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If an employee suffers from workplace discrimination—even blatant animus—that meaningfully affects the person's job or workplace experience, are there some discriminatory acts or practices that are considered too inconsequential or to cause too little harm to be touched by anti-discrimination laws, namely Title VII? This is the essential question presented by *Chambers v. District of Columbia*, which considers whether an employee denied a requested transfer for discriminatory reasons may pursue a Title VII claim.

Title VII is one of the nation's foundational civil rights statutes. In relevant part, it provides: 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

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

Title VII's prohibitions and protections are broad and sweeping. The statute is intended to eradicate and root out *all* forms and vestiges of employment discrimination and provide for *complete* equality of opportunity, while compensating victims and making them whole for

their injuries.[1] Congress' policy of outlawing of discrimination is of the "highest priority."[2]

Under these principles, job "benefits that comprise the 'incidents of employment,' or that form 'an aspect of the relationship between the employer and employees,' may not be afforded in a manner contrary to Title VII."[3] Courts' interpretations and applications of the statute "must be consistent with the important purpose of Title VII—that the workplace be an environment *free of discrimination*, where race [gender, etc.] is not a barrier to opportunity."[4]

And, as emphasized by the Supreme Court in the sexual harassment context: "the language of Title VII is not limited to 'economic' or 'tangible'

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[1] *See* Franks v. Bowman Transp. Co., 424 U.S. 747, 763 (1976) ("Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the on the basis of race, religion, sex, or national origin and ordained that its policy of outlawing such discrimination should have the highest priority.") (collecting cases); Albermarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975) (Title VII's "central statutory purposes" are "eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."); McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 358–59 (1995) (Title VII's purpose is the "elimination of discrimination in the workplace"; the statute is designed to spur employers "to endeavor to eliminate, so far as possible, the last vestiges of discrimination" and also provides for "deterrence" as well as "compensation for injuries caused by the prohibited discrimination").

See also, *e.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974) (Congress sought "to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin"); Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 288 (1987) ("The purpose of Title VII is to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees."); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286–87 (1998).

[2] *Franks*, 424 U.S. at 763.

[3] Hishon v. King & Spalding, 467 U.S. 69, 75–76 (1984).

[4] Ricci v. DeStefano, 557 U.S. 557, 580 (2009) (emphasis added).

discrimination. The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the *entire spectrum* of disparate treatment of men and women' in employment."[5] This is not limited to actual job-related actions (transfers, discipline, etc.), but even to verbal abuse or sexual advances or comments that, if sufficiently severe or pervasive, may undermine workers' psychological well-being and interfere with their job performance.[6]

Despite these overarching precepts, some courts have held that certain types of discriminatory acts and conduct do not qualify as materially adverse employment actions—and thus come outside of the scope of Title VII's prohibition of unlawful employment practices, including discriminatory terms or conditions. Such practices include, for example, involuntary lateral transfers or denials of transfer unaccompanied by a change in pay or benefits or a significant change in responsibilities;[7] denial of job training;[8] negative performance reviews; and written and verbal warnings, reprimands, and other forms of discipline.[9] Under such case

[5] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) (emphasis added).

[6] *See id.* at 64–67. At the same time, the Court has indicated that Title VII should not be converted into a "general civility code" that pervasively controls how employees interact with each other—"ordinary socializing in the workplace" when discrimination on the basis of protected characteristics (race, gender, etc.) is not implicated. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80–81 (1998).

[7] *See*, *e.g.*, Brown v. Brody, 199 F.3d 446, 455–57 (D.C. Cir. 1999); U.S. EEOC v. AutoZone, Inc., 860 F.3d 564, 569 (7th Cir. 2017); Swain v. City of Vineland, 457 F. App'x 107, 110 (3d Cir. 2012).

[8] *See*, *e.g.*, Griffith v. City of Des Moines, 387 F.3d 733, 737 (8th Cir. 2004); Hollimon v. Potter, 365 F. App'x 546, 549 (5th Cir. 2010) ("Hollimon alleges that Caucasian employees were given training that he was denied because of his race and were also allowed to take unscheduled leave. As the district court found, a refusal to train is not an adverse employment action under Title VII."); *but see* Torre v. Charter Commc'ns, Inc., 493 F. Supp. 3d 276, 287 (S.D.N.Y. 2020).

[9] *See*, *e.g.*, King v. Louisiana, 294 F. App'x 77, 84–85 (5th Cir. 2008) ("poor performance evaluations, unjust criticism, and being placed on probation"); Whitaker v. N. Ill. Univ., 424 F.3d 640, 648 (7th Cir. 2005) (disciplinary measures—negative evaluation, written

law, employers are free to run members of protected groups through a gauntlet of degradation and humiliation in the workplace as long as they do not cross a certain threshold of tangible harm.[10]

In this article, we examine the *Chambers* case and the arguments made by the parties and their *amici*. We contend that declaring certain categories of overtly discriminatory workplace acts, such as so-called "harmless" transfers or denials of transfer, off-limits to Title VII rests on an impermissibly narrow reading of the statute that is inconsistent with its language, structure, and purpose; the statute is focused on employer intent and equality of treatment and opportunity. Further, this type of blanket rule is incompatible with the established concept of nominal damages for statutory and constitutional civil rights violations,[11] as well as Title VII's robust provisions for equitable and injunctive relief (*see* 42 U.S.C. § 2000e-5(g)). Questions about the degree of harm suffered by an

warnings, and selective requirement of proof of illnesses—that did not result in "tangible job consequences"); Abuan v. Level 3 Commc'ns, Inc., 353 F.3d 1158, 1174 (10th Cir. 2003) (must be a "significant change in employment status").

Title VII's prohibition on retaliation, 42 U.S.C. § 2000e-3(a), is broader in scope and often provides for expanded grounds for relief. Burlington N. & Santa Fe. Ry. Co. v. White, 548 U.S. 53 (2006). But, even there, some courts have taken a grudging view. *See*, *e.g.*, *King*, 294 F. App'x at 85 (verbal reprimands, improper work requests, unfair treatment, abusive remarks, and threats of termination).

[10] For example, employers might constantly berate such workers, subject them to excessive scrutiny, single them out for special protocols and screenings (*see*, *e.g.*, Reddy v. Salvation Army, 591 F. Supp. 2d 406, 426–28 (S.D.N.Y. 2008); Davis v. NYS Dep't of Corrs., 46 F. Supp. 3d 226, 235–36 (W.D.N.Y. 2014)), make them go through sham investigations based on false accusations (*see*, *e.g.*, Davis, 46 F. Supp. 3d at 236 (false accusations); Ross v. Bd. of Regents, 655 F. Supp.2d 895, 910–11 (E.D. Wis. 2009) (audit conducted in disruptive and unfair manner not actionable except that it resulted in plaintiff's demotion)), or relegate them to the graveyard shift or the back of the company bus or parking lot (*see* Leach v. Nat'l R.R. Passenger Corp., 128 F. Supp. 3d 146, 156–57 (D.D.C. 2015)). Yet, designated heightened security processes for Blacks or unfavorable hours or parking spots for women would seem to violate the core proscription against job segregation. Employers should not be able to do the same thing on a *de facto* basis.

[11] *See*, *e.g.*, Uzuegbunam v. Preczewski, 141 S. Ct. 792 (2021).

employee are best dealt with as damages issues rather than a complete bar to relief.[12]

This is especially the case with regard to job transfers. Even if there is no "tangible" effect on employees' compensation, rank, or job responsibilities, a discriminatory transfer or denial of transfer can have a significant impact on their work experiences and opportunities. Employees seek transfers to be in a particular geographic location or working environment, have preferrable working hours or conditions, work under a particular supervisor or away from an abusive one, or to set up a potential path for advancement in their careers. They should not have to prove an immediate tangible benefit or disadvantage. Doling out plum assignments and opportunities on the basis of a protected characteristic such as race or gender goes to the heart of Title VII's protections against employment discrimination. It affects employees' dignity and quality of life in meaningful ways that restrict or limit their ability to participate in the economy on an equal playing field. The real question on liability is not whether or how the harm can be measured but whether the employer's acts are actually motivated by discriminatory animus.[13]

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[12] *Cf.* Shultz v. Congregation Shearith Israel of City of N.Y., 867 F.3d 298, 306 (2d Cir. 2017) (where an employee has a claim for being subjected to a notice of prospective termination, recission of the notice does not negate liability—even where the employee has never actually been out of a job—but bears "consequences [that] come into play in connection with the calculation of damages.").

[13] Hence, the D.C. Circuit in *Chambers* need not consider Title VII's application to truly trivial matters, which are not at issue on the appeal. *Cf.* Williams v. N.Y. City Hous. Auth., 61 A.D. 62, 80 (N.Y. App. 2009) (under the New York City Human Rights Law, when departing from the federal "severe or pervasive" standard for hostile work environment harassment claims (in favor of a more lenient "treated less well" test), recognizing an affirmative defense for "truly insubstantial cases" in which the employer can prove "that the conduct complained of consists of nothing more than what a reasonable victim of discrimination would consider 'petty slights and trivial inconveniences.'"); *see also Burlington N.*, 548 U.S. at 68–69.

Rundown of the *Chambers* Case

Mary Chambers worked for the District of Columbia's Office of the Attorney General (OAG). In 2000, she became a Support Enforcement Specialist within OAG's Child Support Division. Chambers initially worked in the Child Support Division's Interstate Unit. In 2008, Chambers requested a transfer to the Intake Unit, which was denied.[14]

Following the denial, Chambers began noticing various ways in which the District treated her worse than her male peers. For example, the District suspended her based on a minor, disputed encounter instigated by a visitor even though she had no prior disciplinary record.[15] Meanwhile, a male enforcement specialist who was consistently disrespectful to agency visitors avoided significant discipline. Similarly, another male employee who used a government vehicle for an improper purpose was also never disciplined. This differential treatment led Chambers to believe that her transfer request had been denied for discriminatory reasons.

In August 2010, Chambers filed a charge of discrimination with the EEOC based on the District's denial of her request for a transfer. A month later, she sent an e-mail to her supervisors, asking them to reconsider her request. They denied it again the next day.[16]

[14] *See* Chambers v. District of Columbia, 988 F.3d 497, 499–500 (D.C. Cir. 2021).

[15] On April 6, 2010, Chambers leaned on a trash can while off duty and waiting for an elevator when a client "came out of the office in a rage, walked behind her, dumped his food and his drink in the trash can, and then said, 'Move your fat ass off the trash can.'" Chambers and the client dispute what happened next, but Chambers maintains that when she pointed the client to another trash can, he told her, "If you say another [expletive] thing, I'm going to punch you in your face.'" Chambers was ultimately reported and suspended for having "an inappropriate verbal exchange" with the client. Her union then successfully challenged the suspension and had the discipline removed from her file.

[16] *Id.*

In October 2010, as the Child Support Enforcement Division was restructuring, Chambers again requested a transfer to the Intake Unit. Under the restructuring, the Interstate Unit would be eliminated, and Chambers' position would be moved to the Enforcement Unit. However, the actual work and tasks that Chambers had previously performed in the Interstate Unit were to be transferred to the Intake Unit—where she wished to be reassigned. Nevertheless, the District ***still*** denied Chambers' transfer request, maintaining implausibly, and without further explanation, that reassigning her did "not fit into management's immediate plans" for the Interstate Unit.[17]

At this point, Chambers had ample reason to suspect that the District's continued denial of her transfer requests was a result of gender discrimination and retaliation for her prior discrimination complaints—including her EEOC charge. Similarly situated male colleagues, including those with "significant personnel issues" (*i.e.*, disciplinary or performance concerns), had routinely received requested transfers. In fact, the District agreed to move of one of Chambers' male colleagues simply because he preferred to avoid a noisy co-worker.

In March 2011, after the District again denied Chambers' renewed transfer request, she filed another charge of discrimination with the EEOC, alleging that the transfer denial constituted sex discrimination and retaliation under Title VII.

Chambers tried her luck again six months later. At that time, she and a colleague assigned to the Intake Unit asked to switch positions. In proposing the switch, Chambers explained that it was likely that the Intake Unit would be handling more "establishment cases" and "interstate work," areas within her expertise. Chambers explained that she had also personally trained the individuals working in the Intake Unit. Additionally, Chambers spoke with the Intake Unit's manager, who said

[17] *Id*.

that she "would be welcomed" to the unit. Yet, the District ***again*** denied Chambers' transfer request. This indicated that she was permanently blacklisted, likely because of her gender and repeated complaints of discrimination.

Having exhausted all other avenues, Chambers finally went to court in 2014, suing the District for gender discrimination and retaliation. Following discovery, the district court granted summary judgment against Chambers.[18] The court found that her claims were not actionable under circuit law because she "failed to show that a genuine issue of material fact exist[ed] as to whether she suffered an adverse action."[19] On appeal, a panel of the D.C. Circuit affirmed, holding that "for cases involving purely lateral transfers, a plaintiff does not suffer an actionable injury unless there are some other materially adverse consequences affecting the terms, conditions, or privileges of her employment or her future employment opportunities such that a reasonable trier of fact could conclude that the plaintiff has suffered objectively tangible harm."[20] The D.C. Circuit agreed to rehear the case *en banc*, and a final decision from the full court is pending. Oral argument before the full Circuit Court was held on October 26, 2021.

As an initial matter, we note that Chambers *did* appear to experience palpable harm as a result of the repeated denials of her transfer request. Clearly, a transfer was of critical importance to Chambers and her sense of well-being in the workplace—otherwise, she would not have requested it at least four times from 2008 to 2011. Indeed, she maintained that she needed a transfer because her working conditions were "unbearable"—including a disproportionate and excessive workload that eventually forced her to take extended medical leave—and that a transfer would have also provided greater advancement opportunities. Yet, the District

[18] Chambers v. Dist. of Columbia, 389 F. Supp. 3d 77 (D.D.C. 2019).

[19] *Id.* at 93.

[20] 988 F.3d at 501 (citing and applying *Brown*, 199 F.3d at 457).

Court and a panel of the D.C. Circuit found a lack of adequate factual support for these assertions, and the claim was deemed to be non-viable because Chambers could not demonstrate "objectively tangible harm."

Accepting this conclusion for present purposes,[21] the key issue on appeal is a purely legal one: whether an employer can essentially "mess with" a worker and thwart her hopes and expectations for the job by transferring her or denying a transfer, even for blatantly discriminatory reasons, when she cannot prove that objectively tangible harm would ensue from the employer's actions. In more explicitly legal terms, the question for purposes of *en banc* review is whether the full D.C. Circuit should retain the rule in *Brown*: that forced transfers or denials of transfer requests are actionable under 42 U.S.C. § 2000e-2(a)(1) only if there is "objectively tangible harm."

Before the full D.C. Circuit, Chambers argued that the requisite of "objectively tangible harm" is at odds with Title VII's text, Supreme Court precedent, EEOC guidance, and Congress' plan in passing Title VII. Perhaps remarkably, the District changed its stance in *en banc* proceedings and agreed with Chambers that the full court should overrule *Brown* and conclude that discrimination in transfers is actionable even without particularized concrete harm. Instead, it centered its argument on

[21] We note the existence of a set of more favorable cases recognizing the real impacts of job transfers and denials of transfer. *See, e.g.*, Caraballo-Caraballo v. Corr. Admin., 892 F.3d 53, 61–62 (1st Cir. 2018) (transfer qualified as adverse action as it resulted in "significantly different responsibilities" and duties); Jefferson v. Sewon Am., Inc., 891 F.3d 911, 921 (11th Cir. 2018) (denial of transfer that carried special responsibilities and additional prestige and would have provided training and development opportunities); Ortiz-Diaz v. U.S. Dep't of HUD, 867 F.3d 70, 74 (D.C. Cir. 2017) (alleged denial of transfer "away from a racially and ethnically biased supervisor to a non-biased supervisor more likely to advance his career, falls within Title VII's heartland"); Piercy v. Maketa, 480 F.3d 1192, 1205 (10th Cir. 2007) (facially-discriminatory policy against transfer between jails, when some evidence indicated that a transfer would not be "*purely* lateral"—i.e., working at the second facility would be less arduous and stressful and would increase employees' chances of obtaining additional job and leave flexibility) (emphasis added).

backstopping against a potential broader ruling that § 2000-e(2)(a)(1) covers *any* differential treatment in the workplace, even where the harm is no more than *de minimis*. In light of this vital concession—which could have potentially mooted Chambers' appeal by giving her the liability ruling she wanted—the D.C. Circuit appointed *amicus curiae* to defend the proposition that the court should retain the "objectively tangible harm" standard for Title VII claims under § 2000e-2(a)(1), including where transfers are involved.[22]

The stakes of the appeal were vividly illustrated at oral argument. A lawyer for the District raised the example of an employee who preferred to be seated next to a fig tree rather than a fern, arguing that the situation would be too trivial to give rise to a legal claim. In response, Judge Tatel posited: "Suppose there was a memo in the file that said we're not going to assign the employee to the view of the fig tree because the employee is Black." After the lawyer for the District responded that such a situation still would not be "actionable," Judge Tatel was incredulous, remarking: "This statute was passed in 1964 when there was blatant racial discrimination in the workforce and you think the D.C. Circuit sitting *en banc* should not say that the kind of blatant racial discrimination in the hypothetical I just gave you was not in fact what Congress intended?"[23]

It remains to be seen not only which side will prevail but also how far the full Circuit's ruling will go and how widely it will sweep.

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[22] It is worth noting that multiple Circuit judges, including the current Justice Kavanaugh, had been urging *en banc* review of this question since at least 2017. *See*, *e.g.*, Ortiz-Diaz v. U.S. Dep't of Hous. & Urb. Dev., 831 F.3d 488, 494 (D.C. Cir. 2016) (Kavanaugh, C.J., concurring); *Ortiz-Diaz*, 867 F.3d at 80–81 (Rogers and Kavanaugh concurrences). It seems evident that the D.C. Circuit was somewhat eager to tackle the legal issue at stake and needed to maintain the adversarial context.

[23] Nadia Dreid, *Full DC Circ. Digs Deep Into If Transfers Trigger Title VII Bias*, LAW 360 (Oct. 26, 2021 11:17 PM EDT), https://www.law360.com/employment-authority/articles/1434938/full-dc-circ-digs-deep-into-if-transfers-trigger-title-vii-bias.

In the end, whether focused specifically on transfers or framed more broadly, the issue is whether "objectively tangible harm" (otherwise referred to as "tangible job consequences" or a "significant change of employment status") is required under Title VII. Although some courts have imposed similar thresholds to the *Brown* rule, we contend that Chambers has the better view on several grounds. While the D.C. Circuit may decide to cast away even a *de minimis* bar for claims, we maintain that it need not be distracted by truly trivial scenarios and minutiae (*see* n.13, supra).

Discriminatory Transfers and Transfer Denials Should Be Actionable Under Title VII Even Without Specific Proof of Objectively "Tangible" Harm

A. Statutory Text/Plain Language: Discrimination Under 42 U.S.C. § 2000e-2

A restrictive view of Title VII's anti-discrimination provisions is inconsistent with the plain meaning of its terms. Requiring "tangible job consequences" or a "significant change of employment status" cabins the phase "terms, conditions, or privileges of employment" to entail something less than its natural language—and not to encompass the basic conditions and circumstances under which one works. As the Supreme Court has indicated, in order to effectuate Title VII's broad purposes, this statutory phrase is to be interpreted expansively, in its ordinary sense, not "in the narrow contractual sense."[24] In the employment context, one's geographic location, work setting and environment, unit or department, supervisor, hours, and shift/schedule are key components that define the working experience. Forcing employees to suffer through even

[24] *See Oncale*, 523 U.S. at 78; *see also CM-613 Terms, Conditions, And Privileges of Employment, issued 1982*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/laws/guidance/cm-613-terms-conditions-and-privileges-employment.

subjectively unfavorable workplace conditions, penalizing them, or denying benefits or privileges for discriminatory reasons impacts their work lives and restricts equality of opportunity.[25]

As the concurrence in *Chambers* observed, Title VII's text makes clear that "any action by an employer to deny an employment benefit [including a desired transfer] on [prohibited] grounds is an adverse employment action under Title VII."[26] Indeed, an employee who seeks a transfer requests a different job position, and "it is difficult to imagine a more fundamental 'term[ ]' or 'condition[ ]' of employment than the position itself."[27] Hence, "transferring an employee because of the employee's [sex] (or denying an employee's requested transfer because of the employee's [sex]) plainly constitutes discrimination with respect to 'compensation, terms, conditions, or privileges of employment' in violation of Title VII."[28]

However, based on a value judgment that some courts have made, many cases have held that some forms of discrimination in the "terms, conditions, and privileges of employment" are not serious or severe enough to warrant intervention.[29] For example, the Seventh Circuit has suggested that a "purely lateral" transfer—one that "does not involve a demotion in form or substance"—can never be a "materially adverse

[25] We do not suggest that employees are legally entitled to a general veto power or the prerogative to choose their own bosses or workspace. Rather, we advocate the commonsense notion that an employer must act in a non-discriminatory fashion when allocating benefits and resources among its workforce. For example, if an employer gives all of the white employees brand new desks or equipment and all of the black employees shoddy, old ones, it sends a clear discriminatory and exclusionary message inconsistent with Title VII's mandate of equal job treatment—even if the black employees are still generally able to perform their work.

[26] 988 F.3d at 503 (citation omitted).

[27] *Id.* at 504.

[28] *Id.*

[29] *See supra* nn. 7-10.

employment action" covered by § 2000e-2(a)(1).[30] Yet, courts must follow the statute enacted by Congress and apply its plain language—even if they do not like the result.[31]

How then, does this reading interact with Title VII case law on hostile work environment, including the "severe or pervasive" test? Under the case law, purely verbal conduct is not enough to change the work environment and thus alter the "terms or conditions of employment" unless it meets objective and subjective barometers; isolated, relatively innocuous comments will not do, lest every ordinary interaction give rise to a claim.[32]

But transfers and similar job actions directly implicate the terms, conditions, or privileges of employment even if there is no loss of rank, pay, or other "tangible" markers; transfers in particular involve an outright change in the employee's job position and work environment. As the dissent to the denial of rehearing *en banc* in *Autozone* noted, an employment practice of assigning (and transferring) employees to stores

[30] *AutoZone*, 860 F.3d at 569. Indeed, the *AutoZone* court held that the same result is mandated under § 2000e-2(a)(2), even if the employee proves intentional, systematic job segregation by race. The court viewed (a)(2) as broader and casting a "wider net" than (a)(1); still, (a)(1) does not include comparable language that a job action "would deprive or tend to deprive an[] individual of employment opportunities or otherwise adversely affect his status as an employee." Following oral argument, court-appointed *amici* submitted *AutoZone* as supplemental authority after it was referenced during the argument.

[31] *See, e.g.*, Bostock v. Clayton Cty., Ga., 140 S. Ct. 1731, 1737 (2020) ("When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.").

[32] We contend that this framework has often been misapplied to deny relief in even egregious circumstances. *See, e.g.*, Castleberry v. STI Grp., 863 F.3d 259, 264 (3d Cir. 2017) (supervisor's use of the n-word). In our view, either the prevailing rubric should be liberalized (courts applying the New York City Human Rights Law strike the proper balance, *see* n.13) or—at minimum—courts should be provided greater, more particularized guidance as to the reach of the statute and the range of proscribed conduct.

in different neighborhoods based on race clearly has the "adverse effect" of depriving employees of "employment opportunities at their preferred geographic location."[33]

Consider the following hypothetical: If an employee seeks a transfer away from a boss who is hostile and abusive to her but whose conduct is ultimately determined not to be based on a protected characteristic or to rise to the "severe or pervasive" level, may the employer refuse the transfer for unlawful discriminatory reasons? We would suggest that the answer is *No*, because the transfer must be considered independently.[34]

While some courts have drawn directly or indirectly from the *Faragher*/*Ellerth* duo of cases in holding that "tangible" harm is required,[35] the Court there considered the standards for holding employers liable for the acts of supervisors, not the meaning of the phrase "terms, conditions, or privileges of employment." The cases are applications of the concept of "agency."

The Court in *Faragher v. City of Boca Raton*[36] observed that an employer is automatically vicariously liable for discriminatory "tangible" employment

[33] U.S. EEOC v. AutoZone, Inc., 875 F.3d 860, 862 (7th Cir. 2017). Further, the dissent rightly observed, it has long been established that "deliberate racial segregation by its very nature has an adverse effect on the people subjected to it." *Id*. at 861.

[34] Notably, in the retaliation context, it is established that an employee has a claim if she is retaliated against for opposing allegedly discriminatory conduct that turns out not to actually constitute illegal discrimination. *E.g.*, Boyer-Liberto v. Fontainebleau Corp., 786 F.3d 264, 282 (4th Cir. 2015) ("In the context of element one of a retaliation, an employee is protected when she opposes not only employment actions actually unlawful under Title VII but also employment actions she reasonably believes to be unlawful.")

[35] Including the D.C. Circuit in *Brown*, 199 F.3d at 456–57, deemed controlling by the panel in *Chambers*.

[36] 524 U.S. 775 (1998).

actions—such as "discharge, demotion, or *undesirable reassignment*."[37] There is no indication that a transfer, which is a tangible *action* with tangible *results*, is not covered by Title VII if there is not a proven tangible *harm*.

Similarly, in *Burlington Industries, Inc. v. Ellerth*,[38] the Court held that an employer is strictly liable for "tangible" employment actions, generally characterized as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[39] In such instance, the action is uniquely within the province of a supervisor, bringing the power of the enterprise to bear on subordinates. It is likely to be recorded in the employer's personnel files and could not have been inflicted in absence of the agency relationship.[40] These rationales appear to hold in the case of a transfer (or denial of a transfer) to an entirely different department; it is something that cannot be effectuated by a co-worker but only by a supervisor or manager backed by the power of the enterprise, and would very likely be recorded by the employer. Here, Chambers alleges that the District, her employer, rather than any particular individual, was responsible for denying her repeated transfer requests.

And, even assuming that a "purely" lateral transfer is not "tangible" within the meaning of *Faragher*/*Ellerth*, this does not mean that it falls outside of the scope of Title VII. These cases suggest that conduct perpetrated by an individual supervisor which does not come within the category of "tangible" actions—there, sexual harassment—gives rise to a

[37] *Id.* at 808 (emphasis added); *see also id*. at 790, 805 (examples of "tangible" actions centering on hiring, firing, promotion, demotion, compensation, and "work assignment").

[38] 524 U.S. 742 (1998)

[39] *Id.* at 761.

[40] *Id.* at 761–62.

potential affirmative defense to vicarious liability, centered on the employer's actual or constructive knowledge and exercise of reasonable care.[41] Vicarious liability is not at issue on the *Chambers* appeal.

In sum, the plain language of Title VII's anti-discrimination provision supports a claim for the repeated denial of a lateral transfer for discriminatory reasons. Excluding these types of decisions from the purview of Title VII fails to adhere to the text of the statute and creates an unwarranted heightened hurdle for plaintiffs to clear when bringing their claims to court.[42]

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[41] *See also Burlington N.*, 548 U.S. at 64–65 ("*Ellerth* [provides examples of "tangible" actions] only to "identify a class of [hostile work environment] cases" in which an employer should be held vicariously liable (without an affirmative defense) for the acts of supervisors. *Ellerth* did not discuss the scope of the general antidiscrimination provision.") (citations omitted).

[42] Further, while (in accordance with the rehearing *en banc* order and the arguments before the court), we have focused on the phrase "terms, conditions, or privileges of employment," allocating transfers and job opportunities on the basis of a protected category (*e.g.*, granting transfer requests to men but not women) may also implicate the separate prohibition on limiting or segregating employees "in <u>any</u> way which would deprive *or* <u>tend to</u> *deprive* any individual of employment opportunities *or otherwise adversely affect* his status as an employee." § 2000e-2(a)(2). This language too is expansive, and indicative of an intent to proscribe a panoply of discriminatory conduct. For example, it encompasses disparate impact claims (*see* Griggs v. Duke Power Co., 401 U.S. 424, 426 n.1 (1971)) and the failure to consider employment testers for a job position (Kyles v. J.K. Guardian Sec. Servs., Inc., 222 F.3d 289, 298 (7th Cir. 2000)). Here, even if Chambers cannot show an immediate loss of opportunity, she alleges that denial of the transfer would tend to deprive her of opportunities or otherwise affect her status: she is in one job position and wants to be in a preferable one. We thus concur with the dissent from the denial of rehearing *en banc* in *AutoZone*.

Likewise, we suggest, a substantial argument exists that Chambers raises a jury issue under *Burlington's* deterrence-based standard for retaliation claims: "whether a particular reassignment is materially adverse [such that it may well have dissuaded a worker from engaging in protected activity] depends upon the circumstances of the particular case, and should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances." 548 U.S. at 71. *Burlington* abrogates *Brown's* "adverse employment action" test, Steele v. Schafer, 535 F.3d 689, 695–96 (D.C. Cir. 2008), and thus

B. Title VII's Related Provisions and Remedies

These conclusions are bolstered by Title VII's overall remedial regime and statutory purpose. As set forth above, Title VII is intended to eradicate all forms and vestiges of employment discrimination and ensure complete equality of opportunity. Consequently, the statute does not bar claims where the employee cannot establish a requisite level of damages or harm but instead may entitle a victim of unlawful discrimination to recover declaratory and injunctive relief designed to address the violation and prevent similar occurrences—along with nominal damages, punitive damages, and attorney's fees and costs.

First, nominal damages are a firmly entrenched concept in civil rights cases involving violations of constitutional or statutory rights. They recognize that the violation itself is a cognizable, remediable harm even in the absence of actual damages.[43] Nominal damages are a well-established part of Title VII jurisprudence.[44] And, nominal damages may be a

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calls "into question" cases applying that standard to retaliation claims. Lin v. N.Y. State Dep't of Lab., 2017 WL 435811, at *6 (N.D.N.Y. Feb. 1, 2017); *see also*, *e.g.*, Thompson v. N. Am. Stainless LP, 562 U.S. 170, 173–74 (2011) ("Title VII's antiretaliation provision must be construed to cover a broad range of employer conduct" extending beyond § 2000e-2); Mogenhan v. Napolitano, 613 F.3d 1162, 1166–67 (D.C. Cir. 2010) (*Burlington* standard applies to retaliation in the forms of increased workload and broadcasting plaintiff's EEOC charge internally). *Burlington's* trivial-versus-material dichotomy must be applied with due regard to "context" and the role of the jury. *See Burlington N.*, 548 U.S. at 68–69. Nevertheless, in light of this test and its emphasis on severity, it makes sense for the *en banc* court in *Chambers* to bypass this claim and focus on a pure question of law and statutory interpretation under § 2000e-2(a)(1).

[43] *See*, *e.g.*, Uzuegbunam, 141 S. Ct. 792 (holding that a demand for nominal damages for a completed legal violation is alone sufficient to meet the redressability requirement for Article III standing, even if plaintiff cannot quantify the harm in economic terms).

[44] *See*, *e.g.*, Barber v. T.D. Williamson, Inc., 254 F.3d 1223, 1227–28 (10th Cir. 2001) (where defendant-employer argued that nominal damages were not available under Title VII, collecting cases to the contrary and concluding that it "has wasted this court's time with a specious argument"); Bailey v. Runyon, 220 F.3d 879, 882 (8th Cir. 2000) ("nominal

predicate to an award of attorney's fees and costs.[45]

Second, even without actual (or even nominal) damages, a victim of discrimination may recover punitive damages—designed to punish the employer and deter future violations.[46]

Third, Title VII contains expansive and robust provisions for declaratory and injunctive relief. *See* 42 U.S.C. § 2000e-5(g). It has long been established that a district court has extensive authority and discretion to fashion the remedies appropriate to the circumstances present in any given case.[47] There is no reason why a court could not craft an order tailored to address the repeated denial of lateral transfers for discriminatory reasons, even if the remedy might not involve compensation for "objectively tangible harm."

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damages" are appropriately awarded where a Title VII [harassment] violation is proved even though no actual damages are shown.").

Prior to the 1991 amendments to Title VII, some courts held that nominal damages were not available because the statute only provided for equitable, not legal, relief. *See* Bayer v. Neiman Marcus Grp., Inc., 861 F.3d 853, 870–71 (9th Cir. 2017) (discussing circuit split on whether nominal damages were equitable relief available under 42 U.S.C. § 2000e-5). That is no longer the case.

[45] Farrar v. Hobby, 506 U.S. 103 (1992); Wiercinski v. Mangia 97, Inc., 787 F.3d 106, 116 (2d Cir. 2015) ("A plaintiff who recovers only nominal damages is still a prevailing party and may be entitled to fees and costs in Title VII cases.").

[46] Cush-Crawford v. Adchem Corp., 271 F.3d 352, 357–59 (2d Cir. 2001) ("An award of actual or nominal damages is not a prerequisite for an award of punitive damages in Title VII cases."); Abner v. Kan. City S. R.R. Co., 513 F.3d 154, 165 (5th Cir. 2008) ("[U]nder Title VII, we do not require a ceremonial anchor of nominal damages to tie to a punitive damages award."); Rimkus v. Islamic Republic of Iran, 750 F. Supp. 2d 163, 177 n.8 (D.D.C. 2010). *See further* Timm v. Progressive Steel Treating, Inc., 137 F.3d 1008, 1010–11 (7th Cir. 1998); Tisdale v. Fed. Express Corp., 415 F.3d 516, 534–35 (6th Cir. 2005).

[47] *E.g.*, *Franks*, 424 U.S. at 763–64, 770–71, 779–80; *Albermarle Paper*, 422 U.S. at 418 (courts have "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future"); *Segar v. Smith*, 738 F.2d 1279, 1288–91 (D.C. Cir. 1984).

Significantly, many of Title VII's equitable remedies apply even in mixed motive cases where an employee shows that the employer was partly motivated by an unlawful discriminatory reason but the employer proves that it "would have taken the same action in the absence of the impermissible motivating factor." § 2000e-5(g)(2)(B). In such an instance, the employee has suffered discrimination but *no* actual harm. Thus, the statute provides for those injunctive and declaratory measures designed to address the employer's conduct and practices—as opposed to those meant to make the employee whole—along with attorney's fees and costs needed to encourage pursuit of the claim.[48] It appears especially incongruous, then, to conclude that a claim is barred at the courthouse door and that the act offers no remedy at all when unlawful discrimination is the sole but-for cause of an employment action but the injury is less than concrete.

In essence, an employee who has suffered a Title VII violation is entitled to bring an action to hold the employer accountable and to redress and deter violations—and to avail herself of the statutory fee-shifting provisions that empower and enable her to pursue a claim. It seems incompatible with this regime to hold that some claims, particular those involving transfers, are categorically barred because the injury and corresponding harm is too intangible or elusive.

Conclusion: Implications of the Pending *En Banc* Decision in *Chambers*

Will Title VII be freed to be all that it can (and is supposed to) be or will its wings continue to be clipped by a wary judiciary? This is the fundamental question posed in *Chambers*. Courts' interpretations and applications of the act to preclude claims based on lateral transfers, certain forms of discipline, and the like are driven not by the plain language and purposes

[48] *See id.*

of the statute but by a desire to cabin the statute and limit the number of claims. Even if such doctrines and decisions are well-meaning, they impede the paramount objective to root out employment discrimination wherever it appears. Under Title VII, difficulty in converting the harm suffered into concrete terms should be a damages issue and not a complete bar to a claim. If the influential D.C. Circuit follows the text of Title VII, as some judges have indicated they are inclined to do, it may turn the tide and usher in a new era of greater enforcement of the statutory mandate against discrimination in the workplace.

Edited by Alex Beezley