she did not expect to hit the jackpot! Doubtless, she is on the road to partnership.

Then, Dillinger's mood darkens. He tells Clara that her image is not quite right for the firm. Clara stiffens. "If you want a future here," Dillinger says, "you should walk more femininely, talk more femininely, and dress more femininely."[1] Nelson pipes in, "Use makeup, get your hair styled, and wear jewelry."[2] When the meeting ends, Clara steps out of Dillinger's office in shock.

The next day she is researching a case in the firm library when she overhears Mr. Floyd speaking to Mr. Barrow. "Clara's unladylike," Floyd says.[3] "She has a dirty mouth," Barrow grumbles. "She should go to charm school."[4]

After learning of the partners' criticisms of her behavior and appearance, Clara feels uncomfortable facing them. She works under their daily supervision and feels denigrated in their presence. Not wanting to jeopardize her career, Clara decides not to sue. But if she did, she would not have a chance in federal court.

To have a claim for intentional discrimination, called "disparate treatment,"[5] Clara would have to allege an "adverse employment action," often referred to as an "ultimate employment decision."[6] The Supreme Court has

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[1] These remarks of sex-based stereotyping echo the facts in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989). Unlike *Price Waterhouse*, however, the firm has not denied Clara partnership or otherwise penalized her in any tangible way. *See id.* at 231–32 (delaying consideration of employee's candidacy for partnership until the following year).

[2] *See id.* at 235.

[3] *See id.*

[4] *See id.*

[5] *See* Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 986 (1988) (defining disparate treatment as intentional discrimination).

[6] *See, e.g.*, Hamilton v. Dallas Cty., 42 F.4th 550, 555–56 (5th Cir. 2022) (explaining that an adverse employment action is a requirement of a disparate treatment claim and that such an action includes only "*ultimate employment* decisions such as hiring, granting leave, discharging, promoting, or compensating.") (citations omitted) (emphasis in original).

used the term "tangible employment action" to express this concept.[7] "A tangible employment action," stated the *Ellerth* Court, "constitutes a significant change in employment status, such as the failure to hire, discharge, failure to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[8] Because most courts use the term "adverse employment action" to describe a significant change in employment status, this Article adopts that usage.

Clara would not have a disparate treatment case because she has not suffered harm on the scale of a loss of a promotion or a cut in salary. She might try a claim for sexual harassment, alleging a hostile work environment, but that claim would surely fail. To state such a claim, she would need to allege "severe or pervasive" harassment that would render the work environment abusive.[9] Under prevailing case law, a few isolated instances of sex stereotyping fall short of the mark.[10]

Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination, would govern Clara's claims. Sections 2000e-2(a)(1) and (2) are the two principal provisions of the Act that prohibit discrimination against a member of a protected class.[11] Section 2000e-2(a)(1) makes it unlawful to discriminate "with respect to" the "conditions" of employment.[12] This language prohibits invidious discrimination in the broadest possible terms.

Section 2000e-2(a)(2) also maps out a broad swath of prohibited discriminatory activities. This section makes it unlawful to "limit . . . employees or applicants for employment in any way" that "would . . . tend to deprive [them] of employment opportunities" or "adversely affect" their employment "status."[13] Like section 2000e-2(a)(1), this section does not expressly require

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[7] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 760 (1998). Justice O'Connor explained in her concurring opinion in *Price Waterhouse* that "Congress clearly conditioned legal liability on a determination that the consideration of an illegitimate factor *caused* a tangible employment injury of some kind." 490 U.S. at 265 (O'Connor, J., concurring) (emphasis in original).

[8] *Ellerth*, 524 U.S. at 761.

[9] *See, e.g.*, Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) (holding that "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.") (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

[10] *See, e.g.*, Graves v. Dayton Gastroenterology, 657 F. App'x 485, 486 (6th Cir. 2016) (affirming summary judgment for the defendant, despite allegations that the victim's supervisor sent her two sexually explicit texts, and after she rebuked him, retaliated by assigning her difficult job duties, denying her lunch breaks, and even throwing a medical chart at her); Velázquez-Pérez v. Developers Diversified Realty Corp., 753 F.3d 265, 274–76 (1st Cir. 2014) (affirming summary judgment for male defendant on hostile workplace claim where female in position of authority attempted to force her way into his hotel room, sent him sexually explicit emails, and was instrumental in having him discharged); Mitchell v. Pope, 189 F. App'x 911, 913–15 (11th Cir. 2006) (affirming summary judgment for defendants where the harasser engaged in sixteen discrete acts of harassment, including physical touching and stalking).

[11] *See* Civil Rights Act of 1991, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. § 2000e (2018)).

[12] Unlawful Employment Practices, 42 U.S.C. § 2000e-2(a)(1) (2018).

[13] 42 U.S.C. § 2000e-2(a)(2) (2018).

an adverse employment action. Disregarding the language of these sections, a majority of federal courts have engrafted that injury requirement onto the statute.[14] Ostensibly, the heightened adverse-employment-action requirement of Title VII forecloses claims based on trivial harms.[15]

Foreclosing such claims is sensible. "Stray remarks," which might be defined as offhand and isolated, should not generally trigger the involvement of the U.S. Equal Employment Opportunity Commission ("EEOC") and a clash in federal court.[16] Even a single remark, however, should be actionable depending on factors such as the authority of the person who made it, the people to whom it was directed, and its content. The harm to a plaintiff from minor misconduct, although offensive, does not justify a drain of administrative and judicial resources. Nor should such a claim justify a substantial remedy. From both statutory and policy standpoints, the courts were right to remove "minor" grievances from the protection of Title VII. But the courts went too far.[17] By imposing the requirement of an adverse employment action, the courts excluded a vast midground of claims deserving a remedy. Many potential plaintiffs endure substantially more than a stray remark but less than the judicially mandated thresholds of harm needed to establish a claim.[18] Clara's case occupies this midground. The partners subjected her to stereotyping that

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[14] *See infra* note 123 and accompanying text (citing cases interpreting § 2000e-(2)(a)(1) to require an adverse employment action).

[15] *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring) (using the term "stray remarks" to describe discriminatory misconduct that would not rise to the level of a statutory violation).

[16] *See id.*

[17] Some courts have interpreted the "stray remarks doctrine," announced by Justice O'Connor in her *Price Waterhouse* concurrence, as discounting discriminatory comments and outbursts as expressions of personal opinion unless connected to the challenged employment decision. *See, e.g.*, Heim v. Utah, 8 F.3d 1541, 1547 (10th Cir. 1993) (concluding that such remarks are not direct evidence of discrimination); *see also* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 Stan. L. Rev. 1161, 1164–65 (1995) (criticizing courts for trivializing stereotyping remarks). Professor Hamilton Krieger is correct that such remarks are probative of discrimination when a plaintiff challenges any employment decision, whether defined as "adverse" or not. This Article advocates discounting an isolated remark when that remark, standing alone, should not be the basis for a Title VII claim. *See infra* note 78 and accompanying text (discussing *de minimis* remarks).

[18] Title VII also provides claims for victims of retaliation. Section 2000e-3(a), which establishes Title VII retaliation claims, provides: "It shall be an unlawful employment practice for an employer to discriminate against any of his [or her] employees or applicants for employment . . . because he [or she] has opposed any practice made an unlawful employment practice by this subchapter, or because he [or she] has made a charge, testified, assisted, or participated in any manner in an investigation, hearing, or proceeding under this subchapter." 42 U.S.C. § 2000e-3(a). Retaliation claims also require an adverse employment action. *See, e.g.*, Laster v. Kalamazoo, 746 F.3d 714, 730 (6th Cir. 2014) (requiring plaintiff in retaliation case to allege adverse employment action); Banks v. E. Baton Rouge Parish Sch. Bd., 320 F.3d 570, 578 & n.11 (5th Cir. 2003) (affirming grant of summary judgment for defendant because plaintiff failed to allege an adverse employment action to support a Title VII retaliation claim); Place v. Abbott Lab'ys, 215 F.3d 803, 809 (7th Cir. 2000) (holding that an adverse employment action is a requirement for a Title VII retaliation claim).

exceeds the minor sort of offhand remark that judges justifiably exclude from the coverage of Title VII.

Similar to the language in Title VII as originally adopted, the Civil Rights Act of 1991 (the "1991 Act"), which amended Title VII, does not require an adverse employment action. Section 2000e-2(m) is one of the salient provisions of the 1991 Act. That section provides: "[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for *any* employment practice, even though other factors also motivated the practice (emphasis added)."[19] Like section 2000e-2(a), this section does not require an adverse employment action or any action other than discriminatory words or conduct directed at a member of a protected class.[20]

This Article discusses three major branches of Title VII law: individual disparate treatment, disparate impact, and hostile-work-environment sexual harassment.[21] Two approaches define the elements of a disparate-treatment claim: the *McDonnell Douglas* framework and the *Price Waterhouse* framework as modified by the Civil Rights Act of 1991.[22] This Article, in addition to the Introduction (Part I) and the Conclusion (Part VI) is therefore divided into four Parts, which analyze the *McDonnell Douglas* framework, the *Price Waterhouse* framework, disparate impact law, and hostile-work-environment law. Part VI is the Conclusion.

Part II of this Article examines the *McDonnell Douglas* framework.[23] Predicated on section 2000e-2(a)(1), this framework requires a defendant to articulate a nondiscriminatory reason for the challenged employment action.[24] The predominant view among federal courts is that this framework requires a plaintiff to prove an adverse employment action.[25] Part II debunks this interpretation of section 2000e-2(a)(1) and shows that the section makes discrimination, absent any separate action or decision, a *per se* violation of Title VII.

Part III explores the framework announced in *Price Waterhouse v. Hopkins*.[26] In fashioning this framework, the Supreme Court relied on both sections 2000e-2(a)(1) and (2).[27] Congress later modified this approach in section 2000e-2(m) of the 1991 Act.[28] This approach requires that discrimination be a

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[19] 42 U.S.C. § 2000e-2(m).

[20] *Id.*

[21] Although hostile-work-environment theory applies to any protected class, this Article will focus on sexual harassment claims, which have predominated this area of law.

[22] Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended at 2 U.S.C. §§ 60, 1201–24; § 1a-5; 42 U.S.C. § 1981, 1988, 2000e (2018)).

[23] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[24] *Id.* at 802.

[25] *See infra* note 124 (citing *McDonnell Douglas* cases that have required an adverse employment action).

[26] 490 U.S. 228 (1989).

[27] *Id.* at 240.

[28] *See* 42 U.S.C. § 2000e-2(m).

motivating factor for the challenged employment practice.[29] It does not require an adverse employment action.[30]

Part IV examines disparate impact theory. The Supreme Court established this theory in *Griggs v. Duke Power Co.*[31] Based on section 2000e-2(a)(2), this theory provides that a facially neutral employment practice that has an adverse disproportionate impact on a protected class violates Title VII.[32] Section 2000e-2(k) of the 1991 Act, which codified disparate-impact theory, prohibits an employment practice that has a negative impact on "the position in question."[33] To violate the section, an employment action need not rise to the level of an ultimate decision such as the refusal to hire, demotion, or discharge. The section also forbids non-ultimate decisions such as the denial of needed administrative support or the requirement to perform menial tasks not required of similarly situated employees.

Part V analyzes hostile-work-environment theory. The Supreme Court established this theory in *Meritor Savings Bank v. Vinson*.[34] Based on section 2000e-2(a)(1), this theory requires a plaintiff to prove unwelcome gender- or sex-related words or conduct so severe or pervasive that they render the working environment abusive.[35] The working environment must be abusive from the viewpoints of both a reasonable person and the victim.[36] In fashioning this claim, the Court disregarded the language of the section on which it purportedly relied. Section 2000e-2(a)(1) does not require severe or pervasive harassment or causation of an abusive working environment.

The Article concludes by encouraging federal courts to interpret Title VII according to its terms. Some federal courts have already aligned the case law with Title VII by dispensing with the adverse-employment-action requirement in disparate treatment cases.[37] More courts should follow. Requiring victims of intentional discrimination to prove an adverse employment action frustrates Title VII's policy to rid the workplace of invidious discrimination. A victim such as Clara should have a federal claim.

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[29] *See id.*

[30] *See id.*

[31] 401 U.S. 424 (1971).

[32] *See* Connecticut v. Teal, 457 U.S. 440, 446 (1982) (holding that in a disparate impact case, "a plaintiff must show that the facially neutral employment practice had a significant discriminatory impact"); *Griggs,* 401 U.S. at 432 (noting that "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation") (emphasis added).

[33] 42 U.S.C. § 2000e-2(k)(1)(A)(i).

[34] 477 U.S. 57 (1986).

[35] *See* Oncale v. Sundowners Offshore Servs., Inc., 523 U.S. 75, 80 (1998) (broadening hostile-work-environment theory by holding that "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex").

[36] *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993) (holding that Title VII bars conduct if "the environment would reasonably be perceived, and is perceived, as hostile or abusive").

[37] *See infra* note 162 and accompanying text (discussing federal cases that have repudiated the adverse-employment-action doctrine).

II. Harm Under the *McDonnell Douglas* Framework

A disparate treatment claim derives from sections 2000e-2(a)(1) and (2) of Title VII. A majority of federal case law supports the view that the harm element for such a claim is an adverse employment action.[38] These holdings ignore the statutory language. Neither section 2000e-2(a)(1) nor section 2000e-2(a)(2) contains such a requirement.

A. McDonnell Douglas v. Green*: The Burden-Shifting Framework*

The *McDonnell Douglas* Court announced the three-step burden-shifting framework that applies to individual disparate treatment claims.[39] In that case, Percy Green, an African American, worked as a mechanic for McDonnell Douglas, an aerospace and aircraft manufacturer.[40] After McDonnell Douglas laid Green off in a reduction in force, Green, a long-time civil rights activist, believed that his layoff was racially motivated.[41] To protest McDonnell Douglas's alleged discriminatory practices, Green participated in two civil-rights actions directed against the company.[42] The first was a "stall-in," in which participants stalled their cars on the access roads to the McDonnell Douglas plant during the morning rush hour.[43] The second was a "lock-in," where participants chained and padlocked the front door to the plant, preventing employees from entering and exiting.[44] Three weeks after the lock-in, McDonnell Douglas advertised the availability of mechanic positions.[45] When Green applied for one of those jobs, McDonnell Douglas rejected him because of his participation in the stall-in and lock-in.[46] In response, Green sued McDonnell Douglas for employment discrimination under section 2000e-2(a)(1).[47]

The Supreme Court observed, on appeal, that the Eighth Circuit had not reached consensus on the applicable burdens of proof.[48] To clarify those burdens, the Supreme Court established a three-step burden-shifting framework for individual disparate treatment cases.[49] First, the plaintiff must state a prima

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[38] *See infra* note 123 and accompanying text (discussing *McDonnell Douglas* cases that have required plaintiff to prove an adverse employment action).

[39] *See* 411 U.S. 792 (1973).

[40] *Id.* at 794.

[41] *Id.*

[42] *Id.* at 794–96.

[43] *Id.* at 795.

[44] *Id.*

[45] *Id.* at 796.

[46] *Id.*

[47] *Id.* Green also alleged a retaliation claim under § 2000e-3(a), which provides: "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter. . . ." *Id.* at 796 n.4.

[48] *Id.* at 801.

[49] *See id.* at 802–05.

facie case.[50] In a refusal to hire case, the plaintiff must show that (1) he or she is a member of a protected class, (2) he or she applied for and was qualified for a job opening, (3) the employer rejected the plaintiff, and (4) after rejecting the plaintiff, the employer continued seeking applicants for the job.[51] Notably, the third element of a prima facie case—the employer's rejection of the plaintiff—is an adverse employment action.

Once the plaintiff has proven a prima facie case, step two of the framework requires the employer to articulate a nondiscriminatory reason for the employer's rejection of the plaintiff.[52] The Court explained that the employer's step-two burden does not impose a shift in the burden of persuasion.[53] It is merely a burden of production.[54] At step three, the plaintiff "must be afforded a fair opportunity to show that the [employer's] stated reason for [plaintiff's] rejection was in fact pretext."[55]

Although the Supreme Court never stated that all *McDonnell Douglas*-type cases must involve an adverse employment action, nearly all federal courts ostensibly following *McDonnell Douglas* have interpreted the third element of a prima facie case to require such an action.[56] As shown below, the language of section 2000e-2(a)(1) does not require an adverse employment action to support a claim of employment discrimination. As shown below, discrimination against a member of a protected class is the harm requirement.

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[50] *Id.* at 802.

[51] *See id.*

[52] *See id.*

[53] *See* Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 256 (1981).

[54] *See McDonnell Douglas*, 411 U.S. at 802. The burden of persuasion rests with the plaintiff throughout the case. *See Burdine*, 450 U.S. at 258.

[55] *McDonnell Douglas*, 411 U.S. at 804. *McDonnell Douglas* held that, if a plaintiff disproved the employer's step-two justification for the challenged employment action, the plaintiff would win the case. *See id.* at 807. *St. Mary's Honor Center v. Hicks*, although purporting to follow the *McDonnell Douglas* framework, departed from it. 509 U.S. 502 (1993). The *Hicks* Court held that if the plaintiff disproves the employer's step-two reason, the fact finder may, but is not required to, decide in favor of the plaintiff. *See id.* at 511; *see also* Henry L. Chambers, Jr., *Getting It Right: Uncertainty and Error in the New Disparate Treatment Paradigm*, 60 Alb. L. Rev. 1, 40 (1996) (observing that *Hicks* weakened the *McDonnell Douglas* framework by increasing plaintiff's burden); Kenneth R. Davis, *The Stumbling Three-Step Burden-Shifting Approach on Employment Discrimination Cases*, 61 Brook. L. Rev. 703, 717, 721 (1995) (noting that *Burdine* followed the pretext-only standard, which requires judgment for the plaintiff who disproves the employer's step-two reason, but that *Hicks* diverged from *Burdine* by following the permissive-pretext-plus standard, which allows, but does not compel, judgment for the plaintiff who disproves the employer's step-two reason). *But see* Jody H. Odell, *Between Pretext Only and Pretext Plus: Understanding* St. Mary's Honor Center v. Hicks *and its Application to Summary Judgment*, 69 Notre Dame L. Rev. 1251, 1273 (1994) (arguing that *Hicks* was correct when declaring that *McDonnell Douglas* established the permissive pretext-only standard).

[56] *See infra* note 123 and accompanying text (discussing cases that interpreted the *McDonnell Douglas* framework to require an adverse employment action).

B. Section 2000e-2(a)(1): The Harm Requirement

Section 2000e-2(a)(1) makes it an unlawful practice "to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment" because of race, sex, religion, or national origin.[57] Applying the principle of *ejusdem generis*, one might argue that, because section 2000e-2(a)(1) enumerates three adverse employment actions—failure to hire, refusal to hire, and discharge—it requires all plaintiffs to allege and prove an adverse employment action. Although superficially appealing, this argument is specious because it (1) misapplies the principle of *ejusdem generis* and (2) ignores the statute's zero tolerance for any workplace discrimination.

1. *The* Ejusdem Generis *Argument*

The principle of statutory construction known as *ejusdem generis* instructs that when a statute cites specific terms as examples of a general term, the nature of the specific terms limits the scope of the general term.[58] The general term in section 2000e-2(a)(1) is "discriminate." The specific terms are "fail or refuse to hire" and "discharge." Both "fail or refuse to hire" and "discharge" are adverse employment actions. One may therefore argue that the enumerated instances of discrimination—fail or refusal to hire and discharge—limit the scope of unlawful discrimination. The principle of *ejusdem generis* would arguably counsel that discrimination is actionable only when resulting in an adverse employment action.

A closer reading of section 2000e-2(a)(1) reveals that the section does not invoke the principle of *ejusdem generis*. It is true that the section cites three examples of adverse employment actions, but it goes on to provide: "*or otherwise discriminate* against any individual with respect to his compensation, terms, conditions, or privileges of employment."[59] The disjunctive syntax of this section indicates that the three examples of adverse employment actions merely set forth one type of forbidden discrimination. The language "or otherwise discriminate" indicates that the phrase after the disjunctive "or" expresses a type of unlawful discrimination distinct from adverse employment actions. Even the comma preceding "or otherwise discriminate" separates this phrase from the three examples of adverse employment actions. It is noteworthy that commas do not separate the disjunctives "fail or refuse to hire or discharge" because they comprise a single grammatical unit. The section links

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[57] 42 U.S.C. § 2000e-2(a)(1).

[58] *See, e.g.*, CSX Transp., Inc., v. Ala. Dep't of Rev., 562 U.S. 277, 294 (2011) (noting that *ejusdem generis* is a canon of construction, which "limits general terms [that] follow specific ones to matters similar to those specified") (modification in original) (quoting Gooch v. United States, 297 U.S. 124, 128 (1936)).

[59] 42 U.S.C. § 2000e-2(a)(1) (emphasis added).

their meaning. Thus, "otherwise discriminate" means *discriminate in ways not involving an adverse employment action.*[60]

One might ask why the statute includes three examples of adverse employment actions if the prohibition against discrimination requires no such action. The reason may be that the three examples of adverse employment actions specify the most prevalent and harmful situations in which discrimination occurs: hiring and firing. Abuses in hiring and firing may have been ground zero for Congress's assault on discrimination, yet not Congress's only concern.

Legislative history supports this view. A comanager of the bill, Senator Tom Clark, stated: "The bill simply eliminates consideration of color from the decision to hire or promote."[61] This oversimplification of Title VII may express Congress's principal concerns about employment discrimination, but the statement mentions only one protected class and only two forbidden activities. Senator Clark's statement is an incomplete recitation of the statute's protected class and forbidden activities. He more accurately expressed the rights conferred in Title VII when he stated in his written answers to objections to the bill: "To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by section 704 are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national origin."[62] This explanation of Title VII is not only more expansive than his other statement but it is also more faithful to the statute's language. The congressional Interpretive Memorandum states the purpose of the statute in the same broad terms as Senator Clark's second statement: "To discriminate is to make a distinction, to make a difference in treatment or favor."[63]

These broad statements expressing the scope of the statute do not suggest that the statute requires an adverse employment action such as refusal to hire or discharge. Nor do they imply that the statute even requires a less-extreme employment decision such as a reassignment, performance evaluation, or the

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[60] *But see* Chambers v. Dist. of Columbia, 35 F.4th 870, 890 (D.C. Cir. 2022) (Katsas, J., dissenting) (arguing that the words in section 2000e-2(a)(1) "to fail or refuse to hire or to discharge," limit the meaning of the phrase "otherwise to discriminate" in section 2000e-2(a)(1)).

[61] 110 Cong. Rec. 7218 (1964) (remarks of Sen. Clark).

[62] *Id*. at 7213 (remarks of Sen. Clark).

[63] *Id.* Senate support of the bill was not universal. When critics of the bill argued that it was a "thought control bill," *id.* at 7254, Senator Case responded, "[t]he [employer] must do or fail to do something in regard to employment. There must be some specific external act, more than a mental act. Only if he does the act because of the grounds stated in the bill would there be any legal consequence." *Id.* (remarks of Sen. Case). Senator Case's remarks imply that the statute does not prohibit discriminatory thoughts or attitudes. Although Senator Case refers to an "external act," such an "act" could be interpreted to be discriminatory words as well as discriminatory conduct.

imposition of undesirable working conditions.[64] The statute does not require *any* employment decision.

Contrary to the view of the Supreme Court, the language of section 2000e-2(a)(1) does not require that discrimination *affected* workplace conditions.[65] It forbids, in far broader terms, discrimination "with respect to" the conditions of employment.[66] The phrase "with respect to" does not imply the causation of a discrete injury.[67] The plain meaning of this phrase merely implies that discrimination occurred regarding or concerning the conditions of employment.[68] Thus, the section does not require that discriminatory bias caused an adverse employment action or any action or injury other than discriminatory words or conduct directed against a member of a protected class. Whether manifested in words or by conduct, discrimination against a member of a protected class is the harm that the statute forbids. Discrimination *is* the violation.

One might argue that the Supreme Court in *Babb v. Wilkie* suggested that this Article's interpretation of section 2000e-2(a)(1) is too broad.[69] The *Babb* Court discussed section 623(a)(1), the antidiscrimination provision in the ADEA that applies to non-federal employees.[70] Section 623(a)(1) makes "the refusal or failure to hire or to discharge" any non-federal employee over forty unlawful.[71] The Court, in dicta, reasoned that the section's reference to the "refusal or failure to hire and to discharge," which are all end-result decisions, limited the scope of the section to other end-result decisions.[72] Section 623(a)(1) is worded nearly identically to section 2000e-2(a)(1) of Title VII,[73]

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[64] *See, e.g.*, Hamilton v. Dallas Cnty., 42 F.4th 550, 555–56 (5th Cir. 2022) (discussing unfavorable employment decisions that do not amount to adverse employment actions).

[65] *See, e.g.*, Burlington Northern & Santa Fe Ry. Co. v. White, 548 U.S. 53, 61 (2006) (stating that a violation of section 2000e-2(a)(1) must "affect the terms, compensation, conditions, or privilege of employment.")

[66] 42 U.S.C. § 2000e-2(a)(1).

[67] *See With respect to*, Merriam-Webster Thesaurus, http://www.merriam-webster.com/thesaurus/with%20respect%20to [https:/2/perma.cc/7PQK-X5PV] (stating that the phrase "with respect to" is synonymous to "about, on, of, with regard to, concerning, toward, as for, regarding, as regards, apropos of"); *see also* Allied World Nat'l Assurance Co. v. Old Republic Gen. Ins. Corp., 2023 WL 3579437, at *4 (5th Cir. May 22, 2023) (noting that the parties to the litigation agreed that "the phrase 'with respect to' means 'referring to,' 'concerning,' or 'with reference or regard to something'"). None of these meanings suggests a causation relationship.

[68] *See id*.

[69] *See* 140 S. Ct. 1168 (2020).

[70] *Id.* at 1176.

[71] *See id*.

[72] *Id.* The Court referred to *ejusdem generis* to support its reading of the section. *See id.* at n.4.

[73] *Compare* 29 U.S.C. § 623(a)(1) ("It shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age"), *with* 42 U.S.C. 2000e-2(a)(1) ("It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin").

so one might argue by analogy that the dicta in *Babb* suggests limiting in the scope of section 2000e-2(a)(1) of Title VII to end-result decisions.

It should be noted that the Supreme Court's dicta did not imply that the statute prohibited only adverse employment actions. Any end-result decision such as a transfer or menial work assignment fits the Court's analysis. More critically, however, the Court's dicta was simply wrong. As shown above, the unambiguous language of section 2000e-2(a)(1) forbids any discriminatory practice, even if unaccompanied by any employment decision, whether an end-result decision or an adverse employment action.

Interpreting section 2000e-2(a)(1) to impose a sweeping prohibition of discrimination, might raise the concern that any "stray remark" would support a lawsuit.[74] Although this Article proposes that, even a single remark might be actionable, the concern that this Article would unreasonably expand the limits of Title VII liability is unwarranted. This Article proposes that stray remarks should be actionable depending on such factors as the authority of the speaker, those to whom the speaker directed the remark, and the remark's content. Thus, this Article does not propose that any stray remark should be actionable. As Justice O'Connor has suggested offhand, isolated remarks should not provide a basis for recovery.[75] Although such words may be offensive, Title VII should not operate as a civility code.[76] Such a strict enforcement of the statute might deplete judicial resources and provide undeserving plaintiffs with a remedy.[77] The principle that alleviates concerns that the statute provides a remedy for minor, stray remarks is *de minimis non curat lex,* which holds that the law will not remedy trivial wrongs.[78] This principle applies to all enactments, including Title VII.[79] This Article refers to nonactionable remarks as "*de minimis* remarks."

As shown in the next subpart of this Article, the language of Title VII does not tolerate any workplace discrimination against a member of a

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[74] *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring) ("stray remarks in the workplace, while perhaps probative of sexual harassment, cannot justify requiring the employer to prove its hiring or promotion decisions were based on legitimate criteria") (citations omitted).

[75] *See id*.

[76] *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81–82 (1998) (assuaging fears that sexual harassment law will usher in a civility code in the workplace).

[77] *But 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, 408 (1999) (suggesting that tailoring the scope of an award to the seriousness of the injury will dissuade plaintiffs with minor complaints from commencing lawsuits).

[78] *See, e.g.*, Sandifer v. U.S. Steel Corp., 571 U.S. 220, 233–34 (2014) (acknowledging that trifling harms such as seconds or minutes of unpaid work time do not violate the Fair Labor Standards Act); Wisconsin Dep't of Revenue v. William Wrigley, Jr., 505 U.S. 214, 231 (1992) (explaining that "the venerable maxim *de minimis non curat lex* ('the law cares not for trifles') is part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept.").

[79] *See Wrigley*, 505 U.S. at 231.

protected class. This unqualified prohibition further supports the viewpoint the statute prohibits discriminatory words or conduct, even absent an adverse employment action.

2. Title VII's Zero Tolerance for Employment Discrimination

Title VII targets the myriad forms that discrimination takes.[80] Congress did not limit the statutory prohibition of discrimination to flagrant practices. The statute expresses zero tolerance for invidious discrimination, even when it manifests in subtler forms than an outright refusal to hire or discharge.[81]

A basic principle of statutory construction illuminates Congress's determination to prohibit any manifestation of employment discrimination against a member of a protected class. Courts should "give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction [that] implies that the legislature was ignorant of the meaning of the language it employed."[82] A modern phrasing of this principle favors interpreting statutes so as to avoid rendering "superfluous" any statutory language.[83] This principle implies that Congress intended all four words in Title VII—the compensation, terms, conditions, and privileges of employment—to broaden the protective scope of Title VII by enumerating four different aspects of the employment relationship.

The word "compensation" applies to pay or salary.[84] The "terms" of employment means the substantive provisions in the relevant employment agreement such as the contractual duration of the relationship and the employee's position and job description.[85] The "conditions" of employment encompass what one might consider the "atmosphere" in the workplace. For example, relationships between employees and the nature and quality

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[80] *See* 42 U.S.C. § 2000e-2(a)(1).

[81] *See id.*

[82] Montclair v. Ramsdell, 107 U.S. 147, 152 (1883).

[83] *See* Corley v. United States, 556 U.S. 303, 314 (2009) (quoting Hibbs v. Winn, 542 U.S. 88, 101 (2004)); Sprietsma v. Mercury Marine, 537 U.S. 51, 63 (2002) (according different meanings to the words "law" and "regulation" to avoid rendering either superfluous); Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 112 (1991); Bailey v. United States, 516 U.S. 137, 146 (1995) ("We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning."), *superseded by statute on other grounds* 18 U.S.C. § 924(c)(1)(A). *But see* Ransom v. FIA Card Servs., N.A., 562 U.S. 61, 81 (2011) (Scalia, J., dissenting) ("When a thought could have been expressed more concisely, one does not always have to cast about for some additional meaning to the word or phrase").

[84] *See* Bock v. Computer Assocs. Int'l, Inc., 257 F.3d 700, 706 (7th Cir. 2001) (quoting WEBSTER'S THIRD NEW INT'L DICTIONARY 463 (1981)) (stating that "compensation" means "payment for value received or service rendered.").

[85] Threat v. City of Cleveland, 6 F.4th 672, 677 (6th Cir. 2021) (quoting WEBSTER'S THIRD NEW INT'L DICTIONARY 2358 (1961)) (defining "terms" as "proposition limitations, or provision stated or offered for the acceptance of another and determining (as in a contract) the nature of the scope of the agreement").

of their interactions constitute "conditions" of employment.[86] Similarly, the nature of the physical workspace, including the available tools for carpenters or plumbers, the books for lawyers, or instruments for doctors or dentists would be conditions of employment.[87] The conditions of employment would also include personnel policies, including the expectations of the employer regarding output and quality of performance.[88] Finally, the "privileges" of employment refers to employment benefits beyond basic pay.[89] Seniority rights, bonuses, and promotions would fall under the heading of "privileges."[90]

Although these four terms overlap and delineations between them are not formulaic, each term signifies the congressional intent to expand the rights that Title VII affords employees in a protected class. The breadth of the language—particularly the inclusion of "conditions"—implies that the statute applies to virtually every facet of the employment relationship. The statute forbids any discriminatory practice "with respect to" the conditions of employment.

Taken in tandem, these four terms refute the argument that Title VII claims require plaintiffs to prove adverse employment actions. If Congress meant an adverse employment action to be an element of a section 2000e-2(a)(1) claim, Congress could have provided so expressly. For example, the statute could have provided that it is: "unlawful to discriminate in the compensation, terms, conditions, or privileges of employment when the discrimination results in an ultimate employment injury." The statute could have then specified that "an 'ultimate employment injury' is a substantial adverse employment action, including but not limited to the refusal to hire or promote, demotion, discharge, or a substantial change in employment benefits." Congress declined to include in section 2000e-2(a)(1) any language that demonstrates the intent to limit the scope of the section.

Title VII's expansive prohibition of invidious discrimination does not imply that, regardless of the nature of a violation, the courts should impose the identical remedy. Not all violations are created equal. Some are more harmful than others.[91] The size of the remedy should conform to the provable level of

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[86] *See* Pavon v. Swift Transp. Co., 192 F.3d 902, 908 (9th Cir. 1999) (holding that for purposes of Title VII, pervasive racial slurs, insults, and intimidation by a coworker alter the "conditions of employment").

[87] *See* AFGE, AFL-CIO, Local 1929 v. Fed. Labor Rels. Auth., 961 F.3d 452, 457 (D.C. Cir. 2020) (stating that the phrase "conditions of employment" under the Federal Service Labor-Management Relations Act covers "personnel policies, practices and matters that affect working conditions").

[88] *See id.*

[89] *See Hamilton*, 42 F.4th at 555 (benefits of employment such as seniority benefits are privileges of employment); *Threat*, 6 F.4th at 677 (stating that "[b]enefits that come with seniority may count as privileges of employment").

[90] *Threat*, 6 F.4th at 677.

[91] *See* Lidge, *supra* note 77, at 408 (arguing that the remedy should reflect the seriousness of the violation); Rebecca Hanner White, *De Minimis Discrimination*, 47 Emory L.J.

animus of the offender and the effects that the discriminatory treatment had (1) on the victim, (2) on those who witnessed it, and (3) on those who later learned of it.

One might object to this analysis of section 2000e-2(a)(1), arguing that a violation should not stand on discriminatory words alone because legal liability should require a demonstrable injury.[92] Title VII should therefore require an act or decision beyond discriminatory words. This objection is unpersuasive. As shown below, the law of slander per se imposes liability based on defamatory words without proof of a discrete injury and therefore contradicts this objection to this Article's broad interpretation of Title VII.

C. The Slander Analogy

In most instances, actionable slander requires proof of special damages.[93] Such damages are provable pecuniary losses that result from the slander.[94] Cases involving slander per se are an exception to this general rule.[95] In slander per se cases, damages are presumed.[96] As the Supreme Court explained in *Dun & Bradstreet*: "The rationale of the common-law rules has been the experience . . . that 'proof of actual damages will be impossible in a great many cases where, from the character of the defamatory words and publication, it is all but certain that serious harm has resulted in fact.'"[97] Such statements are actionable without proof of special damages because they subject the victim to "public hatred, contempt or ridicule."[98]

1121, 1173 (1998) (suggesting that *de minimis* violations are actionable, and the remedy should match the harm).

[92] Tort law, for example, requires an injury to support a claim. *See, e.g.*, Carey v. Piphus, 435 U.S. 247, 257 (1978) (commenting that "over the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights.").

[93] *See* F.A.A. v. Cooper, 566 U.S. 284, 295 (2012) (acknowledging the common law rule that an element of defamation is special damages); Sierke v. Sierke, 476 P.3d 376, 385 (Idaho 2020) (noting the general rule that a plaintiff in a defamation case must allege that the defamatory communication caused harm); RESTATEMENT (SECOND) OF TORTS § 621 (AM. L. INST. 1977) (noting that special damages are an element of a slander claim unless the claim is slander per se).

[94] *See F.A.A.*, 566 U.S. at 295.

[95] *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 765 (1985). *See generally* Michael K. Steenson, *Presumed Damages in Defamation Law*, 40 WM. MITCHELL L. REV. 1492, 1496–502 (2014) (discussing issue of presumed damages in defamation cases).

[96] *See Dun & Bradstreet*, 472 U.S. at 765; Weinstein v. Old Orchard Beach Family Dentistry, LLC, 271 A.3d 758, 766 (Me. 2022) (stating that in a case of defamation per se, plaintiff does not need to prove "evidence of actual injury or quantifiable loss" because damages are presumed); Hoffmann v. Clark, 975 N.W.2d 656, 664 (Iowa 2022) (noting that defamation per se claims require no proof of actual loss).

[97] *Dun & Bradstreet*, 472 U.S. at 760 (quoting WILLIAM PROSSER, LAW OF TORTS 765 (4th ed. 1971)).

[98] Bierman v. Weier, 826 N.W.2d 436, 444 (Iowa 2013).

The slander of a business reputation is an example of slander per se.[99] Like other instances of slander per se, the law deems slandering a person's business reputation so harmful that the law presumes damages.[100] In *Rowe v. Metz*, the Colorado Supreme Court reaffirmed this principle: "The rationale for this rule derived from the difficulty of proving damages in these instances."[101] The court emphasized that proving damages is particularly difficult where "the defamatory remarks relate to the conduct of an individual's business affairs."[102] "It is the rare case," the court observed, "in which a slander will destroy business profits in such a way that the loss can be traced to the slanderous remarks."[103]

In *Becker v. Alloy Hardfacing & Engineering Co.*,[104] William Becker was a salesman for Alloy, a manufacturer of machinery. At a business meeting, Mark and William Aulik, officers of Alloy, accused Becker of making derogatory remarks about the company.[105] Alloy ultimately fired Becker.[106] Thereafter, Becker secured new employment with Anderson International.[107] Alloy's attorney then sent a letter to Anderson International's president falsely accusing Becker of stealing Alloy's sales manual and confidential customer lists.[108] Becker sued Alloy and the Auliks for defamation.[109] Affirming the jury's award of compensatory damages to Becker, the court stated that "where a defendant's statements are defamatory per se, general damages are presumed."[110] The court went on to note that the rule applies to "false statements about a person's business, trade, or professional conduct."[111] The defamation, the court reasoned, "upset and embarrassed" Becker, who felt that the defamation had

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[99] *See* Rowe v. Metz, 579 P.2d 83, 84 (Colo. 1978) (explaining why the state presumes damages "where, as here, the defamatory remarks relate to the conduct of an individual's business affairs"); Bextel v. Fork Rd. LLC, 474 P.3d 625, 629 (Wyo. 2020) (pointing out that defamation of someone's competence in a trade or profession is defamation per se and thus exempt from requirement of proof of special damages); Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. Rev. 61, 87 (2009) (commenting that plaintiffs in defamation cases need not prove special damages when the defamatory statements "injure their careers"); Restatement (First) of Torts § 573 (Am. L. Inst. 1938) ("One who falsely and without a privilege to do so, [sic] publishes a slander which ascribes to another conduct, characteristics or a condition incompatible with the proper conduct of his lawful business, trade, [or] profession . . . is liable to the other.").

[100] *See Rowe*, 579 P.2d at 84.

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] 401 N.W.2d 655 (Minn. 1987).

[105] *Id.* at 657.

[106] *Id.*

[107] *Id.*

[108] *Id.* at 657–58.

[109] *Id.* at 656.

[110] *Id.* at 661.

[111] *Id.* at 661. The jury awarded Becker $30,000 in compensatory damages and $30,000 in punitive damages. *Id.* at 656. The court remanded the case to the trial court because the trial court did not properly instruct the jury that an award of punitive damages must rest on "clear and convincing evidence." *Id.* at 659.

injured "his personal and business reputation," and pressured him "to work harder and longer hours at Anderson."[112]

Workplace discrimination without an adverse employment action or other provable injury is analogous to slander per se. The law presumes harm where a person is the target of a slander to his or her business or professional reputation. Section 2000e-2(a)(1) similarly presumes harm when an employee is the target of unlawful discriminatory words or conduct.

The disparagement of Clara is analogous to the slander of Becker. Dillinger undercut Clara's professionalism by subjecting her to sex stereotyping. Clara, like Becker, would consequently be upset, embarrassed, and humiliated. As in *Rowe*, Clara would surely find proving tangible harm a daunting task. Victims of slander per se have a defamation claim without proof of special damages, and Clara should have a Title VII claim without proof of an adverse employment action.

The analogy extends beyond cases of express disparagement of one's professional competence. The undercurrents of bias are not restricted to such cases. Regardless of its form, discrimination is detrimental to the efficiency of the workplace and impugns the victim's job competence and status. While *de minimis* remarks should not be actionable, discriminatory words or conduct should be actionable under section 2000e-2(a)(1) without an injury distinct from the discrimination itself.

D. Adverse Employment Actions in Disparate-Treatment Cases

Ignoring the language of section 2000e-2(a)(1), an overwhelming number of federal court cases impose the requirement of an adverse employment action on Title VII plaintiffs. *Page v. Bolger*[113] is an early, seminal case, which read the requirement of an "ultimate employment decision"—another expression for an adverse employment action—into Title VII. Carl Page, an African American postal foreman, applied for a promotion to general foreman of mails.[114] Three white individuals comprised the review committee with the authority to decide who would get the promotion.[115] The committee awarded the promotion to a white employee.[116] When Page applied for another promotion—this time to the position of postal operations specialist—an all-white committee chose another white employee for the job.[117] Page commenced an action under section 2000e-16(a), which prohibits discrimination against federal employees. The language of this section is similar to the language of section 2000e-2(a).[118]

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[112] *Id.* at 661.
[113] 645 F.2d 227, 233 (4th Cir. 1981) (en banc).
[114] *Id.* at 228.
[115] *Id.* at 229.
[116] *Id.*
[117] *Id.*
[118] *Id.* at 233; *see also* 42 U.S.C. § 2000e-16(a) (providing that federal employees "shall be made free from any discrimination based on race, color, religion, sex, or national origin").

Analogizing those two sections, the Fourth Circuit held that, to prevail in a discrimination case, a plaintiff must prove an ultimate employment decision.[119] The Fourth Circuit provided a non-exhaustive list of ultimate employment decisions including "hiring, granting leave, discharging, promoting, and compensating."[120] The court acknowledged that Page had met this element by alleging the postal department's failure to promote him on two occasions.[121] Nevertheless, the court affirmed summary judgment for the defendant because Page had failed to disprove that the jobs went to white applicants based on merit.[122]

Whether characterized as adverse employment actions or ultimate employment decisions, the injury requirement expressed in *Page* became so entrenched in Title VII jurisprudence that courts routinely dismissed cases on summary judgment motions when plaintiffs had alleged harm not as extreme as "end decisions."[123] As the court stated in *Spivey v. Akstein*, "[p]laintiff

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[119] *Id.* at 233.

[120] *Id.*

[121] *Id.*

[122] *See id.* at 232. The court's basis for affirming summary judgment was flimsy at best. The court noted that the review committee insisted that it was not biased against Page. *See id.* at 230. This self-serving testimony is not sufficient to grant the defendant summary judgment. The court also credited the examiner who conducted the administrative hearing and concluded that Page, who was undoubtedly qualified for the promotions, possessed qualifications equal to those of the white employees who received one of the promotions. *See id.* at 230 n.8. Based on this evidence, the court should have allowed Page his day in court.

[123] *See, e.g.*, Hamilton v. Dallas Cnty., 42 F.4th 550, 552, 557 (5th Cir. 2022) (affirming summary judgment for defendant under constraint of precedent in case where official policy gave male detention officers weekends off while giving their female counterparts either two weekdays off or one weekday and one weekend day off, but requesting court to convene en banc to reconsider the adverse-employment-action requirement); James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 375–76 (4th Cir. 2004) (holding that a reassignment from a managerial position to a non-managerial position with less potential for future earnings and advancement is not an ultimate employment action because the reassignment did not involve a cut in pay and therefore affirming summary judgment for defendant); Grube v. Lau Indus., Inc., 257 F.3d 723, 725–26 (7th Cir. 2001) (basing summary judgment for defendant on plaintiff's failure to prove an adverse employment action, despite plaintiff's proof that her employer transferred her to a different shift, and commenting that "unfair reprimands or negative performance evaluations" do not rise to the level of adverse employment actions); Alvarado v. United Hospice, Inc., 631 F. Supp. 3d 89, 113–14 (S.D.N.Y. 2022) (granting summary judgment for defendants on the ground that the plaintiff failed to raise a tangible employment action, despite plaintiff's proof of the denial of compensation for an increased workload, the denial of necessary staff support to fulfill his job responsibilities, and unfair written criticisms for work-related infractions); Moses v. St. Vincent's Special Needs Ctr., Inc., No. 3:17-cv-1936, 2021 WL 1123851, at *5–6, *13 (D. Conn. Mar. 24, 2021) (granting summary judgment to defendant because reassignment to a more onerous route for client pickups and repeated oral and written disciplinary warnings did not constitute adverse employment actions); McNamara v. Susquehanna Cnty., No. 3:17-cv-02182, 2018 WL 2183266, at *3 (M.D. Pa. May 11, 2018) (noting that a discrimination claim under *McDonnell Douglas* requires that the plaintiff suffered an adverse employment action); Gibson v. Valley Ave. Drive-In Rest., No. 2:12-CV-3901, 2013 WL 6794986, at *7–8 (N.D. Ala. Dec. 19, 2013) (granting summary judgment for the employer because the plaintiff, in a pretext case, did not prove an adverse employment action); Costello v. N.Y. State Nurses Ass'n, 783 F. Supp. 2d 656, 677–78 (S.D.N.Y. 2011) (finding that preferential work assignments to individuals not in the protected class, negative performance evaluations, attempts to overload plaintiff with work

alleges that she suffered gender discrimination 'without adverse employment action.' This is a legal impossibility."[124]

This "legal impossibility" has scuttled the claims of plaintiffs who, despite presenting substantial evidence of discrimination, were defeated at the summary judgment phase of litigation.[125] For example, in *Vann v. Southwestern Bell Telephone Co.*, [126] Valerie Vann worked as a residential sales service representative for Southwestern Bell. She requested and was granted a transfer from Wichita to Tulsa to care for her infirm mother.[127] Vann's new position, which required her to offer Southwestern Bell's services to business customers, provided the same pay and benefits as her position in Wichita.[128] Before beginning work at the new position, Vann required training.[129] Initially, she passed two skills demonstration tests.[130] Then, without prior warning, the company tested her by observing how she handled live customer calls.[131] It is hardly surprising that this unexpected test flustered her.[132] After a one-hour break during which she met with a union representative, she was retested with another live call.[133] Undoubtedly worried about her prior "failure," she allegedly mishandled the retest call.[134] As a result of these testing outcomes, the company ordered Vann to return to her old job in Wichita, located 177 miles from Tulsa.[135]

Vann pointed out that only two of seven white employees who took the training course that she took failed, while two of three African American employees who took that course failed.[136] In addition, she showed that both of the African American employees who took a subsequent training course failed,

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to cause her to fail, and the refusal to provide the necessary support to succeed at work were not adverse employment actions); Riley-Jackson v. Casino Queen, Inc., 776 F. Supp. 2d 815, 825 (S.D. Ill. 2011) (commenting that "[r]eprimands, such as write-ups, typically do not constitute adverse employment action unless they are accompanied by some tangible job consequence . . . such as a suspension without pay"); Zegarra v. D'Nieto Uniforms, Inc., 623 F. Supp. 2d 212, 225, 230 (D.P.R. 2009) (granting defendants summary judgment on the ground that a lateral transfer from the position of administrative assistant, which allowed overtime, to the position of sales assistant, which did not allow overtime, was not an adverse employment action).

[124] No. 104CV1003WSDCCH, 2005 WL 3592065, at *22 (N.D. Ga. Dec. 30, 2005). The court stated that an adverse employment action is an element of a prima facie case under the *McDonnell Douglas* framework. *See id.*

[125] *See infra* note 359 and accompanying text (citing cases where courts have dismissed discrimination claims because plaintiffs have not met the threshold of a tangible employment injury).

[126] 179 F. App'x 491 (10th Cir. 2006).

[127] *Id.* at 492.

[128] *Id.* at 493.

[129] *See id.*

[130] *See id.*

[131] *See id.*

[132] *See id.*

[133] *See id.* at 494.

[134] *See id.*

[135] *See id.* at 494, 497.

[136] *See id.*

while only two of eight white employees failed.[137] In total, four of five African American employees failed, while only four of fifteen white employees failed.[138] The failure rate of African American employees was therefore three times the failure rate of white employees. Vann also showed that the company destroyed the handwritten notes that managers had taken when assessing the performance of employees on the demonstration tests.[139] Neither plaintiff's impressive statistical showing that the testing procedures were discriminatory nor the proof of Southwestern Bell's destruction of documents seemed to faze the court.[140]

The Tenth Circuit analyzed this case under the *McDonnell Douglas* framework. The court held that to establish a prima facie case, Vann must prove an "adverse employment action."[141] Vann argued that the transfer back to Wichita would have required her to relocate 177 miles.[142] Moreover, she had resettled in Tulsa, had lived there ten weeks, and had rented an apartment there.[143] Despite the cost and inconvenience of moving from Wichita to Tulsa, the court held that Vann failed to establish an adverse employment action.[144] The court therefore affirmed summary judgment for Southwestern Bell.[145]

This ruling is distressing because it ignored Vann's substantial evidence of discrimination simply because Southwestern Bell did not fire or demote her. Applied in this way, the requirement of an adverse employment action conflates *evidence* of discrimination with the *consequence* of discrimination. Significant discriminatory misconduct may result in a consequence less extreme than demotion or discharge.[146] Regardless of the consequence of the discrimination, victims of discrimination should survive summary judgment and, in many instances, deserve a judicial remedy.

E. Scholarly Criticism

It is not surprising that scholars have criticized the requirement of an adverse or ultimate employment action.[147] Ernest F. Lidge III argues correctly that

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[137] *See id.*
[138] *See id.*
[139] *See id.*
[140] *See id.*
[141] *Id.* at 496.
[142] *See id.* at 497.
[143] *See id.*
[144] *See id.* at 497–98.
[145] *See id.* at 499.
[146] *See, e.g.*, Jessica L. Roberts, *Rethinking Employment Discrimination Harms*, 91 Ind. L.J. 393, 435–36 (2016) (arguing that invoking stereotypes undermines a victim's performance and concluding that Title VII should address harms ostensibly less serious than adverse employment actions).
[147] *See, e.g.*, 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, 638 (2004) (construing the broad language of section 2000e-2(a)(1) to encompass discriminatory acts such as negative evaluations, increased

Title VII does not contain such a requirement.[148] Focusing on section 2000e-2(a)(1), he reads the statute and its legislative history to require only that an employer "altered the employee's terms, conditions, or privileges of employment because of the employee's membership in a protected group."[149] Lidge laments that the courts have rewritten the statute to include the adverse-employment-action requirement to the detriment of Title VII plaintiffs who would otherwise have valid claims.[150] Rewriting statutes, Lidge observes, is an inappropriate role for the courts.[151] He acknowledges the counterargument that expanding the coverage of Title VII might invite a rash of litigation.[152] Addressing this argument, he notes that courts should tailor awards to reflect the severity of the violation.[153] The prospect of nominal recoveries would discourage employees to litigate relatively minor infractions.[154] Lidge also suggests that employers, eager to avoid litigation, would tend to accommodate employees who have experienced relatively minor acts of discrimination.[155]

Rebecca Hanner White goes further than Lidge in criticizing the adverse-employment-action requirement.[156] She observes the inclination of some courts to limit and, even abandon it.[157] Supporting this trend, she relies on the expansive antidiscrimination language of section 2000e-2(a)(1).[158] White concludes that the breadth of this section of the statute forbids any discriminatory "job action," a term meaning any discriminatory employment decision.[159] Thus, argues White, the prohibition expressed in section 2000e-2(a)(1) extends even to *de minimis* acts of discrimination regardless of their

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workloads, and the refusal to provide support such as secretarial services or equipment); Lidge, *supra* note 77, at 368 (contending that the "adversity" of an employment action is relevant to discriminatory intent, but not relevant to statutory coverage); Rebecca Hanner White, *De Minimis Discrimination*, 47 Emory L.J. 1121, 1135 (1998) (arguing that any on-the-job difference in treatment between a member of a protected class and a non-protected employee violates Title VII); Yina Cabrera, *The "Ultimate" Question: Are Ultimate Employment Decisions Required to Succeed on Discrimination Claims Under Section 703(a) of Title VII?*, 15 FIU L. Rev. 97, 116 (2021) (interpreting section 2000e-2(a) to forbid discriminatory work assignments and changes in the physical conditions of the work environment, even though such changes do not amount to ultimate employment decisions); Esperanza N. Sanchez, *Analytical Nightmare: The Materially Adverse Action Requirement in Disparate Treatment Cases*, 67 Cath. U. L. Rev. 575, 583, 599 (2018) (concluding that the adverse-employment-action requirement is not based on the language of Title VII, and arguing that courts adopted the requirement to achieve judicial economy).

[148] *See* Lidge, *supra* note 77, at 403.
[149] *Id.*
[150] *See id.* at 372–73.
[151] *See id.* at 408.
[152] *See id.*
[153] *See id.*
[154] *See id.*
[155] *See id.*
[156] *See* White, *supra* note 147.
[157] *See id.* at 1126.
[158] *See id.* at 1160–63.
[159] *Id.* at 1163.

consequences.[160] White agrees with Lidge that the remedy should fit the seriousness of the violation.[161] Therefore, in White's view, a *de minimis* violation would justify only a token remedy.

F. A Minor Rebellion

Some circuits have rebelled against the requirement of an adverse employment action.[162] In *Chambers v. District of Columbia*,[163] Mary Chambers worked as a Support Enforcement Specialist and Investigator. Because of an excessive caseload, she sought a transfer, which the Attorney General's office denied.[164] Chambers brought a disparate-treatment claim under section 2000e-2(a)(1), offering evidence that similarly situated male employees received requested transfers.[165]

The D.C. Circuit, sitting en banc, rightly characterized the coverage of section 2000e-2(a)(1) as "capacious."[166] Analyzing the broad statutory language, the court concluded that the adverse-employment-action requirement had no basis in Title VII, but was rather a judicial creation.[167] This judicial meddling with the statute, the court stated, not only distorted its terms but also set the bar for violations too high.[168] Applying the general rule that *de minimis* harms are not remediable, the court concluded that harms exceeding triviality fell within the protective sphere of Title VII.[169] The refusal of The District of Columbia Office of the Attorney General to transfer Chambers was more than trivial and affected the terms and conditions of her employment.[170] The court therefore reversed the grant of summary judgment for the defendant.[171] Having exposed the flaws in the adverse-employment-action requirement, the court overruled precedent in the D.C. Circuit that had established that principle.[172]

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[160] *See id.*

[161] *See id.* at 1163–64.

[162] *See, e.g.*, Chambers v. Dist. of Columbia, 35 F.4th 870, 880–82 (D.C. Cir. 2022) (en banc) (rejecting adverse-employment-act requirement and reversing district court's grant of summary judgment for defendant); Threat v. City of Cleveland, 6 F.4th 672, 676–77, 682 (6th Cir. 2021) (reversing district court's grant of judgment on the pleadings for defendant, where plaintiff complained of several shift changes, which, although failing to meet the adverse-employment-action standard, met the requirements of Title VII).

[163] 35 F.4th at 873.

[164] *See id.*

[165] *See id.* at 873–74.

[166] *See id.* at 874.

[167] *See id.* at 875.

[168] *See id.* at 883 (Walker, J., concurring in the judgment in part and dissenting in part).

[169] *See id*. at 872 (majority opinion).

[170] *See id.* at 874. Judge Walker concurred, agreeing that the adverse-employment-action standard set the bar too high and caused confusion among the judiciary. *See id*. at 883 (Walker. J., concurring in the judgment in part and dissenting in part). He disagreed with the majority that job transfers always meet the statutory threshold of harm. *Id.* at 884.

[171] *See id.* at 883 (majority opinion).

[172] *Id.* The court overruled *Brown v. Brody*, 199 F.3d 446, 457 (D.C. Cir. 1999) (importing the requirement of a "tangible employment action" from other circuits and defining that requirement

Judge Katsas filed a dissenting opinion in which two judges joined.[173] He feared that the court's ruling would open the floodgates of litigation.[174] Although conceding that many decisions have applied the adverse-employment-action rule too strictly, he insisted that the rule was fundamentally sound.[175] He argued that it eliminated claims where a plaintiff had suffered no material harm and warned that the majority's rejection of the established rule would reward claims alleging *de minimis* injuries.[176] Judge Katsas invoked the doctrine of *ejusdem generis*, arguing that "to fail or refuse to hire or to discharge" are specific terms limiting the scope of the general term "or otherwise to discriminate against."[177] Despite the flaws in the *ejusdem generis* argument,[178] he read the statute to require material employment actions.[179]

Although Judge Katsas conceded that courts have frequently applied the adverse-employment-action requirement to the detriment of deserving plaintiffs, he would have preserved the rule by allowing claims where a plaintiff has suffered "'materially adverse' actionable injury," a standard more permissive than the prevailing standard requiring an adverse employment action.[180] He supported his position by citing decisions that deviated or expressed the willingness to deviate from the strict application of the adverse-employment-action requirement.[181] Even this concession, however, does not conform to the statute's unqualified prohibition of employment discrimination. Furthermore, a rule that has wrought unfair outcomes in as many cases as Judge Katsas conceded is a rule that the courts should discard.[182]

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as a materially adverse effect on employment status such as refusal to hire, discharge, demotion, or a decision significantly reducing benefits).

[173] Chambers v. Dist. of Columbia, 35 F.4th 870, 886 (D.C. Cir. 2022) (Katsas, J., dissenting).

[174] *See id.* at 887.

[175] *See id.*

[176] *See id.* at 890.

[177] *Id.*

[178] *See supra* notes 58–79 and accompanying text (pointing out the flaws in the *ejusdem generis* argument).

[179] Chambers v. Dist. of Columbia, 35 F.4th 870, 890 (D.C. Cir. 2022) (Katsas, J., dissenting). Judge Katsas also urged the court to respect the doctrine of stare decisis. *Id.* at 894–95. He pointed out a welter of circuit court precedent, which in his view found support in Supreme Court decisions adopting the adverse-employment-action requirement. *Id*.

[180] *Id.* at 887 (quoting Brown v. Brody, 199 F.3d 446, 455–56 (D.C. Cir. 1999)).

[181] *See id.* at 888; *see, e.g.*, Youssef v. Fed. Bureau of Investigation, 687 F.3d 397, 401–02 (D.C. Cir. 2012) (concluding that a transfer to a position entailing reduced responsibilities may qualify as an adverse employment action and remanding the case for a determination of that issue); Pegram v. Honeywell, Inc., 361 F.3d 272, 283 (5th Cir. 2004) (commenting that a "transfer may qualify as an adverse employment action if the change makes the job objectively worse").

[182] *See Chambers*, 35 F.4th at 894–95 (Katsas, J., dissenting) (citing and discussing numerous cases that have reached questionable results when applying the adverse-employment-action requirement).

G. McDonnell Douglas: Single-Motive Cases

The *McDonnell Douglas* framework assumes that either the employer's legitimate reason or unlawful discrimination caused the adverse employment action.[183] Consequently, the *McDonnell Douglas* framework cannot cope with a case where both reasons were contributing factors.[184] The Supreme Court in *Price Waterhouse v. Hopkins* recognized this limitation of the *McDonnell Douglas* framework.[185] It therefore devised the "mixed-motive" analysis.[186] Congress subsequently modified this analysis,[187] which is more accurately characterized as the motivating-factor test. Part III discusses this approach to disparate-treatment cases and its implications for the adverse-employment-action doctrine.

III. Harm Under the Motivating-Factor Test

Although the motivating-factor test is distinct from the *McDonnell Douglas* framework, both approaches share a crucial element. They require a plaintiff to allege and prove an adverse employment action.[188]

A. Price Waterhouse v. Hopkins*: Mixed-Motive Cases*

In *Price Waterhouse v. Hopkins*, the Supreme Court adopted the mixed-motive analysis.[189] This analysis has two components: the first is the motivating-factor test,[190] and the second component is the "same-decision" affirmative defense.[191] Together with *McDonnell Douglas*, *Price Waterhouse* completed an analytical system equipped to resolve any individual-disparate-treatment

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[183] *See, e.g.*, Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 256 (1981) ("The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision.").

[184] *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 247 (1989).

[185] *See id.* ("[T]he dissent would insist that *Burdine*'s framework perform work that it was never intended to perform. It would require a plaintiff who challenges an adverse employment decision in which both legitimate and illegitimate considerations played a part to pretend that the decision, in fact, stemmed from a single source—for the premise of *Burdine* is that *either* a legitimate *or* an illegitimate set of considerations led to the challenged decision.") (emphasis in original).

[186] *Id.* at 252.

[187] *See* 42 U.S.C. § 2000e-2(m).

[188] *See supra* notes 39–56; *see also* Martin v. Baptist Health Richmond, Civil No. 5:20-cv-00443-GFVT, 2022 WL 1215632, at *8 (E.D. Ky. Apr. 25, 2022) (stating that "an adverse employment action" is an element of a mixed-motive claim).

[189] *See* 490 U.S. at 252.

[190] *Id.* at 242 (holding that "a[n] [employee's] gender may not be considered when making decisions that affect her").

[191] *Id.* (concluding that "an employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision"). *See, e.g.*, Quigg v. Sch. Dist., 814 F.3d 1227, 1244 (11th Cir. 2016) (applying the "same-decision" defense); Costa v. Desert Palace, Inc., 299 F.3d 838, 849 (9th Cir. 2002) (referring to the "same decision" defense").

case, whether single-motive or mixed-motive.[192] Regrettably, *Price Waterhouse* engrafted the requirement of an adverse employment action onto section 2000e-2(a)(2).[193]

1. Price Waterhouse*: The Motivating-Factor Test*

Ann Hopkins was a senior manager who had worked five years for Price Waterhouse when partners of the firm proposed her candidacy for partnership.[194] Her credentials were impressive.[195] Partners described her as "an outstanding professional," "very productive," "extremely competent," and "energetic and creative."[196] Her strongest credential for advancement may have been the instrumental role she played in securing a twenty-five million dollar government contract, a feat unequalled by any of her eighty-seven male peers eligible for partnership that year.[197] It is striking that Hopkins was the only female candidate.[198]

Such an outstanding record suggested that the firm would approve her bid for partnership. But her tactless interpersonal skills proved too weighty a negative.[199] Even her supporters acknowledged that she was sometimes "overly aggressive," "unduly harsh," and "impatient with staff."[200]

A substantial body of evidence adduced at her bench trial demonstrated that another reason stymied Hopkins's bid for partnership: she was the victim of "sex stereotyping."[201] Partners variously remarked that she was "macho," needed to take "a course at charm school," and criticized her for using unladylike "foul language."[202] Thomas Beyer, a partner of the firm, conveyed the news to Hopkins that the firm had put her application on hold.[203] He advised her that to achieve partnership she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[204]

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[192] *See id.* at 242–43.

[193] Section 2000e-2(a)(2) makes it unlawful for an employer "to limit, segregate, or classify his [or her] 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 [or her] status as an employee." 42 U.S.C. § 2000e-2(a)(2).

[194] *Price Waterhouse*, 490 U.S. at 231–32.

[195] *See id.* at 233–34.

[196] *Id.* at 234.

[197] *See id.* at 233–34

[198] *See id.* at 233.

[199] *See id.* at 234.

[200] *Id.* at 235.

[201] *See id.* Dr. Susan Fiske, a social psychologist and Associate Professor of Psychology at Carnegie-Mellon University, testified at trial that partners who had had minimal contact with Hopkins described her as "universally disliked" and "consistently annoying and irritating." *Id.* Fiske believed that these comments resulted from sex stereotyping. *See id.* at 236.

[202] *Id.* at 235.

[203] *See id.*

[204] *Id.*

Judge Gesell, who presided at trial, concluded that both Hopkins's abrasiveness and the firm's female stereotyping contributed to its denial of her application for partnership.[205] This ruling raised a novel issue for the Supreme Court: how to assess liability when both the alleged discriminatory and nondiscriminatory reasons played a part in the adverse employment decision.[206] The Court began its analysis by citing both sections 2000e-2(a)(1) and (2).[207] Acknowledging the breadth of the prohibitory language of both sections, the Court read them to categorically forbid discrimination against a member of a protected class.[208] The Court stated that discrimination against such a person "must be irrelevant to employment decisions."[209]

The Court's pronouncement placed a minimal burden on victims of employment discrimination.[210] All the statute required, held the Court, was that discrimination was a contributing factor that influenced an employment decision.[211] It would be no defense for an employer to prove that the influence of discrimination on the employment decision fell below a minimum threshold.[212]

The Court's interpretation of section 2000e-2(a)(2) was correct as far as it went. The unqualified statutory prohibition did demand an outright condemnation of invidious discrimination, even if subtle, unless *de minimis*. However, the Court's pronouncement did not go far enough. The Court clung to the requirement—found nowhere in the statute—that the discrimination be tethered to an employment decision.[213] Although the Court did not appear to require an adverse employment action, neither section 2000e-2(a)(1) nor section 2000e-2(a)(2) requires *any* employment decision. Under either section, discriminatory remarks, if more than *de minimis*, violate Title VII. Part II of this Article showed that section 2000e-2(a)(1) does not require any employment decision,

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[205] *See id.* at 236–37 (citing Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1117 (D.D.C. 1985)).

[206] *See id.* at 237–38.

[207] *See id.* at 240.

[208] *See id.*

[209] *Id.*

[210] *See id.*

[211] *See id.* The Court considered whether Title VII invoked weightier causation standards. First, the Court considered but-for causation. This causation standard, the Court observed, asks whether an event would not have occurred if a factor were removed. *See id.* The Court concluded that Title VII did not adopt but-for causation, noting that the statute uses the present tense ("to fail or refuse"), but does not refer to what might hypothetically have occurred under different circumstances. *Id.* at 240–41. The Court rejected the sole-causation standard, pointing out that Congress declined to adopt an amendment that proposed this standard. *See id.* at 241 n.7.

[212] *See id.* at 241. Justice Kennedy, joined by Chief Justice Burger and Justice Scalia, dissented. *See id.* at 279 (Kennedy, J., dissenting). Justice Kennedy argued that the statutory phrase "because of" implies that the discriminatory conduct affected the outcome. *See id.* at 281. Citing precedent consistent with requiring but-for causation and common law principles, he found but-for causation the "least rigorous standard" that would meet the causation requirement of the statute. *Id.* at 282.

[213] *See id.* at 241 (majority opinion).

let alone an adverse employment action. As shown below, the same is true of section 2000e-2(a)(2).

2. Section 2000e-2(a)(2): The Harm Requirement

Section 2000e-2(a)(2) makes it unlawful for an employer "to limit, segregate, or classify his [or her] employees or applicants for employment in any way which would deprive or even tend to deprive any individual of employment opportunities or otherwise adversely affect his [or her] status as an employee . . . ."[214] This language establishes an expansive prohibition of discrimination, though, unlike section 2000e-2(a)(1), it does not make discrimination per se unlawful. Nevertheless, the section is extremely broad and does not require an adverse employment action or any employment decision. It is clear that the section does not require a deprivation of employment opportunities, because it prohibits words or conduct that would *tend to deprive* an employee or applicant of employment opportunities. Words or conduct that would tend to deprive an employee of job opportunities do not require an employment decision. For example, assume that someone in the workplace makes a demeaning racial remark about an employee's capabilities. That remark, if heard by the employee's supervisor, might tend to influence the supervisor not to recommend the employee for a promotion. Thus, the statute has been violated, even absent such a denial.

A disjunctive "or" in the section separately prohibits discriminatory words or conduct that would "tend to deprive any individual of employment opportunities" from those that would "adversely affect [a person's] status as an employee." The second quoted part of the section—the "adversely affect" clause—confers rights separate from and greater than those conferred in the "tend to deprive" clause. A racial remark made to coworkers or supervisors will likely adversely affect an employee's status because the racial remark may affect how coworkers view the disparaged employee. Thus, an employment decision, or even a possible diminution in employment opportunities, is not necessary to trigger this prohibition.

As noted, *de minimis* remarks are not actionable.[215] Such minor discriminatory words or conduct, though offensive, would not likely tend to deprive an individual of an employment opportunity or to affect the individual's status at work. But discriminatory words or conduct such as those endured by Clara violate section 2000e-2(a)(2).

Serious harm to an employee's status will likely result from discriminatory words or conduct in the workplace. Assume that Dillinger calls a meeting

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[214] 42 U.S.C. § 2000e-2(a)(2).

[215] *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring) (arguing that "stray remarks in the workplace, while perhaps probative of sexual harassment . . . cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria.").

of a team of attorneys assigned to an antitrust case. The team is comprised of ten associates, one of whom is Keshawn, an African American. The other nine associates at the meeting are white. Dillinger assigns each of the team members—most of whom are junior to Keshawn—the task of writing a section of a draft memorandum of law in support of a motion for summary judgment. Without any justification based on Keshawn's job performance, Dillinger says at the meeting, "Keshawn, I don't think you're up to writing a section of the memo of law." Dillinger then assigns him the task of sorting documents acquired in discovery, which is a mechanical job usually delegated to first-year associates. Finally, assume that Dillinger's disparagement of Keshawn influences one or more of the associates at the meeting to question Keshawn's capabilities as a lawyer because Keshawn is African American. Whether motivated consciously or unconsciously, Dillinger's treatment of Keshawn harmed Keshawn's status at the firm and violates Title VII's broad prohibition of employment discrimination.

In this hypothetical case, Keshawn has not suffered an adverse employment action. The discriminatory practice is subtle. By demeaning Keshawn in front of Keshawn's colleagues, Dillinger has used an unlawful "employment practice." He invoked the stereotype that African Americans are not the intellectual equals of their white peers.[216] Dillinger has marked Keshawn as an inferior lawyer. Such a public denigration would humiliate anyone. But Dillinger has also invoked a stereotype. African Americans are not strangers to this kind of slur.[217] It is surely as harmful as the rejection from a job or the denial of a promotion. In the sense of human cost, using a racist trope to humiliate Keshawn in front of his peers, though not inflicting economic injury, may be more devastating than tangible employment injuries.[218] The victim of such belittlement is not likely to forget its impact, especially since he or she works on a day-to-day basis with the other lawyers who witnessed the episode. Those in the workplace have a "special relationship" because they spend so much time interacting during their working hours.[219] The continuous level of contact between coworkers exacerbates the impact of Dillinger's racial innuendos.[220]

Some of the other attorneys at the meeting, rather than reacting empathically, might question Keshawn's competence. Such a reaction is likely given

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[216] *See* Tristin K. Green, *Racial Emotion in the Workplace*, 86 S. Cal. L. Rev. 959, 1010 (2013) (referring to the use of the racial stereotype that African Americans are unable to perform adequately on the job as a "racial assault").

[217] *See id.*

[218] *See* Roberts, *supra* note 146, at 395–96 (defining "stereotype threat" as calling attention to a stereotype and then asking a person so stereotyped to perform a skill related to the stereotype and noting that stereotype threat evokes stress and anxiety in the victim).

[219] *See, e.g.*, Miller v. Motorola, Inc., 560 N.E.2d 900, 903 (Ill. App. Ct. 1990) (applying the special-relationship doctrine to claim of the public disclosure of private facts in the workplace); McSurely v. McClellan, 753 F.2d 88, 112 (D.C. Cir. 1985) (recognizing the special-relationship doctrine).

[220] *See Miller*, 560 N.E.2d at 903.

that the stereotyping came from an authority figure.[221] The implication that Keshawn is incompetent may reinforce prejudicial stereotypes that some of the other attorneys may have long harbored, even if unconsciously.[222] Negative stereotyping, whether overt or covert, may demoralize Keshawn and interfere with his sense of being a valued professional in the firm.[223] Burdening Keshawn with the implication of inferiority may result in a self-fulfilling prophecy. The corrosive effects of Dillinger's prejudicial treatment might cause Keshawn to avoid interacting with his colleagues and might spawn an atmosphere of hostility and distrust.[224] Working in a tainted environment might detract from Keshawn's job performance.[225] For all these reasons, Dillinger's demeaning treatment of Keshawn may "adversely affect [Keshawn's] status as an employee."[226]

Unlike section 2000e-2(a)(1), section 2000e-2(a)(2) does not provide that injury is presumed. To prevail at trial, Keshawn would need to prove that Dillinger's misconduct adversely affected Keshawn's employment status or tended to deprive him of job opportunities. To meet this burden of proof, Keshawn might offer the testimony of an expert witness such as a social psychologist.[227] Such a showing would establish a violation of section 2000e-2(a)(2).

3. The Same-Decision Defense

The *Price Waterhouse* Court explained that, in addition to Title VII's antidiscrimination policy,[228] Title VII recognized the business interests of

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[221] *See* Andrew M. Perlman, *Unethical Obedience by Subordinate Attorneys: Lessons from Social Psychology*, 36 Hofstra L. Rev. 451, 460–61 (2007) (showing that the attitudes of subordinate attorneys conform to the unethical attitudes expressed by attorneys in positions of authority).

[222] *See* Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. Rev. 465, 467 (2010) (pointing out that ingrained biases affect attitudes of workers toward coworkers in the workplace); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317, 339–44 (1987) (highlighting the prevalence of unconscious discrimination in the workplace); *see also* Amelia M. Wirts, *Discriminatory Intent and Implicit Bias: Title VII Liability for Unwitting Discrimination*, 58 B.C. L. Rev. 809, 811 (2017) (arguing that exposure to prejudicial cultural norms implants biased attitudes in the unconscious mind of individuals).

[223] *See* Thomas Healy, *Stigmatic Harm and Standing*, 92 Iowa L. Rev. 417, 454–55 (2007) (citing research showing that expressions of racial bias affect victim's self-esteem).

[224] *See* Green, *supra* note 216, at 976–78 (citing social science research showing that avoidance is a reaction to discriminatory treatment and that avoidance may lower job performance).

[225] *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993) (remarking that a discriminatory work environment, "even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing their careers").

[226] 42 U.S.C. § 2000e-2(a)(2).

[227] *See, e.g.*, Susan T. Fiske & Eugene Borgida, *Providing Expert Knowledge in an Adversarial Context: Social Cognitive Science in Employment Discrimination Cases*, 4 Ann. Rev. L. & Soc. Sci. 123, 140 (2008) (emphasizing the importance of expert psychological testimony in employment discrimination cases).

[228] *See* 42 U.S.C. § 2000e-2(a).

employers."[229] To accommodate these interests, *Price Waterhouse* created a loophole that would excuse even the most blatant acts of employment discrimination.[230] Dubbed "the same-decision defense," this loophole enabled the employer to escape liability under section 2000e-(a)(1) or (2) by proving that, absent the discriminatory motive, it would have reached the same employment decision.[231] One may state this proposition conversely: the employer would have made the challenged employment decision based on the nondiscriminatory reason alone.[232] Although its basis cannot be found in section 2000e-2(a),[233] the same-decision defense may excuse even the most flagrant acts of discrimination.

B. The Civil Rights Act of 1991

Two years after *Price Waterhouse*, Congress enacted the Civil Rights Act of 1991. One provision of the new law was section 2000e-2(m), which codified the motivating-factor test.[234] A second provision of the 1991 Civil Rights Act, section 2000e-5(g)(2)(B), modified the same-decision defense.[235]

1. Codification of the Motivating-Factor Test

Section 2000e-2(m) provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for *any* employment practice, even though other factors also motivated the practice."[236] A forbidden practice need not involve hiring, firing, promoting, or demoting. Any discriminatory practice violates the statute. Such an action need not be an adverse employment action or any employment decision. Discriminatory words or conduct unless *de minimis* meet this standard.

This section sweeps as broadly as section 2000e-2(a)(1). It does not require that a discriminatory motive be the sole factor, or even a substantial factor, for an employment practice. By requiring that bias was merely a motivating factor, this section sets the liability bar as low as possible. Any lesser standard would be no standard at all.[237]

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[229] *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 244 (1989).

[230] *See id.* at 244–45.

[231] *See id.; see also* Quigg v. Sch. Dist., 814 F.4th 1227, 1244 (11th Cir. 2016) (applying the "same-decision" affirmative defense.); Costa v. Desert Palace, Inc., 299 F.3d 838, 849 (9th Cir. 2002) (referring to the "same decision" defense).

[232] *See id.*

[233] *See* 42 U.S.C. § 2000e-2(a).

[234] 42 U.S.C. § 2000e-2(m).

[235] 42 U.S.C. § 2000e-5(g)(2)(B).

[236] 42 U.S.C. § 2000e-2(m) (emphasis added).

[237] *See* Kenneth R. Davis, *The "Severe and Pervers-ive" Standard of Hostile Work Environment Law: Behold the Motivating Factor Test*, 72 RUTGERS U. L. REV. 401, 424 (2020) (musing that "[a] motivating factor is cause in limbo, a lost cause, an ineffectual tagalong to the actual cause").

It is noteworthy that this section does not speak in terms of "motivating cause." Unlike section 2000e-2(m), sections 2000e-2(a)(1) and (2) both forbid discrimination "because of" an individual's membership in a protected class.[238] Similarly, section 2000e-3(a), the antiretaliation provision, makes it unlawful to discriminate "because" of an employee's opposition to an unlawful discriminatory practice or "because" an employee participated in an activity in furtherance of a discrimination claim.[239] Given the causation language in these antidiscrimination provisions in Title VII, one cannot reasonably attribute to inadvertence Congress's abandonment of causation language in section 2000e2(m). The section sets the bar against employment discrimination as low as possible: words or conduct motivated by bias violate this statute even if the words or conduct had no effect on the conditions of employment.

Turning to Clara's case, one cannot doubt that she should have a Title VII claim under the motivating-factor test. When Dillinger and the other partners subjected Clara to sex stereotyping, sex discrimination was surely a motivating factor. They might argue that their desire to help Clara succeed in her quest for partnership also motivated their remarks, but even if that explanation were true, they would still be liable under section 2000e-2(m) because sex stereotyping was certainly a motivating factor for the remarks about her grooming and conduct.

Keshawn's case differs from Clara's because Dillinger, in addition to spouting derogatory remarks about Keshawn, made an employment decision assigning Keshawn the task of reviewing documents. A work assignment is not an adverse employment action. Yet, racial discrimination was a motivating factor for Dillinger's discriminatory words and decision to assign Keshawn a relatively menial task. Keshawn should therefore have a section 2000e-2(m) claim against the firm.

2. *Modification of the Same-Decision Defense*

Section 2000e-5(g)(2)(B) provides defendants with a partial affirmative defense. It provides that if the employer "demonstrates that [it] would have taken the same action in the absence of the impermissible motivating factor," the court may award the plaintiff declaratory or injunctive relief and attorney's fees.[240] The court may not, however, award such a plaintiff damages or backpay, or order the employer to hire the plaintiff or to reinstate the plaintiff to a job.[241] Thus, section 2000e-5(g)(2)(B) limits a plaintiff's available remedies but does not exonerate an employer guilty of discrimination.[242]

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[238] 42 U.S.C. § 2000e-2(a); *see also id.* § 2000e-2(k)(1)(A)(i) (making an employment practice unlawful if it "causes a disparate impact" on a protected class).

[239] *See* 42 U.S.C. § 2000e-3(a).

[240] 42 U.S.C. § 2000e-5(g)(2)(B).

[241] *See* 42 U.S.C. § 2000e-5(g)(2)(B)(ii).

[242] *See* 42 U.S.C. § 2000e-5(g)(2)(B).

By reducing the scope of the same-decision defense, Congress strengthened Title VII and reasserted its commitment to combat employment discrimination. Perpetuating the adverse-employment-action requirement would have the opposite effect by weakening Title VII. Section 2000e-5(g)(2)(B) therefore reinforces the conclusion that an adverse employment action is not a requirement of a violation.

C. Cases After the 1991 Civil Rights Act

In *Desert Palace, Inc. v. Costa*,[243] the Supreme Court held that the motivating-factor test of section 2000e-2(m) applied to all individual-disparate-treatment cases, whether the evidence of discrimination was direct or circumstantial or whether the case involves a single or mixed motive. In reaching this conclusion, the Court relied on the breadth of section 2000e-2(m), which requires a plaintiff to prove that discrimination was "a motivating factor for *any* employment practice."[244] As shown above, the section does not provide that a forbidden practice must amount to an adverse employment action.

Despite the terms of section 2000e-2(m), a majority of federal courts cling to the requirement that a plaintiff, alleging a mixed-motive violation,

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[243] 539 U.S. 90, 102 (2003). In *Costa*, Catharina Costa, a warehouse worker and heavy equipment operator for Caesar's Palace Hotel and Casino, was rebuked, suspended, and ultimately fired because of conflicts she had with management, culminating in a physical clash with another employee. *Id.* at 95. The other individual involved in the confrontation—a man—received a five-day suspension. *Id.* at 96. Costa then commenced a lawsuit, alleging sex discrimination. *Id.* The issue was whether, to qualify for a mixed-motive jury instruction, a plaintiff needed to offer direct, rather than circumstantial, evidence of discrimination. *Id.* at 92. This issue arose because Justice O'Connor's influential concurring opinion in *Price Waterhouse* argued that a mixed-motive analysis and its non-burdensome motivating-factor test applied only when a plaintiff offered direct, rather than circumstantial, evidence of discrimination. *Id.* at 94; *see* Price Waterhouse v. Hopkins, 490 U.S. 228, 275 (1989) (O'Connor, J., concurring). Absent direct evidence, a plaintiff would have to prove that discrimination "played a substantial role" in causing the challenged employment action. *Desert Palace*, 539 U.S. at 102 (O'Connor, J., concurring) (quoting *Price Waterhouse*, 490 U.S. at 275 (O'Connor, J., concurring)). Writing for a unanimous Court, Justice Thomas noted that section 2000e-2(m) requires a plaintiff merely to "demonstrat[e]" that the employer discriminated. *Desert Palace*, 539 U.S. at 98 (Thomas, J.). The word "demonstrate[]," Justice Thomas stated, does not suggest a greater burden of proof for single-motive cases than for mixed-motive cases. *Id.* at 98–99. Justice Thomas also pointed out that "demonstrates," as defined by Congress in the 1991 Act, means to meet "the burdens of production and persuasion." *Id.* If Congress intended to create a higher burden of proof for mixed-motive cases, it could have done so with appropriate statutory language. *Id.* He also observed that section 2000e-5(g)(2)(B) requires an employer to "demonstrat[e]" the partial same-decision defense. *Id.* at 100–01. To "demonstrate[]" this defense, an employer is not required to meet a heightened burden of proof. *Id.* The same word when used in sections of the same statute should be accorded the same meaning in both sections. *Id.* at 101.

[244] *Desert Palace*, 539 U.S. at 101 (quoting 42 U.S.C. § 2000e-2(m)) (emphasis added).

must prove an adverse employment action.[245] One striking example is *Davis v. Legal Services Alabama, Inc*.[246] Artur Davis, an African American, was the executive director of Legal Services Alabama ("LSA"), a non-profit law firm serving Alabamians.[247] He began experiencing problems with colleagues, and after those colleagues complained to his employer, he was suspended with pay pending investigation of accusations raised against him.[248] Those accusations included making improper spending decisions, not following LSA hiring procedures, and creating a hostile work environment for other employees.[249] Davis brought a Title VII claim, alleging race discrimination.[250] LSA moved for summary judgment, and the district court granted LSA's motion.[251]

The Eleventh Circuit cited section 2000e-2(a)(1) as the statutory basis of the claim, and held that a plaintiff asserting a mixed-motive claim must prove an adverse employment action.[252] The court stated that adverse employment actions are "termination, demotions, suspensions without pay, and pay raises or cuts—as well as other things that are similarly significant standing alone."[253] Suspensions with pay, the court instructed, are not adverse employment actions.[254] Thus, according to the court, the humiliation caused by a discriminatory suspension of a person in a leadership role in a prominent public service organization is not sufficient to support a claim of race discrimination.[255] To rationalize this dubious conclusion, the court observed that when

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[245] *See, e.g.*, EEOC v. AutoZone, Inc., 860 F.3d 564, 565–66 (7th Cir. 2017) (holding in race discrimination case that several transfers without lower pay, lesser benefits, or reduced responsibility are not adverse employment actions needed to meet the requirement of section 2000e-2(a)(2)); Vega v. Hempstead Union Free School Dist., 801 F.3d 72, 86 (2d Cir. 2015) (holding that a plaintiff invoking the motivating-factor test must allege adverse employment action); White v. Baxter Healthcare Corp., 533 F.3d 381, 402–03 (6th Cir. 2008) (holding that the mixed-motive test requires a plaintiff to prove an adverse employment action and that unfairly downgraded performance evaluation was such an action because it negatively affected pay raise); Gagnon v. Sprint Corp., 284 F.3d 839, 848–49 (8th Cir. 2002) (finding adverse employment action in mixed-motive case where non-decisionmaker's discriminatory rejection of large salary increase for plaintiff affected the ultimate decisionmaker who granted plaintiff a smaller salary increase); Newell v. Acadiana Planning Comm'n Inc., 637 F. Supp. 3d 419, 426 (W.D. La. 2022) (stating that mixed-motive pleading requirements follow *McDonnell Douglas's* requirements, including the necessity of alleging an adverse employment action).

[246] 19 F.4th 1261 (11th Cir. 2021) (per curiam).

[247] *See id.* at 1264.

[248] *See id.*

[249] *See id.*

[250] *See id.*

[251] *See id.* at 1265.

[252] *Id.* at 1271 n.2. The Eleventh Circuit noted that Davis had brought his claim under the mixed-motive theory and that the district court had erroneously applied the *McDonnell Douglas* pretext framework. The court found this error harmless because both a *McDonnell Douglas* pretext claim and a mixed-motive claim require an adverse employment action. *See id*.

[253] *Id.* at 1266 (quoting Monaghan v. Worldpay US, Inc., 955 F.3d 855, 860 (11th Cir. 2020)).

[254] *See id.* at 1267.

[255] *See id.* Davis raised without success this negative-publicity argument as an aggravating circumstance. *See id.*

an employee is accused of wrongdoing, a suspension is a sensible measure pending the outcome of an investigation.[256]

The court erred in two ways. First, Title VII does not require an adverse employment action. Second, the reasonableness of the suspension should have been irrelevant to the court's determination of whether the suspension was an adverse employment action. The question of whether a decision is an adverse employment action depends on the severity of the action, not its appropriateness under the circumstances.

Having reached the decision that Davis's suspension was not an adverse employment action, the court entertained Davis's argument that aggravating factors raised his suspension to the level of an actionable injury.[257] Among these factors were LSA's engagement of a security guard shortly after Davis's suspension, and the timing of the suspension, which occurred only three days before a high-profile LSA reception with the state bar.[258] The Eleventh Circuit discounted these aggravating circumstances, concluding that Davis had not proven that LSA's motivation for these actions was to harm him.[259] The court therefore confirmed the district court's grant of summary judgment for LSA.[260]

The court's reasoning is again perplexing. An action such as demotion or discharge is classified as an adverse employment action because of the seriousness of the decision, not because of the employer's motivation. The ultimate issue for trial was whether discrimination motivated LSA's decision to suspend Davis. The Eleventh Circuit conflated discriminatory intent with the type of decision that qualifies as an adverse employment action.

D. The Policy of Title VII

The urgency of the federal policy to cleanse the workplace of invidious discrimination is beyond question.[261] Although every person in every

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[256] *See id.* Davis asserted that the former executive director and the former operations director of LSA, both white, engaged in misconduct worse than the charges leveled at him. *See id.* at 1264. The former operations director had engaged in abusive conduct toward other employees, and the former executive director overstated mileage expenses and made sexually harassing remarks to subordinates. *See id.* Yet LSA did not suspend either prior to their resignations. *See id.*

[257] *See id.* at 1267.

[258] *See id.* Davis also argued that he and the consultant appointed to handle public relations arising from Davis's suspension had a long-time adversarial history, a circumstance which raised the specter of bad faith on LSA's part and therefore rendered their actions highly adverse. *See id.* at 1264. The court rejected this argument. *See id.* at 1267.

[259] *See id.*

[260] *See id.* at 1271.

[261] *See, e.g.*, Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 342 (2013) (declaring that "Title VII is central to the federal policy of prohibiting wrongful discrimination in the Nation's workplaces and in all sectors of economic endeavor."); Alex B. Long, *The Statutification of Tort Law Involving the Workplace*, 42 Berkeley J. Emp. & Lab. L. 371, 381–82 (2021) (commenting that "Title VII represented a momentous change to the traditional law governing the employment relationship."); Maria L. Ontiveros, *The Fundamental Nature of Title VII*, 75 Ohio St. L.J. 1165, 1175–76, 1201 (2014) (arguing that the history of the struggle for civil rights, including slavery,

protected class deserves the full protection of the law, those subjected to racial discrimination stand on unique ground.[262] The law should not allow racial discrimination—or discrimination of any other kind—to seed in the workplace. Tolerating discrimination that does not involve a refusal to hire, demotion, or discharge is a mistake. Invidious discrimination does not always conform to such neatly denominated categories. Often elusive, it does not call attention to itself.[263] It does not wave its hand in your face; it hides behind closed office doors.

The remedy should fit the offense. Those who drive recklessly on a highway are not imprisoned for life. A "minor" civil-rights violation would justify a minor civil-rights remedy. A more extreme remedy would presumably follow a civil-rights violation involving the imposition of an adverse employment action. In cases where an employer has subjected an individual to an adverse employment action, a partial same-decision defense would be appropriate. But, unlike section 2000e-5(g)(2)(B), the defense should not automatically strip a victim of discrimination of the right to damages, reinstatement, and other forms of equitable relief.[264] The penalties for employment discrimination should serve not only as a punishment but also as a deterrent. Employers guilty of "moderate" instances of discrimination would redouble their commitment to an equitable workplace if they faced more than a gentle rebuke.

Disparate-impact theory, which does not require proof of discriminatory intent, stands beside disparate-treatment theory as a major safeguard against workplace discrimination. A plaintiff alleging disparate impact must establish that an employment decision had a disproportionate, negative effect on a protected class. Under section 2000e-2(a)(2), any employment decision-making practice, even if less extreme than an adverse employment action, meets the requirements of this theory. As shown in Part IV, many federal courts ignore the statute and require plaintiffs to meet the heightened standard.

Jim Crow laws, and workplace racial discrimination, elevate Title VII to the status of a superstatute, and that the rights conferred in Title VII deserve the broadest possible interpretation); William N. Eskridge, Jr. & John A. Ferejohn, *Super-Statutes*, 50 Duke L.J. 1215, 1237 (2001) (recognizing that the 1964 Civil Rights Act "embodies a great principle (antidiscrimination), was adopted after an intense political struggle and normative debate and has over the years entrenched its norm into American public life").

[262] Congress recognized the uniqueness of racial discrimination when it excluded differential treatment based on race from the bona-fide-occupational-qualification defense. Section 2000e-2(e) provides that "it shall not be an unlawful employment practice . . . where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e). The words "race" and "color" do not appear in this section. *See id.*

[263] *See, e.g.*, McGowan v. Billington, 281 F. Supp. 2d 238, 241 (D.D.C. 2003) (acknowledging that proving discriminatory intent is often difficult); Ann C. McGinley, *Discrimination Redefined*, 75 Mo. L. Rev. 443, 443 (2010) (recognizing that employers, aware of the potential liability of Title VII lawsuits, hide their discriminatory intent).

[264] 42 U.S.C. § 2000e-5(g)(2)(B).

IV. Harm Under Disparate-Impact Law

In the 1971 landmark case, *Griggs v. Duke Power Co.*,[265] the Supreme Court recognized disparate-impact theory. This theory makes it unlawful for employers to use facially neutral selection criteria that have a disproportionate, adverse effect on a protected class.[266] *Griggs* was a milestone in the evolution of employment-discrimination law because it relieved plaintiffs of the burden of proving discriminatory intent.[267] Unfortunately, *Griggs* did not clarify the statutory basis for its holding.[268] Eleven years later, in *Connecticut v. Teal*, the Court addressed this apparent oversight by announcing that section 2000e-2(a)(2) provided support for disparate-impact theory.[269]

A. Griggs*: The Advent of Disparate-Impact Theory*

Duke Power operated an energy generating plant in Draper, North Carolina.[270] Its low-level positions at this facility were divided into five operating departments.[271] The entry-level department was "Labor."[272] In ascending order, the other operating departments were Coal Handling, Operations, Maintenance, and Laboratory and Test.[273]

Before the effective date of the Civil Rights Act of 1964, Duke Power openly discriminated against African Americans, restricting them to Labor department jobs, which paid lower wages than any of the other operating departments.[274] Duke instituted two stratagems to perpetuate its practice of racial discrimination.[275] First, in 1965, it began requiring employees seeking transfer from the Labor department to have a high school diploma.[276] This requirement effectively excluded African Americans from higher paying jobs because they had been denied any semblance of educational opportunity.[277] On July 2, 1965—the very date that the 1964 Civil Rights Act became effective—Duke

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[265] 401 U.S. 424 (1971).
[266] *See id.* at 431.
[267] *See id.* at 430 (noting that "[u]nder the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices").
[268] *See id.* at 426 n.1 (quoting § 2000e-2(a)(2)).
[269] 457 U.S. 440 (1982).
[270] *Griggs*, 401 U.S. at 426.
[271] *See id.* at 427.
[272] *Id.*
[273] *See id.*
[274] *See id.* at 426–27.
[275] *See id.* at 427–28.
[276] *See id.* at 427.
[277] *See id.* at 430. The Court recognized that African Americans "have long received inferior education in segregated schools." *Id.* It noted that it had previously acknowledged the unfairness in the North Carolina educational system when in *Gaston County v. United States*, 395 U.S. 285 (1969), it disallowed literacy tests as a qualification for voter registration because such a practice would abridge African Americans' right to vote. *See id.* Statistics demonstrated the unfairness of Duke Power's high school diploma requirement. In 1960, thirty-four percent of white male high

Power virtually guaranteed the exclusion of African Americans from all but Labor department jobs by requiring new hires to achieve the median scores of high school graduates on two aptitude tests.[278] In September 1965, Duke Power eliminated the high-school-diploma requirement for transfers, though it retained the aptitude-test requirements.[279]

Thirteen of Duke Power's fourteen African American employees sued Duke Power for violating Title VII of the Civil Rights Act of 1964.[280] The Supreme Court sustained these claims, observing that "[t]he Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[281] Thus, the Court recognized that Title VII forbids facially neutral employment practices, absent discriminatory intent, if those practices have a discriminatory effect.[282] The analysis would have been incomplete had the Court stopped there. An employment practice may have a discriminatory impact but nonetheless be a valid indicator of job performance. Recognizing the legitimate needs of employers to select capable workers, the Court noted that "if an employment practice which operates to exclude [African Americans] cannot be shown to be related to job performance, the practice is prohibited."[283] The Court called a provable relationship between a selection criterion and job performance a "business necessity."[284]

Two facts doomed Duke Power's argument that business necessity supported its usage of the high-school-diploma requirement and the aptitude tests.[285] First, rather than offering statistical evidence supporting these criteria, Duke Power relied on the self-serving testimony of a company vice president.[286] Even more damaging to Duke Power's position, incumbent white employees who did not meet the diploma or test requirements performed satisfactorily on jobs in operating departments above the Labor department.[287]

Disparate-impact theory was a breakthrough in discrimination law. First, it construed the language of Title VII broadly, dismissing any suggestion that the statute forbids only disparate treatment, which, as noted, is intentional discrimination. *Griggs*'s correct interpretation of Title VII established

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school students earned a diploma, while only twelve percent of African American male students completed their high school education. *See id.* at 430 n.6.

[278] *See id.* at 427–28.

[279] *See id.* at 428.

[280] *See id.* at 426.

[281] *See id.* at 431, 436.

[282] *See id.* Duke Power argued that section 703(h) of Title VII permits the use of general intelligence tests. *See id.* at 433. Section 703(h) allows the use of "any professionally developed ability test" not "designed, intended or used to discriminate." *Id.* Rejecting this argument, the Court referred to guidelines issued by the Equal Employment Opportunity Commission, which authorized only job performance-related tests. *See id.* The Court also found support for its stance in the section's legislative history. *See id.* at 434–35.

[283] *Id.* at 431.

[284] *Id.*

[285] *See id.*

[286] *See id.*

[287] *See id.* at 431–32.

an alternative to disparate-treatment theory and, by doing so, promoted the antidiscrimination policy of Title VII. Second, the Court recognized that employers guilty of discrimination often conceal their illicit intent.[288] Disparate-impact theory provides a fallback position when a plaintiff cannot prove discriminatory intent.[289] Although compensatory and punitive damages are not available to victims of disparate impact,[290] such plaintiffs may secure equitable remedies.[291] Such remedies include backpay, front pay, and reinstatement.[292] Disparate-impact theory resurrects claims that might fail if alleged under disparate-treatment theory.

B. The Implications of Griggs*: The Necessity of a Decisionmaking Practice*

The text of the *Griggs* decision does not cite a statutory basis for disparate-impact theory. However, a footnote indicates that the decision is based on section 2000e-2(a)(2).[293] Because no analysis accompanies this citation, one may only speculate as to how the Court fit disparate-impact theory within the purview of the statute. Nevertheless, one point is clear: despite the expansive language of section 2000e-2(a)(2), the Court, under the facts presented in *Griggs*, tied the disparate-impact violation to employment decisions affecting a protected class. Those decisions were, in *Griggs*, refusal to hire and, in *Connecticut v. Teal*, refusal to transfer to higher paying jobs, both of which are adverse employment actions.[294] As shown in the next section, the *Teal* Court expressly invoked section 2000e-2(a)(2) to support disparate-impact theory.

C. Teal*: The Invocation of Section 2000e-2(a)(2)*

The issue in *Teal* was whether the "bottom line" defense could shield an employer from liability for discrimination.[295] This defense would apply to a multi-tiered selection process where one tier had a discriminatory impact but

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[288] *Cf.* Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 994 (1988) (acknowledging the difficulty in detecting discriminatory intent in the workplace).

[289] *Cf. id.* at 990 (noting that the elusiveness of proving discriminatory intent supports the establishment of disparate-impact theory).

[290] *See* 42 U.S.C. § 1981(a)–(a)(1) ("In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5, 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act [42 U.S.C. 2000e-2, 2000e-3, 2000e-16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b)").

[291] *See, e.g.*, Landgraf v. USI Film Prod., 511 U.S. 244, 252–53 (1994) (observing that Title VII provides equitable remedies to victims of discrimination).

[292] *See* Winsor v. Hinckley Dodge, Inc., 79 F.3d 996, 1002 (10th Cir. 1996) (commenting that equitable remedies, which include backpay, front pay, reinstatement, and declaratory and injunctive relief are available to Title VII plaintiffs).

[293] Griggs v. Duke Power Co., 401 U.S. 424, 426 n.1 (1971).

[294] *See id.* at 427, 430; Connecticut v. Teal, 457 U.S. 440, 443–44 (1980).

[295] *See Teal*, 457 U.S. at 442.

the other tier or tiers counterbalanced the negative effect so that the overall result was nondiscriminatory.[296] The four plaintiffs in *Teal*, all of whom were African American, were welfare workers seeking permanent promotion to supervisory positions.[297] To earn a permanent promotion, applicants needed a passing score on a written examination.[298] A total of 329 applicants took the examination: forty-eight African American and 259 white.[299] The pass rate for the African American applicants was fifty-four percent; the pass rate for white applicants was approximately eighty percent.[300] Four African Americans who failed the examination and were consequently denied promotion alleged in federal district court that the examination had had an impermissible disparate impact on African Americans.[301]

Approximately one month before trial, the defendants made the promotion decisions.[302] In a transparent attempt to evade liability, the bank belatedly added three decision-making criteria for the promotion decisions: past work performance, supervisor recommendations, and seniority.[303] The "bottom-line" was that eleven of the promotions went to African American applicants, which was twenty-two percent of the African American applicant pool.[304] Thirty-five promotions went to white applicants, which was thirteen percent of the white applicant pool.[305] Thus, African American applicants for promotion fared better in the overall selection process than did white applicants. Based on the bottom-line results, Connecticut argued that it had not violated Title VII.[306]

The Supreme Court rejected the viability of the bottom-line defense, holding that Title VII guarantees *individuals* freedom from invidious discrimination.[307] The bottom line in the *Teal* case, although favorable to African Americans overall, did not nullify the discriminatory impact that the examination had on the individual African Americans who, having failed the test, were eliminated from consideration for a promotion.[308] In reaching this conclusion, the Court relied on section 2000e-2(a)(2). The Court noted that this section forbids selection criteria that deprive or tend to deprive "*any individual* of employment opportunities."[309]

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[296] *See id*. at 454.
[297] *See id.* at 442–43.
[298] *See id.* at 443.
[299] *See id*.
[300] *See id.* at 443 & n.4.
[301] *See id.* at 444.
[302] *See id*.
[303] *See id*.
[304] *See id.*
[305] *See id.*
[306] *See id.* at 444, 447 n.7.
[307] *See id*. at 455–56.
[308] *See id.*
[309] *Id.* at 453 (quoting 42 U.S.C. § 2000e-2(a)(2)). Justice Powell, writing for a four-justice minority, dissented. *Id.* at 457 (Powell, J., dissenting). He argued that disparate-treatment theory protects individuals whereas disparate-impact theory protects groups. *See id.* Continuing from

This analysis correctly interpreted Title VII by implementing the expansive language of the statute and advancing its underlying policy to eradicate invidious employment discrimination. Unfortunately, the *Teal* case, similar to the *Griggs* case, involved an adverse employment action: the defendants' exclusion of African Americans from promotions to supervisory positions.[310] *Griggs* and *Teal* do not imply that an adverse employment action is the required minimum injury for disparate-impact cases. Although disparate-impact theory forbids employment decisions that negatively affect a protected class, adverse employment actions exceed the minimum threshold. As was shown in Part III, section 2000e-2(a)(2)—the statutory basis for *Teal*—does not require plaintiffs to prove an adverse employment action.

D. Section 2000e-2(k): Codification of Disparate-Impact Theory

Congress codified the Supreme Court's definition of a disparate-impact violation in section 2000e-2(k) of the 1991 Civil Rights Act.[311] That section provides in relevant part: "[a]n unlawful employment practice based on disparate impact is established under this subchapter only if a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin."[312] The section goes on to codify the business necessity defense.[313] It provides that a disparate-impact claim is valid only if "the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."[314] The statute therefore prohibits *any* discriminatory practice that is not performance related. It does not require an adverse employment action.

E. Impact Cases Requiring an Adverse Employment Action

Ignoring the language of section 2000e-2(k), many federal courts have incorporated the adverse-employment-action requirement into disparate-impact

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this premise, he believed that the bottom-line effect of a selection process captures the discriminatory effect of that process on the protected group. *See id.* at 458. By rejecting the viability of the bottom-line defense, he argued, the majority blurred the distinction between disparate treatment and disparate impact by wrongly focusing disparate-impact analysis on the outcome on each individual at each tier of a multi-tiered process. *See id.* Such an analysis, he argued, is in the domain of disparate-treatment analysis, not disparate-impact analysis. *See id.*

[310] *Id.* at 440 (majority opinion).

[311] *See* 42 U.S.C. § 2000e-2(k).

[312] 42 U.S.C. § 2000e-2(k)(1)(A)(i).

[313] *See id*.

[314] *Id.* The section also codified the Supreme Court's rejection of the bottom-line defense. *See* 42 U.S.C. § 2000e-2(k)(1)(B)(i). It also codified the Court's view that a plaintiff will prevail in a disparate-impact case if able to demonstrate a less discriminatory alternative to the practice the employer used and the employer's refusal to adopt that alternative. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(ii).

claims.[315] For example, in *Reyes v. Pharma Chemie, Inc.*,[316] Rocio Reyes was a product packaging technician for Pharma Chemie, Inc. ("PCI"), a company that produced nutritional and flavor supplements for foods. During work, she routinely spoke with a coworker, Monica Cortez, in Spanish.[317] Jeanette Rivera, Reyes's supervisor, complained to Mark Pieloch, the company owner, that neither Reyes nor Cortez responded in English when she, Rivera, gave them instructions.[318] Pieloch then called a meeting in February 2010 at which he expressed Rivera's concerns.[319] He stressed that the constant use of Spanish, rather than English, might lead to miscommunications and production errors.[320] Because of communication issues, Reyes received low performance evaluations.[321] On March 4, PCI adopted an English-only policy to promote efficiency, safety, and proper oversight.[322] Reyes disregarded this policy, but PCI did not discipline her for non-compliance.[323] However, two months after the February meeting, in April 2010, PCI discharged Reyes, ostensibly as part of a reduction in force.[324] Reyes then commenced a Title VII action against PCI.[325] She alleged that the English-only policy constituted a disparate-impact violation.[326]

The court granted PCI's motion for summary judgment.[327] In doing so, the court, following erroneous case law, held that an adverse employment

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[315] *See, e.g.*, Banks v. E. Baton Rouge Parish Sch. Bd., 320 F.3d 570, 581 (5th Cir. 2003) (affirming summary judgment for defendant where implementation of a reading policy and salary structure for newly created janitorial position were not adverse employment actions); Chi. Tchrs. Union, Loc. 1 v. Bd. of Educ., 419 F. Supp. 3d 1038, 1045–46 (N.D. Ill. 2020) (citing a disparate-treatment case as precedent for the requirement of an adverse employment action in a disparate-impact case); Tresvant v. Oliver, No. DCK 12-0406, 2013 WL 598333, at *4 n.3 (D. Md. Feb. 15, 2013) (holding that an adverse employment action is a requirement of a disparate-impact claim under Title VII); Young v. Covington & Burling LLP, 740 F. Supp. 2d 17, 21 (D.D.C. 2010) (holding that an adverse employment action is an element of a disparate-impact claim under Title VII); West v. Norton, 376 F. Supp. 2d 1105, 1121–22, 1128 (D.N.M. 2004) (granting defendant summary judgment where disparate-impact claim based on supervisor's criticisms and reprimands did not constitute adverse employment actions).

[316] 890 F. Supp. 2d 1147 (D. Neb. 2012).

[317] *Id.* at 1153–54.

[318] *See id.* at 1154. Reyes and Rivera were friends before Reyes began working at PCI, and Rivera recommended Reyes for the job. *See id.* at 1153.

[319] *See id.* at 1154.

[320] *See id.* The parties disputed Reyes's English fluency. *See id*. Reyes asserted that she spoke little English, which explained why she enjoyed speaking Spanish to Cortez. *See id.* PCI argued that Reyes was bilingual and pointed out that she had often spoken English to Rivera. *See id.*

[321] *See id.* at 1155.

[322] *See id.* The "Language While Performing Work" policy allowed for exceptions where employees speaking a language other than English worked out of the presence of coworkers who did not speak that language. It provided that violations were punishable with disciplinary action, including discharge, but that inadvertent or isolated violations would be treated with reminders. *See id.*

[323] *See id.* at 1156.

[324] *See id.* at 1156–57.

[325] *See id.* at 1156.

[326] *See id.* at 1158.

[327] *See id.* at 1168.

action was a requirement of a disparate-impact claim.[328] The court also found that the English-only policy was not an adverse employment action.[329] Having disposed of Reyes's primary contention, the court proceeded to find that her discharge—clearly an adverse employment action—was not tied to the English-only policy.[330] Rather, stated the court, she was discharged as the result of the reduction in force, which based terminations of full-time employees on performance evaluations.[331]

The court seemed blind to the chain of events that led to Reyes's discharge. Her habit of speaking Spanish on the job and disobeying the English-only policy[332] surely influenced her low performance evaluation, which in turn resulted in her discharge. Even more troubling than the court's insensitivity to the circumstances that led to Reyes's discharge was its insistence that, to state a claim, she needed to allege an adverse employment action.

V. Harm Under Sexual Harassment Law

Sexual harassment theory provides another framework for recourse to victims of discrimination.[333] In *Meritor Savings Bank, FSB v. Vinson*,[334] the Supreme Court announced the elements of a sexual harassment claim arising from a hostile work environment.[335] Regrettably, the *Meritor* Court erected barriers to victims of unlawful discrimination. These barriers, which have no basis in Title VII, undermine the statute's policy to eradicate employment discrimination. As shown below, the principal barrier is the requirement that a plaintiff prove that the harassment was severe or pervasive. Although this requirement differs from the adverse employment action requirement, it similarly prevents deserving plaintiffs from securing remedies.

A. Meritor Savings Bank, FSB v. Vinson*: Severe or Pervasive Harassment*

The allegations in *Meritor* were so egregious that they presented the Court with an ideal vehicle for recognizing this new theory.[336] Sidney Taylor, a branch manager of Meritor Savings Bank ("Meritor"), hired Mechelle

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[328] *See id.* at 1161–62.
[329] *See id.* at 1160.
[330] *See id.*
[331] *See id.*
[332] *See id.* at 1153, 1157.
[333] Courts recognize two theories of harassment: quid pro quo and hostile work environment. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 62 (1986) (acknowledging both theories of harassment as they apply to sex discrimination). Quid pro quo occurs when a supervisor conditions employment benefits to a subordinate in exchange for sexual favors. *See, e.g.*, *id.*; Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 751 (1998).
[334] 477 U.S. 57 (1986).
[335] *See id.*
[336] *See id.* at 60–61.

Vinson as a teller-trainee.[337] During Vinson's four-year period of employment at Meritor, she advanced to assistant branch manager.[338] Ultimately, Meritor discharged her for the excessive use of sick leave.[339] After her discharge, Vinson commenced an action against Meritor and Taylor, alleging sexual harassment.[340] At trial, Vinson testified that early in her employment at Meritor, Taylor asked her to have sex with him.[341] She further testified that she initially refused his advance but, fearing retaliation, finally consented.[342] A prolonged sexual relationship ensued.[343] She also testified that Taylor followed her into the women's restroom, fondled her in the workplace, exposed himself to her, and raped her.[344]

Relying on section 2000e-2(a)(1), the *Meritor* Court held that a sexually motivated hostile work environment constitutes unlawful sex discrimination.[345] Conceding the general viability of such a claim, Meritor argued that the facts in the case did not support liability.[346] Meritor noted that Title VII's prohibition of discrimination applies to the "compensation, terms, conditions, or privileges" of employment.[347] The Court gleaned from this language that Congress intended to prohibit discrimination only in cases that resulted in economic harm.[348] Because Vinson could not prove economic harm, the bank argued that her claim was deficient.[349]

The Court deftly turned this statutory argument against Meritor.[350] The breadth of the very language that Meritor relied on in seeking to limit the reach of Title VII showed that Congress intended "to strike at the entire spectrum" of discrimination.[351] The statute therefore proscribed discrimination absent economic harm.[352] Nevertheless, the Court restricted the scope of this new doctrine. It noted that infrequent racial slurs, without more, would not violate the statute.[353] Eliminating the one- or two-time slur from the protective

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[337] *See id.* at 59.
[338] *See id.* at 59–60.
[339] *See id.* at 60.
[340] *See id.*
[341] *See id.*
[342] *See id.* Based on Vinson's consent to Taylor's sexual advances, the district court ruled against Vinson's harassment claim because the relationship between Vinson and Taylor was voluntary. *See id.* at 68. The Supreme Court disagreed; merely because Taylor did not coerce Vinson, explained the Court, does not mean she "welcomed" that relationship. *See id.* Rather than analyzing Vinson's conduct based on consent, the Court refocused the inquiry on whether Taylor's sexual advances were unwelcome. *See id.*
[343] *See id.* at 60.
[344] *See id.*
[345] *See id.* at 66.
[346] *See id.* at 64.
[347] *Id.*
[348] *See id.*
[349] *Cf. id.*
[350] *See id.*
[351] *Id.* (quoting L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).
[352] *Cf. id.* at 64.
[353] *See id.* at 67 (quoting Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971)).

scope of Title VII was a means of screening out claims that might arguably fall below a sensible threshold. The Court, however, misapplied the statute by holding that a valid hostile work environment claim must allege unwelcome words or conduct[354] "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[355]

The *Meritor* Court seemed unable to make up its judicial mind. By holding that economic injury was not an element of Title VII,[356] it acknowledged the statute's broad remedial policy. It even went beyond rejecting the necessity of an economic injury, instructing that the statute does not require a "tangible" injury.[357] Yet, as if deciding another case at another time with a different group of justices, the Court held that plaintiffs must prove severe or pervasive misconduct that renders the work environment abusive.[358] This element of a hostile work environment case seems to require an injury that is quite tangible.

The undesirable consequences of the severe-or-pervasive requirement are not merely theoretical. Courts have often applied this requirement rigorously, granting summary judgment against plaintiffs despite strong facts supporting their harassment claims.[359] In *McCowan v. Philadelphia*,[360] Curtis Younger trained Jennifer Allen for her new job at the Analysis and Investigations Unit of the Investigations Bureau, an information sharing law enforcement op-

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[354] *See id.* at 68.

[355] *Id.* at 67 (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

[356] *See id.* at 64.

[357] *Id.* In refuting the bank's economic-harm argument, the Court pointed out most appropriately that "the language of Title VII is not limited to 'economic' or 'tangible' discrimination." *Id.* The Court correctly interpreted Title VII's broad remedial language when it instructed that the statute seeks to eradicate workplace discrimination absent "tangible" harm. Yet, as shown throughout this Article, the Court has abandoned its correct observation about Title VII and has interposed the requirement of tangible harm, not only in sexual harassment law, but also in disparate-treatment law (*see supra* Parts II and III) and disparate-impact law (*see supra* Part IV).

[358] *See Meritor*, 477 U.S. at 67.

[359] *See, e.g.*, Paskert v. Kemna-ASA Auto Plaza, Inc., 950 F.3d 535, 536–37 (8th Cir. 2020) (affirming summary judgment for defendant where supervisor subjected female subordinates, and plaintiff in particular, to a pattern of "demeaning, sexually suggestive, and improper" treatment.); Graves v. Dayton Gastroenterology, Inc., 657 F. App'x 485, 485–87 (6th Cir. 2016) (affirming summary judgment for defendants where, after victim complained about supervisor's harassing texts, supervisor assigned her more difficult work, denied her time for lunch, and threw a chair at her); Mitchell v. Pope, 189 F. App'x 911, 913 n.3, 915 (11th Cir. 2006) (affirming summary judgment for defendant where supervisor on sixteen separate occasions harassed victim verbally and physically, including incidents of stalking); Brooks v. City of San Mateo, 229 F.3d 917, 921, 927 (9th Cir. 2000) (affirming summary judgment for defendant where coworker grabbed victim's bare breast while blocking her escape); Coclough v. Akal Security, Inc., No. 16-2376, 2022 WL 768469, at *1, *7 (D.D.C. Mar. 13, 2022) (granting defendants summary judgment where employees of security firm tracked lesbian plaintiff with security cameras and used intercom system to make lewd remarks about her); Ricks v. Indyne, Inc., 552 F. Supp. 3d 1248, 1253, 1258 (N.D. Fla. 2021) (granting defendant summary judgment where coworker made numerous unwelcome racist and sexual remarks to plaintiff at work, hugged her and tried to kiss her, asked to "feel her rear end," and asked her to have sex with him); *see also* Kenneth R. Davis, *Strong Medicine: Fighting the Sexual Harassment Pandemic*, 79 Ohio St. L.J. 1057, 1077 n.158 (2018) (citing cases where courts denied deserving plaintiffs' claims for hostile work environment).

[360] No. 19-3326-KSM, 2022 WL 758991 (E.D. Pa. Mar. 10, 2022).

eration.[361] During a two-month period, Younger called Allen a "sexy motherfucker," said her breasts were "big," told her she had "lost all of [her] ass after having her baby," asked if she found it weird that her son would "suck on her nipples," and made violent threats directed at her husband.[362] Despite her resistance, he also lifted her by her waist at a "prayer circle."[363] Minimizing Younger's pattern of offensive words and actions, the Eastern District of Pennsylvania granted the defendant's motion for summary judgment, inexplicably stressing that Younger never expressly propositioned Allen.[364]

As shown below, the Supreme Court in *Harris v. Forklift Sys., Inc.*,[365] like *Meritor,* was indecisive, both advancing and inhibiting the reach of Title VII. Regrettably, *Harris* imposed additional requirements on hostile work environment plaintiffs exceeding the terms of section 2000e-2(a)(1).

B. Harris v. Forklift Sys., Inc.*: Objective and Subjective Harm*

Teresa Harris worked for Forklift Systems, Inc. (Forklift), a firm which rented equipment.[366] During her period of employment with the company, the president, Charles Hardy, subjected her to gender-related insults and sex-related innuendos.[367] In the presence of others in the workplace, Hardy often demeaned Harris because of her sex, at least once declaring that she was "a dumb ass woman."[368] Sometimes he asked female employees, including Harris, to fetch coins from his pants pockets.[369] He threw objects on the floor and asked female employees, again including Harris, to retrieve the objects.[370] He also commented in sexual terms on their clothing.[371] When Harris complained to Hardy about his conduct, he apologized for his boorish behavior and promised to stop it.[372] But shortly thereafter, his sexual innuendos began anew, prompting Harris to quit and sue Forklift for sex discrimination.[373]

The district court dismissed the action because Harris could not prove psychological injury, and the Sixth Circuit affirmed.[374] Basing its decision on section 2000e-2(a)(1), the Supreme Court disagreed with the lower courts and

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[361] *See id.* at *6.
[362] *Id.*
[363] *See id.*
[364] *See id.* at *28.
[365] 510 U.S. 17 (1993).
[366] *See id.* at 19
[367] *See id.*
[368] *Id.*
[369] *See id.*
[370] *See id.*
[371] *See id.*
[372] *See id.*
[373] *See id.*
[374] *See id.* at 18, 20. The district court judge did not believe that a reasonable person would have found Hardy's behavior so severe that it "poisoned" the work environment. Similarly, the court concluded that Hardy's misconduct, although sometimes offensive, had not intimidated Harris. *See id.* at 20.

concluded that psychological injury, though relevant, is not essential to a hostile work environment claim.[375] Punctuating this point, the Court remarked that the harassment does not have to lead to a "nervous breakdown."[376] Notably, the Court quoted the passage in the *Meritor* opinion where the Court had stated that a Title VII claim does not require "'tangible' discrimination."[377] Perhaps inconsistently, it also affirmed the "severe or pervasive" standard.*378* Yet, not wishing the egregious facts of *Meritor* to set a floor for hostile work-environment claims, the *Harris* Court stressed that the outrageous abuses that Vinson endured exceeded the requirements for such cases.[379]

Though less appalling than the facts in *Meritor,* the facts in *Harris* met the threshold of liability.[380] The Court underlined its intolerance of harassment when it faulted the district court for characterizing *Harris* as "a close case."[381] Justice Ginsburg, in a concurring opinion, clarified the standard for hostile work environment claims, commenting that a reasonable person must find that the alteration to the working conditions affected the plaintiff by making "it more difficult [for her] to do the job."[382]

To this point in the decision, *Harris* would have been beneficial to plaintiffs. But the majority was not done. It ruled that a plaintiff must prove that a

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[375] *See id.* at 21–22.

[376] *Id.* at 22. The Court listed some factors that are relevant to a determination of the severity and pervasiveness of harassing misconduct. *See id.* at 23. The Court listed some factors that are relevant to a determination of the severity and pervasiveness of harassing misconduct. *Id.* at 23. Those factors include the frequency of the discriminatory conduct, the level of physical threat or humiliation, and the effect on the victim's work performance. *Id.* The Court added that the effect of the misconduct on the psychological well-being of the employee is also relevant. *See id.*

[377] *Id.* at 21 (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986)).

[378] *Id.*

[379] *See id.* at 22.

[380] *See id.* at 23.

[381] *Id.* Justice Scalia wrote a concurring opinion. *See id.* at 24 (Scalia, J., concurring). He lamented the majority decision for creating a claim so vague that it opens "expansive vistas of litigation." *Id.* He conceded, however, that the "inherently vague statutory language" left the Court no alternative. *Id.* at 25.

[382] *Id.* at 25 (Ginsburg, J., concurring) (citing Davis v. Monsanto Chem. Co., 858 F.2d 345, 349 (6th Cir. 1988)). It is noteworthy that Justice Ginsburg adopted the reasonable person standard. *See id.* In *Ellison v. Brady*, the Ninth Circuit opted for the reasonable victim standard. *See* 924 F.2d 872, 880 (9th Cir. 1991). The Ninth Circuit stated: "[W]e believe that in evaluating the severity and pervasiveness of sexual harassment, we should focus on the perspective of the victim. If we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination. . . . Conduct that many men consider unobjectionable may offend many women. . . . Women who are victims of mild forms of sexual harassment may understandably worry whether a harasser's conduct is merely a prelude to violent sexual assault." *Id.* at 878–79. Many courts, particularly those in the Ninth Circuit, continue to follow *Ellison's* reasonable victim standard. *See. e.g.*, Nosik v. All Bright Fam. Dentistry, LLC, No. 2:18-cv-00972, 2022 WL 943604, at *4–5 (D. Nev. Mar. 29, 2022) (assessing sexual hostile-work-environment claim from perspective of reasonable woman, and sustaining claim on that basis); Caldwell v. The Boeing Co., No. C17-1741, 2018 WL 2113980, at *4, *11 (W.D. Wash. May 8, 2018) (applying the reasonable victim standard in racial-harassment case and denying defendant's motion for summary judgment on hostile work environment claim).

reasonable person would perceive the challenged conduct as hostile.[383] This requirement seems to comport with the *de minimis* standard proposed in this Article. The Court, however, went on to require that the plaintiff subjectively perceived the conduct as creating an abusive work environment.[384] By adopting the subjective requirement, the Court diverged from the language of the statute and nullified much of the good that the decision would otherwise have done for victims of harassment.

C. The Implications of Meritor *and* Harris

Meritor and *Harris* established the elements of a Title VII hostile-work-environment claim under section 2000e-2(a)(1). These decisions are, in a sense, two interlocking parts of the same principle. *Meritor* eliminated economic injury as a requirement of Title VII, and *Harris* eliminated psychological injury as a requirement. To support these rulings, the Court noted the breadth of section 2000e-2(a)(1), which prohibits invidious discrimination in the "compensation, terms, conditions, or privileges" of employment.[385]

If *Meritor* and *Harris* had stopped with these pronouncements, the Court would have been on firm statutory ground. But the Court seemed unwilling to give Title VII the running room that it needed. *Meritor* invented both the "severe or pervasive" element and the abusive-work-environment requirement. *Harris* manufactured the subjective standard. These court-imposed requirements weakened the remedial scope of Title VII.

D. Unwelcome Words or Conduct

Meritor held that a plaintiff alleging a hostile work environment must have found the sexual words or conduct "unwelcome."[386] True, this element of a claim must have a place in the analysis. If a plaintiff initiates a sexual relationship or voluntarily consents without any coercion to another's sexual advances, the claim will have no merit. The statutory language, however, does not require the plaintiff to prove that discrimination was unwelcome. It should be the employer's burden to prove that the plaintiff initiated a sexual relationship or welcomed the sexual advances of the alleged wrongdoer. This element should be denominated as the affirmative defense of either waiver or estoppel. A waiver is the voluntary relinquishment of a known right.[387] A waiver of a sexual harassment claim might occur if a plaintiff, after another's

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[383] *See Harris*, 501 U.S. at 22 (majority opinion).
[384] *See id.*
[385] *Id.* at 21.
[386] Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68 (1986).
[387] *See* Schneckloth v. Bustamonte, 412 U.S. 218, 235 (1973) (defining waiver as "an intentional relinquishment or abandonment of a known right or privilege") (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)); 31 C.J.S., *Estoppel and Waiver* § 85 (2022) (defining waiver "as a voluntary and intentional relinquishment or abandonment of a known existing legal right, advantage, benefit, claim, or privilege").

sexual advances, willingly and without coercion approved those advances. An estoppel is when a defendant reasonably relied to his detriment on a position taken by the plaintiff.[388] An estoppel in a sexual harassment case might arise if the plaintiff welcomed the challenged sexual advances or made significant advances herself.

In sum, the elements of a hostile-work-environment claim diverge from the requirements of Title VII. The most problematic of these elements is the severe or pervasive standard, which places an undue burden on victims of harassment. In *Faragher v. City of Boca Raton*,[389] the Supreme Court attempted to justify this standard.

E. Faragher v. Boca Raton*: Defense of the Severe or Pervasive Standard*

Beth Ann Faragher, a college student, worked as a lifeguard during summer vacations.[390] Two of her supervisors subjected her to "lewd remarks," "offensive touching," and derogatory comments about women.[391] Based on this pattern of abusive words and conduct, Faragher brought a claim against Boca Raton for hostile work environment.[392]

The Supreme Court accepted this case to determine an employer's liability for the harassment of its supervisory employees.[393] Before resolving this issue, the Court discussed the requirements of a hostile-work-environment claim.[394] The Court noted that "although the statute mentions specific employment decisions with immediate consequences [such as refusal to hire and discharge], the scope of the prohibition 'is not limited to "economic" or "tangible" discrimination.'"[395] This reading of the statute was correct. Unfortunately, the

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[388] *See* Mesa Air Grp. v. Delta Air Lines, 573 F.3d 1124, 1129 (11th Cir. 2009) (stating that "[a]n estoppel rests upon the word or deed of one party upon which another rightfully relies and so relying changes his position to his injury") (quoting Nassau Tr. Co. v. Montrose Concrete Prods. Corp., 436 N.E.2d 1265, 1269 (N.Y. 1982)); 28 Am. 1. 2d *Estoppel and Waiver* § 39 (2022) (explaining that party may assert estoppel when "it has relied on conduct of an adversary in such a manner as to change their [sic] position for the worse and that reliance was reasonable in that the party claiming estoppel did not know and could not have known that its adversary's conduct was misleading").

[389] 524 U.S. 775 (1998).

[390] *Id.* at 780.

[391] *Id.*

[392] *Id.* at 780–81.

[393] *Id.* at 780. The Court held that when a supervisor is aided by his agency powers in imposing on the victim a "tangible employment action, such as discharge, demotion, or undesirable reassignment," the employer is strictly liable. *Id.* at 808. If, however, a supervisor does not take such an action against the victim, the employer has an affirmative defense composed of two elements. *Id.* at 805. The first element is that "the employer exercised reasonable care to prevent and to correct promptly any sexually harassing behavior." *Id.* The second element is that "the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or failed to avoid harm otherwise." *Id.*; *see also* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761–65 (1998) (explaining *Faragher* holding).

[394] *Faragher*, 524 U.S. at 786–88.

[395] *Id.* at 786 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (quoting Meritor Savings Bank v. Vinson*,* 477 U.S. 57, 64 (1986))).

Court went on to emphasize that, absent a tangible job action such as a refusal to hire or discharge, harassment is actionable only if sufficiently "severe or pervasive" to create an "abusive working environment."[396] The Court relied on racial harassment cases to support the conclusion that Title VII required severe or pervasive misconduct in sexual harassment cases.[397] In *Rogers v. EEOC*, for example, the Fifth Circuit reasoned that the "mere utterance of an ethnic or racial epithet" does not invoke liability.[398] This reasoning may be correct, but it does not follow that the threshold for a claim is severe or pervasive words or conduct.

Harry L. Chambers has attempted to explain *Faragher*'s affirmation of the severe or pervasive standard. He argues that in hostile-work-environment cases, that standard ensures that the victim's "terms of employment have sufficiently changed when no actual job detriment has occurred."[399] He concludes that "[t]he 'severe or pervasive' requirement thus acts as a proxy for actual job detriment in the quid pro quo harassment context" where the harasser trades a job benefit for sexual favors.[400]

This proxy explanation seems to suggest that the severe or pervasive element derives from the statute. A more accurate explanation for the severe-or-pervasive requirement is that it serves as a judicially created gatekeeper. It disqualifies from coverage cases based on violations that, in the Court's judgment, are insufficiently serious to justify a judicial remedy. But there is no justification for a proxy for a tangible employment action because a tangible job action is not a requirement of section 2000e-2(a).

F. The Hypersensitive Plaintiff

One might argue that abandoning the severe-or-pervasive standard would open the door to complaints of hypersensitive plaintiffs who might have overblown subjective reactions to minor instances of harassment. *Harris* attempted to eliminate claims of hypersensitive plaintiffs by adding a reasonable person standard to the requirements of section 2000e-2(a)(1).[401] However, judicial reformulation of the statute is not necessary. The safeguard against such complaints is implicit in the very terms of Title VII. Like disparate-treatment

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[396] *Id.* (quoting *Meritor*, 477 U.S. at 67).

[397] *See id.* at 786–87.

[398] *Id.* at 787 (quoting Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972)); *see also* Faragher, 524 U.S. at 787 (quoting 1 Barbara Lindemann & Paul Grossman, Employment Discrimination Law 349, nn.36–37 (3d ed. 1996) (stating that "[d]iscourtesy or rudeness should not be confused with racial harassment" and that "a lack of racial sensitivity does not, alone, amount to actionable harassment.")).

[399] Henry L. Chambers, Jr., *A Unifying Theory of Sex Discrimination*, 34 Ga. L. Rev. 1591, 1622 (2000).

[400] *Id.*

[401] Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993).

claims, hostile-work-environment claims should be subject to the doctrine of *de minimis non curat lex*.[402]

Furthermore, if a court entertained the complaint of a hypersensitive plaintiff, the remedy would be minimal. Title VII is not a blunt instrument incapable of calibrating the remedy to the severity of the violation. Tort law suggests an analogy. Assume that Bill is exiting a subway. Another passenger intentionally shoves him from behind. Bill stumbles but regains his balance without falling. He suffers no injury other than the shove itself, which is technically a battery.[403] Angered by the aggressiveness of the passenger who shoved him, Bill commences a civil lawsuit for assault and battery. Bill has a claim, but his remedy will at most be nominal damages.[404] It is hard to imagine a judge or jury awarding Bill a treasure trove of loot. A judge might well castigate Bill for wasting the court's time and resources.

G. Oncale v. Sundowner Offshore Services, Inc.*: Gender-Related Harassment*

In *Oncale v. Sundowner Offshore Services, Inc.*,[405] the Supreme Court broadened the definition of a hostile work environment to include gender-related harassment even if not involving sexual desire.[406] This expansive redefinition blurred the distinction between hostile work environment and disparate treatment. When stripped of court-created elements, the two theories become identical. Any discriminatory words or conduct exceeding *de minimis* remarks violate Title VII under either theory.

Oncale was a roustabout in an eight-man crew working on an oil rig.[407] Other members of the crew physically intimidated him, assaulted him, and threatened him with rape.[408] When Oncale reported these abuses to company supervisors, he received no help.[409] Oncale brought a Title VII claim against Sundowner, alleging a hostile work environment.[410] The principal issue in the case was whether Title VII prohibits same-sex harassment.[411]

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[402] *See supra* note 78 and accompanying text (discussing this doctrine's application to disparate-treatment cases).

[403] *See, e.g.*, Tardif v. City of New York, 991 F.3d 394, 410 (2d Cir. 2021) (confirming that civil battery "is an intentional wrongful physical contact with another person without consent"); Loos v. Club Paris, LLC, 684 F. Supp. 2d 1328, 1335 (M.D. Fla. 2010) (holding that civil battery is an intentional offensive contact with another person).

[404] *See, e.g.*, Uzuegbunam v. Preczewski, 141 S. Ct. 792, 798–800 (2021) (explaining that courts award nominal damages when plaintiff proves a violation of right but fails to prove quantifiable injury).

[405] 523 U.S. 75 (1998).

[406] *See id.* at 80.

[407] *See id.* at 77.

[408] *See id.*

[409] *See id.*

[410] *See id.*

[411] *See id.*

A unanimous Court answered that it does.[412] The Court did not stop there. It confirmed the implication raised in *Harris*, noting that "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex."[413] The Court explained that degrading gender-related remarks may constitute sexual harassment.[414] A hostile-work-environment claim would be actionable, for example, "if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace."[415]

The *Oncale* Court faithfully applied Title VII. Section 2000e-2(a)(1) forbids discrimination with respect to the terms of employment.[416] Gender-related slurs are as discriminatory as sexual words of desire.

Dillinger's treatment of Clara in this Article's introduction should be an example of a valid hostile-work-environment claim. Although the claim is based on derogatory gender-related stereotyping, rather than statements of sexual desire, these remarks constitute discrimination with respect to Clara's conditions of employment under section 2000e-2(a)(1). They also adversely affect her employment status under section 2000e-2(a)(2). Clara could frame her claim as one for harassment or disparate treatment. She has a claim under both theories.

VI. Conclusion

A victim of discrimination has a lot to think about. If she sues for disparate treatment, she must allege an adverse employment action. Discriminatory slurs, stereotyping, and differential treatment are not likely enough absent the loss of a job, demotion, or the denial of advancement. Deserving plaintiffs, though subjected to ridicule and humiliation, may not be able to meet such

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[412] *Id.* at 79–80. Justice Scalia, writing the opinion, reasoned that the language of Title VII does not restrict its coverage to a man's harassment of a woman. *See id.* at 79. The breadth of the statute's language forbids all acts of sexual harassment, regardless of the sex of the offender or the victim. *See id.* at 80. Conceding that discrimination against women in the workplace was the principal concern of Title VII's prohibition of sex discrimination, he pointed out that statutes often provide protections that extend beyond the principal evil that Congress meant to address. *See id.* at 79.

[413] *Id.* at 78, 80.

[414] *See id.* at 80.

[415] *Id.* Justice Scalia tried to dispel concerns that the holding in *Oncale* would usher in a workplace "civility code." *Id.* at 80–82. He emphasized that neither *Meritor*, *Harris*, nor Title VII prohibits innocuous behavior in which people of the same sex or the opposite sex interact. *See id.* at 81. Hostile-work-environment law, he assured, does not require "asexuality" or "androgyny." *Id.* He illustrated this point by noting that if a football coach smacks a player's behind as the player enters a game, it is unlikely that the coach's conduct would be sexually harassing. If, by contrast, when back at the office, the coach slapped his secretary's behind, regardless of the gender of his secretary, that conduct would be offensive. *See id.*

[416] 42 U.S.C. § 2000e-2(a)(1).

a high bar. The language of Title VII is not at fault. The statute's wording is as broad as one can imagine. Its breadth matches the urgency of the policy to eradicate employment discrimination.

A victim of discrimination, unable to prove disparate treatment, may turn in another direction. She might allege that she was the victim of a hostile work environment. She will fare no better with this approach. A hostile-work-environment claim requires a plaintiff to allege severe or pervasive misconduct. There is more. The misconduct must have rendered the work environment subjectively abusive. This thicket of requirements brings victims to a standstill. Like an adverse employment action, these elements of a claim do not appear in Title VII. They are inventions of the judiciary. No matter which way a plaintiff turns, she faces obstacles. She is bogged down. She has nowhere to go.

The force of precedent may be too much to overcome. Federal courts may feel compelled to adhere to volumes of questionable case law. But nothing prevents a court from breaking free. Some federal courts have criticized the requirement of an adverse employment action and have honored the terms of the statute. More courts should follow. A few decisions may lead to a trend, and a trend may lead to a change in the law.