No. 05-259

In the Supreme Court of the United States

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, PETITIONER

v.

SHEILA WHITE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether a plaintiff who asserts a claim of retaliatory discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3(a), must show that she suffered a materially adverse employment action.

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INTEREST OF THE UNITED STATES

This case presents the question whether an employee who asserts a claim of discriminatory retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3(a), must show that she suffered a materially adverse employment action. The United States has a significant interest in the resolution of that question. The Attorney General is responsible for enforcing Title VII against public employers, and the Equal Employment Opportunity Commission (EEOC) enforces Title VII against private employers. In addition, Title VII applies to the federal government as an employer. See 42 U.S.C. 2000e-16. The United States, as the principal enforcer of the civil rights laws and the Nation's largest employer, therefore has a strong interest in the fair and balanced enforcement of Title VII.

STATEMENT

Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for an employer "to discriminate against any individual with respect to his * * * terms, conditions, or privileges of employment, because of such individual's * * * sex." 42 U.S.C. 2000e-2(a)(1). Title VII also makes it an unlawful employment practice for an employer "to discriminate against any of his employees * * * because he has opposed any practice made an unlawful employment practice by [Title VII] * * * or because he has made a charge * * * under [Title VII]." 42 U.S.C. 2000e-3(a). This case involves the scope of the latter prohibition, which is known as Title VII's anti-retaliation provision.

1. In June 1997, petitioner Burlington Northern hired respondent Sheila White to work in its Maintenance of Way department at its Tennessee Yard in Memphis. Pet. App. 3a. Respondent's general job classification was "track laborer." J.A. 37. Marvin Brown, the roadmaster at the Tennessee Yard, assigned respondent to operate the forklift. Pet. App. 3a. Unlike most other track laborers, respondent therefore spent the bulk of her day operating the forklift. Respondent was the only female in the Maintenance of Way department. *Ibid.* Her immediate supervisor, foreman Bill Joiner, did not believe that it was appropriate for a woman to work in that department, and he repeatedly told her that. *Ibid.* According to respondent, several other employees also expressed their belief that women should not "work on a railroad." *Ibid.* Joiner, however, acknowledged that "White had no problems performing her job." *Id.* at 3a-4a.

On September 16, 1997, respondent complained to Brown that Joiner had been sexually harassing her. Pet. App. 4a. After an investigation, petitioner suspended Joiner for ten days and ordered him to attend a training session on sexual harassment. *Ibid.* Brown informed respondent about Joiner's discipline. *Ibid.* At the same time, he told her that he was reassigning her

from the forklift job to a "standard track laborer position." *Ibid.* Brown explained that other employees had objected to respondent operating the forklift instead of a more senior man because the forklift job was "less arduous and cleaner" than track work. *Ibid.* Respondent's pay and benefits remained the same, but the focus of her responsibilities became repairing railroad tracks. *Ibid.*; see Tr. Tran. 126-128 (respondent's testimony).

On October 10, 1997, respondent filed a charge with the Equal Employment Opportunity Commission (EEOC), claiming that petitioner had discriminated against her on the basis of sex and had retaliated against her for complaining about sexual harassment. Pet. App. 5a. On December 4, 1997, respondent filed a second charge with the EEOC, alleging retaliation on the ground that Brown had placed her under surveillance. *Ibid.*

On December 11, 1997, respondent was working with a regional tie gang under the supervision of Percy Sharkey, one of petitioner's foremen. Pet. App. 5a. Sharkey told respondent to ride with James Key, another foreman, and told Greg Nelson, another track laborer, to ride with him. *Id.* at 5a-6a. According to respondent, when she approached Key, he told her to ride with Sharkey, and then drove away with Nelson. *Id.* at 6a. According to Sharkey, respondent refused to ride with Key. *Ibid.* When Sharkey told Brown his version of events, Brown instructed Sharkey to remove respondent from service for insubordination. *Ibid.* That afternoon, Sharkey suspended respondent without pay. *Ibid.* Nelson, who had disobeyed Sharkey's instruction to ride with him, did not receive any discipline. *Ibid.*

Respondent filed a grievance with her union to challenge the suspension without pay, and she filed another charge of retaliation with the EEOC. Pet. App. 6a-7a. While the grievance was pending, respondent did not have a job or income. *Id.* at 7a. During that time, respondent sought medical treatment for emotional distress and incurred medical expenses. *Ibid.* On January 16, 1998—37 days after respondent's initial suspen-

sion—petitioner resolved respondent's grievance in her favor, and reinstated her with full back pay. *Ibid.*

2. After exhausting her administrative remedies with the EEOC, respondent filed suit in federal district court under Title VII, alleging that petitioner had subjected her to discrimination because of her sex and because she had opposed such discrimination. Pet. App. 7a. A jury trial was held at which the jury was instructed that, in order to prove actionable retaliation, respondent was required to show that she suffered a material adverse change in the terms or conditions of her employment. J.A. 63. The jury returned a verdict in respondent's favor on the discriminatory retaliation claim and a verdict in favor of petitioner on the sex discrimination claim. Pet. App. 7a. The jury awarded respondent $43,500 in compensatory damages. *Ibid.* The district court denied petitioner's motion for judgment as a matter of law on respondent's retaliation claim. *Id.* at 116a-126a.

3. A divided panel of the court of appeals reversed the district court's judgment on respondent's retaliation claim. Pet. App. 84a-115a. The panel held that neither the removal of respondent's forklift duties nor her 37-day suspension without pay was sufficiently adverse to give rise to a retaliation claim. *Id.* at 94a-104a. Judge Clay dissented. *Id.* at 105a-115a. In his view, the jury was entitled to find that respondent's "effective demotion [from forklift operator to standard track laborer] and subsequent suspension * * * constituted the requisite materially adverse employment action." *Id.* at 106a.

4. The court of appeals granted rehearing en banc, vacated the panel decision, and, in pertinent part, affirmed the district court's judgment on respondent's retaliation claim. Pet. App. 1a-83a. The court unanimously concluded that the removal of respondent's forklift duties and her suspension without pay both

constituted actionable discrimination under Title VII's anti-retaliation provision. *Id.* at 19a-25a, 35a, 50a.[1]

a. The court of appeals explained that, to establish a prima facie case of retaliation under Title VII, a plaintiff must show that she suffered an "adverse employment action." Pet. App. 8a-9a. The court then defined that term as "a materially adverse change in the terms of her employment." *Id.* at 13a (citation omitted). The court pointed to this Court's decision in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742, 761 (1998), where the Court stated that "[a] tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." See Pet. App. 14a. The court rejected the EEOC's position that an "adverse employment action" in this context means "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter a charging party or others from engaging in protected activity." *Id.* at 15a (quoting 2 EEOC Compl. Man. (CCH) § 8008, at 6512 (July 31, 1998)).

The court explained that the EEOC's standard was not supported by the language of Title VII's anti-retaliation provision. Pet. App. 16a. The court acknowledged that the EEOC's standard furthers that provision's purpose of ensuring that persons are not deterred from filing Title VII complaints. *Id.* at 17a. But it concluded that the materially adverse standard also furthers that purpose as well, while preventing lawsuits "based on trivialities." *Ibid.* The court also concluded that while the EEOC's standard requires case-by-case determinations, the materially

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[1] In its other primary ruling, the court of appeals held that the district court erred in instructing the jury on punitive damages and remanded the case for a new trial only on punitive damages. See Pet. App. 28a-34a. Judge Sutton —who agreed with the majority decision upholding the jury's verdict on respondent's retaliation claim—dissented with respect to the punitive damages issue. See *id.* at 50a-61a. The punitive damages issue is not before this Court.

adverse standard provides significant guidance on what actions "rise above the level of the trivial." *Ibid.* The court also explained that the EEOC's position would require the application of different "discrimination" standards to retaliation claims and other Title VII claims, even though Title VII uses the same "discriminate against" language for both kinds of claims. *Ibid.*

b. Applying the "materially adverse employment action" standard, the court of appeals held that respondent's 37-day suspension without pay was actionable. Pet. App. 19a-24a. The court rejected petitioner's contention that respondent's reinstatement with full back pay precluded such a finding. *Ibid.* The court reasoned that Title VII does not limit prohibited retaliation to ultimate employment decisions. *Id.* at 22a. The court also concluded that petitioner's position would conflict with Title VII's make-whole purposes because it would preclude an employee who has been wrongfully suspended from recovering either interest on back pay or damages for emotional suffering. *Id.* at 23a. The court also explained that petitioner's position was at odds with decisions of this Court holding that a statute of limitations runs from the time an unlawful act has occurred and is not tolled during a grievance process. *Ibid.*

The court also concluded that removing respondent's forklift duties and reassigning her to standard track duties qualified as a materially adverse employment action. Pet. App. 25a. The court explained that "the forklift operator position required more qualifications"; "the forklift operator position was objectively considered a better job"; and, "[i]n essence, as the district court found, the reassignment was a demotion." *Ibid.* The court also stated that the track laborer position was "more arduous and 'dirtier'" than operating the forklift. *Ibid.*

c. Judge Clay filed a concurring opinion in which four other judges joined. Pet. App. 35a-50a. He would have adopted the EEOC's standard for proving a retaliation claim, *i.e.*, "an employer's retaliatory action is sufficiently adverse for § 704(a) pur-

poses if it would be 'reasonably likely to deter [employees] from engaging in protected acvtivity.'" *Id.* at 35a (quoting *Ray* v. *Henderson*, 217 F.3d 1234, 1242-1243 (9th Cir. 2000)). Applying that standard, Judge Clay concluded that the removal of respondent's forklift duties and her suspension constituted adverse actions that were actionable under Title VII. *Id.* at 50a.

SUMMARY OF ARGUMENT

Title VII's anti-retaliation provision (Section 2000e-3(a)) adopts the same threshold requirement for discrimination as the Act's core prohibitions. Applying settled principles, Section 2000e-3(a) should be interpreted in context and in light of the Act's overall structure. In the preceding provisions of the Act, Title VII describes in detail the "[u]nlawful employment practices" that employers, employment agencies, labor organizations, and training agencies may not take on the basis of race, sex, or another prohibited factor. 42 U.S.C. 2000e-2. As to employers, the Act provides that an employer may not rely on such prohibited characteristics, *inter alia*, "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment." 42 U.S.C. 2000e-2(a)(1). The Act uses different language to impose comparable prohibitions on employment agencies, labor organizations, and training agencies. When read in context, the natural inference is that Congress used the phrase "discriminate against" in Section 2000e-3(a) as a short hand for employment practices that would be unlawful if done on account of race, sex, or another prohibited factor. Section 2000e-3(a) thus creates an additional basis for unlawful discrimination, but does not create a different or more expansive concept of discrimination than the Act's core prohibitions.

That interpretation of Section 2000e-3(a) creates a uniform discrimination standard for Title VII that sets the bar at the level Congress deemed appropriate to deter outright discrimination. Conduct that does not give rise to an actionable violation of Title

VII's primary prohibitions on discrimination on the basis of race or sex should not give rise to a claim for retaliation.

To prove actionable discrimination under Title VII's anti-discrimination provisions (including Section 2000e-3(a)), a plaintiff must show that she has been subjected to a materially adverse employment action, *i.e.*, a materially adverse change in the terms, conditions, or privileges of employment. That standard dovetails with the standard that this Court adopted in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998), for describing a "tangible employment action" that would subject an employer to vicarious liability for sexual harassment committed by one of its supervisors. The Court stated that a "tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 761. In addition, the Court drew support for that definition from lower court case law applying the materially adverse employment action standard. *Ibid.* *Ellerth* also reaffirmed that a "hostile work environment" that is based on "a showing of severe or pervasive conduct" likewise "constitutes a change in the terms or conditions of employment that is actionable under Title VII," *id.* at 753-754, and thus constitutes a materially adverse employment action.

The court of appeals correctly held that a jury was entitled to find that each of the retaliatory acts at issue constitutes a materially adverse employment action and, therefore, actionable discrimination under Title VII. Respondent's 37-day suspension without pay represented a significant change in her employment status. The fact that she was later reinstated with back pay affects the appropriate remedy for a retaliatory suspension, but does not eliminate the initial discrimination. Likewise, respondent's reassignment from operating a forklift to repairing railroad tracks constitutes a materially adverse action because a jury could reasonably find that it represented a significant

change in her responsibilities, even though her job title remained the same. Indeed, the court of appeals stated that the "forklift operator position required more qualifications," and that the reassignment was tantamount to a "demotion." Pet. App. 25a.

ARGUMENT

THE COURT OF APPEALS CORRECTLY HELD THAT RESPONDENT WAS SUBJECTED TO ACTIONABLE DISCRIMINATION UNDER TITLE VII'S ANTI-RETALIATION PROVISION

A. Title VII's Anti-Retaliation Provision Should Be Read *In Pari Materia* With Title VII's Core Prohibitions

Title VII's anti-retaliation provision makes it unlawful "for an employer to discriminate against any of his employees * * * because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. 2000e-3(a). The basic question presented by this case is what discrimination is actionable under Section 2000e-3(a). When Section 2000e-3(a) is read, as it must be, in context and in light of Title VII's surrounding provisions and its broader function as a prohibition against *employment* discrimination, the statute's reference to "discriminat[ion]" naturally incorporates the same threshold underlying Title VII's core anti-discrimination prohibition (*i.e.*, Section 2000e-2). Thus, where an employer's act would constitute actionable employment discrimination if done on account of an employee's race, sex, or other prohibited factor, Section 2000e-3(a) makes it actionable if done on account of a Title VII charge or other protected activity.

1. "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 809 (1989). Thus, Title VII, "like every Act of Congress, should not be read as a

series of unrelated and isolated provisions," but rather as "a symmetrical and coherent regulatory scheme." *Gustafson* v. *Alloyd Co*, 513 U.S. 561, 570 (1995). See also *FTC* v. *Mandel Bros.*, 359 U.S. 385, 389 (1959) (statutory provisions should be read so that they fit into "an harmonious whole"). The "discriminat[ion]" referred to in Title VII's anti-retaliation provision therefore must be interpreted in light of the Act's surrounding provisions, and not as an unrelated or isolated term.

In the provisions preceding Title VII's anti-retaliation provision, Title VII sets out in elaborate detail the "unlawful employment practice[s]" that employers, employment agencies, and labor organizations may not take against individuals because of their "race, color, religion, sex, or national origin." See 42 U.S.C. 2000e-2(a)-(d). In particular, an employer may not use those prohibited characteristics "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." 42 U.S.C. 2000e-2(a)(1). The subsequent provisions of Section 2000e-2 likewise detail the practices in which employment agencies and labor organizations may not engage based on those prohibited characteristics. 42 U.S.C. 2000e-2(b) (employment agencies); 42 U.S.C. 2000e-2(c) (labor organizations). In addition, Section 2000e-2 further defines the kind of actions that the statute does and does not treat as unlawful employment discrimination based on race, color, religion, sex, and national origin. 42 U.S.C. 2000e-2(e)-(n).

Section 2000e-3(a)—entitled "Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings"—must be read in light of these preceding provisions. Particularly when read in that light, the natural inference is that Congress used the phrase "discriminate against" as shorthand for the employment practices that it had previously identified as unlawful, if taken on the basis of race, color, religion, sex, or national origin. That is consistent with the way that this Court

has interpreted Title VII. In *Jackson* v. *Birmingham Board of Education*, 125 S. Ct. 1497 (2005), the Court not only recognized that Title VII is distinct from other civil rights statutes in that it "spells out in greater detail the conduct that constitutes discrimination in violation of that statute," but it referred by shorthand to "the conduct that constitutes discrimination in violation of [Title VII]" as the conduct defined in the Act as "unlawful employment practices." *Id.* at 1505.

The inference that Congress intended Section 2000e-3(a) to cover the same type of discriminatory conduct barred by Section 2000e-2 is particularly strong because the anti-retaliation provision uses the terms "unlawful employment practice," and "discriminate," both of which are used repeatedly throughout Title VII's core prohibitions in Section 2000e-2. See *e.g.*, 42 U.S.C. 2000e-2(a), (b), (c), and (d). That common usage is a specific manifestation of Congress's intent to tie the scope of the retaliation prohibition to Title VII's core prohibitions. See *Gustafson*, 513 U.S. at 568. The inference that Congress intended Section 2000e-3(a) to be read in *pari materia* with Section 2000e-2 is further strengthened by the fact that Section 2000e-3(a) refers to each of the principal types of employment groups that are separately addressed in Section 2000e-2(a)-(d), *i.e.*, employers, employment agencies, labor organizations, and training programs. Without repeating the more detailed language of those sections, Section 2000e-3(a) adds participation in Title VII's remedial process as a forbidden basis for discrimination of the specific forms made relevant to employers, employment agencies, labor organizations and training programs respectively.

Conversely, reading Section 2000e-3(a)'s reference to "discriminate against" to cover *any* kind of discrimination (*i.e.*, differential treatment) would improperly fail to account for the fact that Congress used that phrase in a statute that is explicitly addressed to *particular* types of discrimination—*i.e.*, the employment-related discrimination specified in Section 2000e-2,

the immediately preceding provision. Cf. *Raygor* v. *Regents of the Univ. of Minn.*, 534 U.S. 533, 545 (2002) ("With respect to *dismissals* the tolling provision covers, one could read § 1367(d) in isolation to authorize tolling regardless of the reason for dismissal, but § 1367(d) occurs in the context of a statute that specifically contemplates only a few grounds for dismissal"); *Thermtron Prods., Inc.* v. *Hermansdorfer*, 423 U.S. 336, 345-346 (1976) (provision stating without qualification that an order remanding a case is not appealable is to be read *in pari materia* with the preceding subsection and is therefore limited to the kinds of remand orders set out in that subsection).

Title VII's anti-retaliation provision thus creates an additional protected class (*i.e.*, employees who engage in a protected activity), but not a different or more expansive concept of discrimination than the statute's basic anti-discrimination provision. Section 2000e-2—the Act's core anti-discrimination provision—prohibits an employer from discriminating against an employee on account of race, sex, or another prohibited factor. And Section 2000e-3(a)—the anti-retaliation provision—prohibits an employer from discriminating against an employee for filing a charge or engaging in other protected activity. Thus, an employer could not fire, dock in pay, or subject an employee to a hostile work environment because of her sex, and it could not do so because she *charged* discrimination on account of sex either. But while Section 2000e-2 and 2000e-3(a) prohibit different bases for discrimination, the "quantum of discrimination" that is actionable under both provisions is "coterminous." *Jensen* v. *Potter*, 435 F.3d 444, 448 (3d Cir. 2006) (opinion by Alito, J.).

The anti-retaliation provision bars discrimination against persons who engage in the specified forms of protected activity to the same extent that it bars intentional discrimination against employees because of their race, color, religion, sex, or national origin. That means that an employer may not discriminate against an employee because he has engaged in an activity pro-

tected by the anti-retaliation provision if that discrimination affects the employee's "compensation, terms, conditions, or privileges of employment." 42 U.S.C. 2000e-(2)(a)(1). Likewise, an employer may not on account of such protected activity subject an employee to harassment that is severe or pervasive enough to alter the terms or conditions of employment by creating a hostile work environment. See *Pennsylvania State Police* v. *Suders*, 542 U.S. 129, 133 (2004); *Jensen*, 435 F.3d at 448-449.[2]

That *in pari materia* approach is consistent with the basic reality that Title VII is an *employment* discrimination statute. Although Congress could have prohibited all retaliation by employers, even against non-employee witnesses, it clearly chose to limit Section 2000e-3(a) to discrimination by an employer against "employees or applicants for employment." Just as Congress chose to limit the class of Section 2000e-3(a) plaintiffs to the same basic universe as Section 2000e-2 plaintiffs, it makes sense to read the type of employment actions covered by Section 2000e-3(a) as parallel to those covered by Section 2000e-2.

2. Interpreting Section 2000e-3(a)'s reference to "discrimi-

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[2] Section 2000e-2(a)(2) makes it unlawful for an employer "to limit, segregate, or classify his employees * * * in any way which would deprive or tend to deprive" the employee "of employment opportunities or otherwise adversely affect his status as an employee" on account of the employee's race, sex, or another prohibited factor. 42 U.S.C. 2000e-2(a)(2). Some courts have held that the anti-retaliation provision incorporates that discriminatory practice as well, see, *e.g.*, *Robinson* v. *City of Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir. 1997), and that conclusion is consistent with an *in pari materia* construction of the Act. However, given the nature of a retaliation claim, an employee who alleges retaliation based on the kind of discrimination covered by Section 2000e-2(a)(2) would be required to establish an intentional act. See *Jackson*, 125 S. Ct. at 1504 ("Retaliation is, by definition, an intentional act."); *Jensen*, 435 F.3d at 449 n.2. Moreover, the vast majority of cases in which the question presented has arisen have involved alleged retaliatory discrimination that falls into the category of Section 2000e-2(a)(1). Because that is true of this case, the Court need not decide whether Title VII's anti-retaliation provision authorizes a claim based on an alleged disparate-impact covered by Section 2000e-2(a)(2).

nate against" to incorporate the same employment practices covered by Title VII's basic anti-discrimination provision promotes consistency because it would establish a uniform standard for determining whether an employment practice is actionable under Title VII. Cf. *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 787 n.1 (1998) ("[W]e think there is good sense in seeking generally to harmonize the standards of what amounts to actionable harassment."). Furthermore, interpreting Section 2000e-3(a) to adopt the same "discrimination" threshold as the Act's basic anti-discrimination provision promotes the balance that Congress struck in Title VII between preventing pernicious discrimination in the workplace and "prevent[ing] Title VII from expanding into a general civility code." *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998); see *Faragher*, 524 U.S. at 787. Likewise, this interpretation promotes Congress's intent to ensure that employees may invoke statutory remedial mechanisms, see *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 346 (1997), because it sets the bar for establishing actionable discrimination on account of filing a Title VII charge at the same level that Congress deemed appropriate to deter outright discrimination on account of race, sex, or another prohibited factor.

A contrary conclusion would attribute to Congress an intent to afford employees *greater* protection from protected activity discrimination than from intentional discrimination based on race, color, religion, sex, or national origin. Although Congress could certainly create such a hierarchy, there is no reason to assume lightly that Congress would have such an intent. As pernicious as retaliatory behavior is, discrimination against an employee because of her race or sex is no less pernicious. Indeed, retaliation is prohibited in the statute to further the statute's *primary* prohibition on discrimination against race, sex, religion, or national origin. There is certainly no reason to conclude that Congress believed that the trigger set by Section 2000e-2 for actionable discrimination on account of race or sex

was too forgiving to root out discrimination on account of filing a Title VII charge. See *Von Gunten* v. *Maryland*, 243 F.3d 858, 863 n.1, 865 (4th Cir. 2001) ("Congress has not expressed a stronger preference for preventing retaliation under § 2000e-3 than for preventing actual discrimination under § 2000-2.") (citation omitted).[3]

In enacting Title VII, Congress granted American employees broad-based protection against discrimination based on personal characteristics, such as race and sex. See *Oncale*, 523 U.S. at 78 (Section 2000e-2(a) "evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment") (citation omitted). In Section 2000e-3(a), Congress sought to give employees who file a charge or engage in other protected activity that same level of protection.[4]

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[3] Congress knows how to decouple a retaliation provision from the more basic prohibition in an anti-discrimination statute. For example, in enacting the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, Congress not only prohibited "discriminat[ing]" against a disabled individual because he filed a complaint about disability discrimination, 42 U.S.C. 12203(a) (entitled "Retaliation"), but it also separately provided that "[i]t shall be unlawful to coerce, intimidate, threaten, or interfere with any individual" for exercising any right granted by the ADA, 42 U.S.C. 12203(b) (entitled "Interference, coercion, or intimidation"). Under such a provision, it is enough for a claimant to allege "interference, coercion, or intimidation" without having to allege separately that an employer's action constituted "discrimination" as that term is used in the Act's core prohibitions.

[4] In guidance issued in 1998, the EEOC stated that Title VII's anti-retaliation provision reaches "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity." 2 EEOC Compl. Man. (CCH) § 8008, at 6512 (July 31, 1998). Under that test, which has both an objective and a subjective component (see *Vasquez* v. *County of Los Angeles*, 349 F.3d 634, 646 (9th Cir. 2003)), the anti-retaliation provision's threshold for discrimination is potentially more expansive than the threshold for the Act's core prohibitions. The Ninth Circuit has adopted the 1998 EEOC guidance, see *ibid.*, and the EEOC filed an amicus brief below advocating that view. Two other circuits have adopted a purely objective test which applies the anti-retaliation provision

B. The Principal Arguments For Interpreting The Anti-Retaliation Provision More Expansively Than Title VII's Core Prohibitions Are Unpersuasive

The lower courts and dissenting judges that have rejected the foregoing interpretation and concluded that Title VII's anti-retaliation "discrimination" threshold is more expansive than the threshold for the Act's core prohibitions have relied on three principal considerations. None is persuasive.

1. First, because Section 2000e-(3)(a) does not repeat the language "terms, conditions, or privileges of employment," which appears in Section 2000e-2(a)(1), the concurring judges below drew the conclusion that Section 2000e-(3)(a) was intended to cover "*any* form of discrimination." See Pet. App. 36a, 37a (Clay, J., concurring) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)).

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to action that is reasonably likely to deter. See *Rochon* v. *Gonzales,* No. 04-5278, 2006 WL 463116, at *8 (D.C. Cir. Feb 28, 2006) (plaintiff must show that the "'employer's challenged action would have been material to a reasonable employee,' which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'") (quoting *Washington* v. *Illinois Dep't of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005)). In practice, the results under the various formulations may not vary greatly. Nonetheless, for the reasons explained in the text above, the *in pari materia* approach advocated above is the better reading of the statute. If this Court disagrees, it should, at a minimum, follow the lead of the Seventh and District of Columbia Circuits and adopt a purely objective version of the "reasonably likely to deter" test. A subjective element injects unpredictability and administrative difficulties into the inquiry. In the First Amendment retaliation context (where courts are not bound by the text of any statutory provision), the majority of courts have adopted an analogous "deter a person of ordinary fitness" test that is purely objective. See *Bennett* v. *Hendrix*, 423 F.3d 1247, 1251-1254 (11th Cir. 2005), petition for cert. pending, No. 05-989 (filed Feb. 6, 2006). For all the reasons stated in Part D below, an affirmance would be required under the reasonably likely to deter standard as well.

The "disparate inclusion" principle articulated in *Russello* is just one tool of statutory construction, not an inexorable command. It is therefore inapplicable when there is an alternative explanation for the difference in wording or more persuasive evidence of congressional intent. See *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 432-437 (2002); *Thermtron*, 423 U.S. at 345-346. Both are present here. First, because Section 2000e-3(a) prohibits retaliation in conjunction with the various forms of conduct separately addressed in subsections 2000e-2(a)-(d) treating employers, employment agencies, labor organizations, training programs, respectively, the omission of the "terms, conditions, or privileges" phrase was integral to a formulation that avoided restating much of the text in the preceding subsections of 2000e-2.

More broadly, as discussed in Part A above, the surrounding provisions and overall structure of the Act; the common use of the terms "unlawful employment practice" and "discriminate"; and the anomaly of concluding that Congress intended to adopt a narrower discrimination threshold standard under the Act's core prohibitions lead to the conclusion that Congress intended for the anti-retaliation provision to be coterminous in scope with Title VII's core prohibitions. Moreover, interpreting Section 2000e-(3)(a) to cover "*any* form of discrimination," Pet. App. 36a (Clay, J., concurring) (emphasis added), would greatly expand the reach of Title VII, including to acts outside the employment context. As discussed next, that result would be at odds with Title VII's explicit focus on "employment practices" and "employees."

2. Second, an argument has been made that tying the anti-retaliation provision to the scope of the core prohibitions would exclude non-employment-related acts of retaliation and thereby undermine the purpose of the anti-retaliation provision. That is incorrect. Precisely because the anti-retaliation provision exists to further the basic prohibitions in Section 2000e-2, it makes little

sense to conclude that Congress intended to make it harder to make out a claim of discrimination under the Act's core prohibition than under the anti-retaliation provision.

Title VII's discrimination threshold is tied to employment-related practices, and that squares with the text of the Act and its overall structure and objectives. See *Nelson* v. *Upsala Coll.*, 51 F.3d 383, 387 (3d Cir. 1995) ("In view of Congress's objective in enacting Title VII, it is not surprising that cases dealing with unlawful retaliation under Title VII typically involve circumstances in which the defendant's conduct has impaired or might impair the plaintiff in employment situations.") (citing cases). Indeed, Title VII's anti-retaliation provision is explicitly defined as "an unlawful employment practice." 42 U.S.C. 2000e-3(a). In addition, the Act's basic prohibitions are explicitly tied to "employment practice[s]" as well. See 42 U.S.C. 2000-e(2). As that statutory language shows, Congress simply did not adopt an all-purpose prohibition against any conduct that might deter the filing of a complaint or the other protected activities; rather, it limited the Act's core prohibitions as well as its anti-retaliation provision to *employment-related* misconduct. That is hardly surprising in a statute's whose objective was "to achieve equality of employment opportunities." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429 (1971). Furthermore, when Congress wants to enact a broad-based anti-retaliation provision that extends beyond a civil rights law's basic prohibition, it knows how to do so. See, *e.g.*, 42 U.S.C. 12203(b), discussed note 3, *supra*. Cf. *Whitfield* v. *United States*, 543 U.S. 209, 217 (2005).

Other features of the anti-retaliation provision confirm that it is limited to employment-related conduct. By its terms, the anti-retaliation provision protects only "applicants for employment" and "employees." 42 U.S.C. 2000e-3(a). Thus, if an employer acted against a non-employee witness (for example, by cancelling an independent contractor's contract), that witness would not have a cause of action under the anti-retaliation provision. Similarly, the anti-retaliation provision governs only the

conduct of employers, employment agencies, joint labor-management committees, and labor organizations. *Ibid.* Accordingly, the anti-retaliation provision would not forbid a person that did not meet that description, such as a former co-worker, from taking an adverse action against an employee who filed a Title VII charge. As those examples illustrate, "no legislation pursues its purposes at all costs, * * * and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987).

Furthermore, the fact that Title VII's anti-retaliation provision—just like the Act's core prohibitions—is limited to employment-related actions does not mean that the victims of non-employment related misconduct are without a remedy. For example, if an employer engages in wrongful misconduct against an employee or potential witness outside of the employment relationship, the victim often may be able to assert a state-law cause of action. See *Nelson*, 51 F.3d at 388.[5]

3. The third argument against treating the scope of the retaliation provision as coterminous with the scope of Title VII's core prohibitions is that there may be employment-related actions that would deter an employee from charging discrimination, but would not be viewed as affecting the terms, conditions, or privileges of employment. See *Herrnreiter* v. *Chicago Hous. Auth.*, 315 F.3d 742, 746 (7th Cir. 2002), cert. denied, 540 U.S. 984

[5] It is clear that Title VII's federal employer provisions do not extend beyond the employment practices addressed in the Act's basic prohibitions. Section 2000e-16(a) provides that "personnel actions affecting" federal government employees "shall be made free from any discrimination based on race, color, religion, sex, or national origin." That provision has been interpreted to prohibit retaliatory discrimination, see, *e.g.*, *Hale* v. *Marsh*, 808 F.2d 616, 619 (7th Cir. 1986); *Ayon* v. *Sampson*, 547 F.2d 446, 449-450 (9th Cir. 1976), and because there is a single prohibition on discrimination (without a separate anti-retaliation provision), the federal government's potential liability under Title VII and its wavier of sovereign immunity are limited to retaliation that rises to the level of a "personnel action," *i.e.*, an action relating to the terms, conditions, or privileges of employment.

(2003). That argument is tantamount to a policy objection to the line drawn by Congress for the statute's core anti-discrimination prohibition. As discussed above, Title VII proscribes a broad array of employment-related practices, but Congress stopped short of making any workplace interaction a basis for a potential lawsuit. See *Oncale*, 523 U.S. at 80. Moreover, the argument is based on the premise that Congress intended to adopt a broader concept of actionable discrimination to protect employees when discrimination is based on protected conduct than when discrimination is based on race or sex. Balancing the competing concerns of rooting out discrimination and keeping litigation within appropriate bounds, Congress declined to adopt an "any differential treatment" standard under Title VII's basic prohibition for discrimination on account of race, sex, or another prohibited factor. Neither the Act nor its objectives supports the contention that Congress believed that employees should enjoy greater protection when it came to the complementary prohibition against retaliation.

Furthermore, there is no evidence that the existing anti-retaliation provision has failed to encourage employees to file Title VII charges or otherwise engage in protected conduct. To the contrary, retaliation filings nearly doubled from 1992 to 2005 and a quarter of all Title VII charges now include claims of retaliation. See EEOC, *Charge Statistics FY 1992 Through FY 2005* (last modified Jan. 27, 2006) <http://www.eeoc.gov/stats/charges.html.> In any event, this is a policy determination for Congress. If Congress were to determine that a lower discrimination threshold were necessary to ensure that employees took advantage of remedial mechanisms, it could enact such a threshold. But, as currently enacted, Title VII is best read as establishing the same threshold for both outright discrimination and retaliation claims.

C. Like Title VII's Core Prohibitions, The Anti-Retaliation Provision Proscribes Any Discrimination That Amounts To A Materially Adverse Employment Action

Title VII adopts the same threshold for discrimination on the

basis of engaging in protected activity under Section 2000e-3(a) that it does for direct discrimination under Section 2000e-2: to prevail, a plaintiff must show that she has been subjected to a materially adverse employment action.

1. To establish a prima facie case of retaliation under Title VII, a plaintiff must demonstrate that "(1) she engaged in protected conduct under Title VII; (2) she suffered an adverse employment action; and (3) the adverse action was causally connected to the protected activity." *Marrero* v. *Goya of P.R., Inc.*, 304 F.3d 7, 22 (1st Cir. 2002). As the Third Circuit has explained, in developing the adverse employment action requirement, "[c]ourts have operationalized the principle that retaliatory conduct must be serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment." *Robinson*, 120 F.3d at 1300. Numerous circuits, including the court of appeals below, have thus held that an employee must show a materially adverse change in the terms, conditions, or privileges of employment to satisfy the adverse action element of the prima facie case. See Pet. App. 13a, 18a.[6]

2. That approach squares with this Court's decision in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998). In *Ellerth*, the Court held that an employer may be vicariously liable for sexual harassment committed by a supervisor when the supervisor "takes a tangible employment action against the subordinate." *Id.* at 760. The Court explained that a "tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 761. Moreover, the Court drew support for "[t]he concept of a tangible employment action" from case law applying the materially adverse employment ac-

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[6] See also, *e.g.*, *Fairbrother* v. *Morrison*, 412 F.3d 39, 56 (2d Cir. 2005); *Marrero*, 304 F.3d at 23-27; *Von Gunten*, 243 F.3d at 866; *Gupta* v. *Florida Bd. of Regents*, 212 F.3d 571, 587-588 (11th Cir. 2000), cert. denied, 531 U.S. 1076 (2001); *Ribando* v. *United Airlines, Inc.*, 200 F.3d 507, 510-511 (7th Cir. 1999); *Robinson*, 120 F.3d at 1300.

tion standard. *Ibid.* (citing, *e.g.*, *Crady* v. *Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993)).

The Court explained that "[a] tangible employment action in most cases inflicts direct economic harm," *Ellerth*, 524 U.S. at 762, and that a tangible employment action may include "a discharge, demotion, or undesirable reassignment," *id.* at 765. In addition, the Court contrasted case law in which courts had concluded that an employee's "bruised ego" or "reassignment" without any materially significant disadvantage did not constitute actionable discrimination. See *id.* at 761 (citing *Flaherty* v. *Gas Research Inst.*, 31 F.3d 451, 457 (7th Cir. 1994); *Kocsis* v. *Multi-Care Mgmt., Inc.*, 97 F.3d 876 (6th Cir. 1996); *Harlston* v. *McDonnell Douglas Corp.*, 37 F.3d 379 (8th Cir. 1994).

Ellerth also resolved the rule of vicarious liability that applies to sexual harassment committed by a supervisor that does not result in a tangible employment action. After reaffirming that a plaintiff in such a case must show that the supervisor's actions are sufficiently "severe or pervasive," to constitute a "hostile work environment," 524 U.S. at 754, the Court adopted the following rule of vicarious liability for such cases: An employer is liable for the supervisor's conduct, unless it establishes as an affirmative defense "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.* at 765.

Thus, *Ellerth* recognizes two types of discrimination under Title VII's core prohibition: (1) "tangible employment actions," with respect to which the "employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII"; and (2) a "hostile work environment" that is based on "a showing of severe or pervasive conduct" and thus "constitute[s] discrimination in the terms or conditions of employment." 524 U.S. at 753-754. A plaintiff who can show that she has been subjected to either type of employer-related conduct has suffered a materially adverse employment action that,

if done on account of the filing of a Title VII charge or other protected activity, would constitute actionable discrimination under Section 2000e-3(a). See Pet. App. 14a (relying on *Ellerth* in explaining materially adverse employment action standard).[7]

3. The materially adverse employment action test not only follows the path marked by *Ellerth*, but provides a workable, objective, and uniform standard for adjudicating both direct discrimination and retaliation claims under Title VII. Under the materially adverse action standard, an employer's conduct must cause "objectively tangible harm" to be actionable, and thus "[p]urely subjective injuries, such as dissatisfaction with a reassignment, * * * public humiliation or loss of reputation" would not qualify as a matter of law. *Forkkio* v. *Powell*, 306 F.3d 1127, 1130-1131 (D.C. Cir. 2002). Such purely subjective injuries do not alter the terms and conditions of employment, and thus, would not qualify as actionable discrimination under Section 2000e-2(a)(1). In addition, a subjective standard would be more difficult to apply and could produce different results from the same action depending on the idiosyncracies of a particular plaintiff.[8]

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[7] Because *Ellerth* resolved only the question of when an employer is vicariously liable for sexual harassment committed by a supervisor outside the scope of his employment, it did not necessarily resolve the full substantive reach of Title VII's core prohibitions. Nevertheless, the Court's decision furnishes an instructive description of the type of employment-related discrimination that is actionable under Title VII. As explained in Part D below, the discriminatory acts found by the jury in this case constitute tangible employment actions and, therefore, satisfy the materially adverse action test.

[8] The objective nature of the inquiry is consistent with the lower court case law cited in *Ellerth*. See 524 U.S. at 761. For example, in *Flaherty*, the court of appeals observed that "a plaintiff's perception that a lateral transfer would be personally humiliating is insufficient, absent other evidence, to establish a materially adverse employment action." 31 F.3d at 457; see also *Kocsis*, 97 F.3d at 886 (noting that an employee's change in title would not be materially adverse where there was no significant change in responsibilities). The test that this Court applies in determining whether an employee has been subjected to a hostile work environment incorporates a subjective component, in that—in

D. The Court Of Appeals Correctly Held That The Retaliatory Acts At Issue Constitute Actionable Discrimination

The court of appeals held that the jury was entitled to find that each of the discriminatory practices at issue in this case constitute materially adverse employment actions that are actionable under Section 2000e-3(a). That conclusion is supported by the record and the reasonable inferences that a court is required to draw from the evidence in favor of the non-movant (here, respondent) in reviewing a motion for judgment as a matter of law. See *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); Pet. App. 8a.

1. Respondent's 37-day suspension without pay clearly constituted a tangible employment action that significantly changed her employment status. For 37 days, respondent was not permitted to work, she was denied any pay or benefits, and she did not know when, if ever, she could return to work. See Pet. App. 6a, 111a, 119a. For those 37 days, there was unquestionably a significant change in respondent's employment status. Although respondent was later reinstated with back pay, that affects only the appropriate remedy for the retaliatory suspension. See *id.* at 23a. It does not change the fact that respondent's employment status was significantly altered during the 37-day suspension. The suspension without pay therefore constituted a materially adverse employment action that is actionable discrimination under Title VII.

Petitioner also contends (Br. 33-38) that the suspension was not an official company act for which it is vicariously liable under this Court's decisions in *Ellerth* and *Suders*. That is incorrect. As discussed, *Ellerth* held that an employer is vicariously liable for the act of a supervisor when the supervisor takes a tangible employment action against a subordinate. 524 U.S. at 760. In

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addition to proving an "objectively hostile or abusive work environment"—a plaintiff must prove that she "subjectively perceived the environment to be abusive." See *Harris* v. *Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). However, even in that context, an allegation of subjective injury is insufficient, standing alone, to establish an actionable claim of discrimination under Title VII.

Suders, the Court reaffirmed that a company may be held vicariously liable for the "tangible employment actions" of supervisors. 542 U.S. at 144. Under *Ellerth* and *Suders*, because the action of the supervisor who suspended respondent without pay was a tangible employment action that could only have been taken by a supervisor, petitioner is vicariously liable for that suspension.

Petitioner also contends (Pet. 34) that it is not liable for the tangible action of suspending respondent without pay because its collective bargaining agreement makes the initial suspension tentative. But under *Ellerth*, an employer's vicarious liability for the act of a supervisor does not depend on whether a collective bargaining agreement characterizes a supervisor's tangible employment action as an action of the company, or whether that tangible action is said to be tentative or final. Instead, as a matter of law, if an action taken by a supervisor rises to the level of "a tangible employment action," it "becomes for Title VII purposes the act of the employer." 524 U.S. at 762. That understanding is consistent with this Court's statement in *Suders* that a "tangible employment decision * * * may be subject to review by higher level supervisors." 542 U.S. at 144-145 (citation omitted).[9]

The contention that an employer may avoid liability by labeling a supervisor's decision tentative and subjecting it to internal review also cannot be reconciled this Court's statute-of-limitations cases. Those cases hold that Title VII's statute of limitations begins to run when a discriminatory act occurs and that a discriminatory act is not rendered nonfinal by a mechanism for

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[9] Nor is there any force to petitioner's argument (Br. 38) that respondent should be denied a complete remedy under Title VII in order to promote the primacy of grievance procedures made available through collective bargaining. Because Congress expressly intended for Title VII remedies and grievance procedures under a collective bargaining agreement to be independent remedies, the Court long ago rejected the argument that it should qualify Title VII's protections in light of such grievance procedures. *International Union of Elec. Workers* v. *Robbins & Myers*, 429 U.S. 229, 235-238 (1976); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 52, 54 (1974).

internal review. See *International Union of Elec. Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 234 (1976); *Delaware State Coll.* v. *Ricks*, 449 U.S. 250, 261 (1980). Indeed, in *Robbins & Myers*, 429 U.S. at 234, the Court rejected the argument that an employee's termination was not "final" until the conclusion of an internal grievance process, explaining that the employee "stopped work" the day she was fired and "ceased receiving pay and benefits as of that date." Likewise, in *National Railroad Passenger Corp.* v. *Morgan*, 536 U.S. 101, 110 (2002), the Court stated that "[a] discrete retaliatory or discriminatory act 'occurred' on the day that it 'happened.'"

Petitioner argues (Br. 36) that Congress could not have intended a suspension without pay to be actionable when an employer reinstates the employee with backpay on the ground that there was no relief in that situation before the 1991 Amendments to Title VII. That is incorrect. Before 1991, a plaintiff in such a case could have sought interest for the time backpay was withheld, *Loeffler* v. *Frank*, 486 U.S. 549 (1988), and an injunction to "bar like discrimination in the future." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975). Moreover, the 1991 Amendments reflect Congress's judgment that previous remedies were inadequate and that permitting victims of employment discrimination to recover compensatory relief for harm caused by an unlawful employment practice is necessary to further Title VII's deterrent and make-whole purposes. If employers were permitted to avoid liability for the tangible employment actions of their supervisors, that congressional judgment would be thwarted.

Petitioner asserts (Br. 39-40) that its supervisors must have authority to suspend without pay employees who violate work and safety rules. But employers also need the authority to fire and demote employees, and no one would argue that such actions are not covered by Title VII. Nothing in Title VII removes a supervisor's authority to suspend without pay (or fire or demote). Rather, Title VII limits a supervisor's authority to suspend an employee without pay (or fire or demote) only when the supervisor does so because of a prohibited factor, such as race, or for having engaged in a protected activity. When, as here, a supervi-

sor nonetheless suspends an employee without pay on one of those prohibited grounds for a significant period of time, Title VII, as interpreted in *Ellerth*, makes the employer liable.

2. Although it is a closer question, the court of appeals also properly concluded that a reasonable juror could have found respondent's transfer from her forklift duties to be a materially adverse employment action. Pet. App. 25a.

The general rule is that "a purely lateral transfer, that is, a transfer that does not involve a demotion in form or substance, cannot rise to the level of a materially adverse employment action." *Brown* v. *Brody*, 199 F.3d 446, 455-456 (D.C. Cir. 1999) (internal quotation marks omitted). But substance does matter. Even when a transfer does not result in a change in pay or benefits, courts have recognized that it may amount to a materially adverse employment action when it entails a "significant change in job responsibilities," or significantly different working conditions such that a reassignment in form, is a demotion in substance. *Forkkio*, 306 F.3d at 1131; see *Jones* v. *District of Columbia Dep't of Corrs.*, 429 F.3d 276, 281 (D.C. Cir. 2005) (jury may find actionable discrimination based on such a transfer if plaintiff establishes "some other *materially adverse* [employment] *consequence*") (citation omitted); *Von Gunten*, 243 F.3d at 868 ("If the change in [the plaintiff's] job assignment truly had been significant, * * * then her contention would have merit."); *Kocsis*, 97 F.3d at 886 (employee did not suffer a "materially adverse employment action" where she enjoyed the same pay and benefits and "her duties were not materially modified"); *Harlston*, 37 F.3d at 382 (same). Likewise, in *Ellerth* this Court specifically recognized that an employee's "reassignment with significantly different responsibilities" constitutes a "tangible employment action." 524 U.S. at 761, 765.

Viewing the facts in the light most favorable to respondent, a reasonable juror could have found that she suffered a materially adverse employment action when petitioner changed her duties from operating the forklift to a standard track laborer position. The court of appeals stated that "the forklift operator position required more qualifications." Pet. App. 25a. In addi-

tion, testimony in the record indicated that "the forklift job was not merely an occasional task; it was an actual job which, according to Roadmaster Brown's own testimony, was advertised to the railroad employees." *Id.* at 106a (Clay, J., dissenting from panel decision). Thus, the court of appeals stated that, "[i]n essence, as the district court found, the reassignment was a demotion." *Id.* at 25a; see *id.* at 106a-107a (Clay, J., dissenting from panel decision) ("[Respondent], in effect, experienced not a mere 'lateral transfer,' * * * but a demotion"). As such, a reasonable juror could have found that, while respondent's pay, benefits, and job title remained the same, she was subjected to a "significant change in job responsibilities" (*Forkkio*, 306 F.3d at 1131).

Petitioner contends (Br. 25) that respondent was not reassigned at all, because respondent remained in the Maintanence of Way position to which she had been initially assigned, and the job description for that position included track laborer duties. That argument should be rejected. Just as the fact that an employee's pay and benefits remain the same does not automatically lead to the conclusion that she has not suffered a materially adverse employment action, the fact that her position or job description remains the same does not inevitably lead to that conclusion either. Rather, as discussed, an employee may establish a materially adverse employment action by proving that she has been subjected to a "significant change in job responsibilities." *Forkkio*, 306 F.3d at 1131. Nor does it matter (Pet. Br. 28-29) that during the period of her assignment to forklift duties, respondent sometimes performed track work. A jury could find that she suffered "a significant change in [her] job responsibilities," and thus actionable discrimination, when her primary responsibilities changed from operating a forklift to manually repairing railroad tracks.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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