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Yina Cabrera
Florida International University College of Law, Ycabr024@fiu.edu

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THE "ULTIMATE" QUESTION: ARE ULTIMATE EMPLOYMENT DECISIONS REQUIRED TO SUCCEED ON A DISCRIMINATION CLAIM UNDER SECTION 703(A) OF TITLE VII?

Yina Cabrera[*]

ABSTRACT

To make a prima facie case of disparate treatment discrimination, courts apply the paradigm set forth in *McDonnell Douglas Corp. v. Green*. The plaintiff must show that he or she: (1) belongs to a protected class; (2) was qualified for the job; and (3) was subjected to an adverse employment action; and that (4) the employer gave better treatment to a similarly situated person outside the plaintiff's protected class. In prong three, the term "adverse employment action" is introduced as a requirement. Title VII outlines several examples of adverse employment actions, which *may* include termination, demotion with significantly less pay, etc.

In *Burlington Northern v. White*, the Court explained that Section 703, Title VII's substantive anti-discrimination provision, sets out to prevent injury to employees for "who they are" and prevent harms within the scope of employment and the workforce. *Burlington* further distinguished Section 703 from Section 704, Title VII's anti-retaliation provision, stating that Congress intended for the retaliation statute to be broader in order to encompass retaliatory conduct taken by employers against employees not directly tied to their employment or for harms caused *outside* the workplace. However, this left a gray area for discriminatory actions taken by employers *within* the scope of employment but that are not necessarily reflected in an ultimate employment decision, such as a firing, failure to hire, or a demotion with a change in pay.

In February of 2019, *Peterson v. Linear Controls Inc*. was decided. Here, the Court of Appeals for the Fifth Circuit ruled that there was no materially adverse action where black employees were subject to working outside in the heat without access to water, while white employees remained inside in the air conditioning with access to water. The court reasoned that because the employees did not suffer an "ultimate employment decision" such as a discharge or change in compensation, the differences in their employment conditions were not actionable under Title VII. Other circuits,

[*] J.D. 2021, Florida International University College of Law

however, reason that adverse employment actions include conduct that is reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion, essentially ridding the term of the requirement that an ultimate employment decision be taken in order for a disparate treatment claim to be actionable.

Thus, given the varying interpretations to the adverse employment action requirement, the Supreme Court should expand its holding in *Burlington*, where it stated that "ultimate employment decisions" are not required for retaliation claims, to encompass disparate treatment cases. This would ultimately allow claims to prevail without an absolute showing of a failure to hire, failure to grant leave, a discharge, a failure to promote, or a decrease in compensation. Rather, moving forward, Title VII should stand true to its very words and prohibit a more extensive range of employer practices that may affect the terms, conditions, or privileges of employment.

I. INTRODUCTION

At the moment, we are witnessing a system in which employers may subject black employees to drastically different work environments than they do white employees and still prevail at trial if no "ultimate employment decision" was taken against the black employees.[1] For instance, employers can get away with placing black employees outside in the heat, with no water access, while allowing white employees to remain working inside with air conditioning and water, so long as both groups are completing the same job duties with the same pay.[2] If the black employees choose to bring a disparate treatment claim against their employer, depending on what circuit they bring

1 *See* Peterson v. Linear Controls Inc., 757 F. App'x. 370, 373 (5th Cir. 2019).

2 *Id.*

their claim in, they may not prevail because no "ultimate employment decision," such as a firing, demotion, or a transfer with significantly fewer duties, was taken.[3] This ignores the fact that most discrimination in the workplace today is subtle or masked in discrete forms, rather than the explicit discrimination that Title VII first sought to correct. Consequently, employers may circumvent liability by subjecting employees of protected classes to harsher working conditions without necessarily taking an "ultimate employment action." This has been evidenced by the Fifth Circuit's decision in *Peterson v. Linear Controls*, decided in February of 2019, where this exact scenario took place.[4] The petitioner from *Peterson* asked the Supreme Court to decide whether the "terms, conditions, or privileges of employment" covered by Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 are limited only to hiring, firing, promotions, compensation, and leave.[5] Lamentably, in July 2020, the Supreme Court dismissed the petition for writ of certiorari after the petitioner, Peterson himself, moved to dismiss the case under Supreme Court Rule 46.[6] Had the case not been dismissed, the Supreme Court should have granted certiorari to ultimately decide this pressing issue. If given a similar opportunity in the near future, the Supreme Court should find that the "terms, conditions, or privileges of employment" covered by Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 are *not* limited only to hiring, firing, promotions, compensation, and leave.

Currently, courts remain split on their interpretations of the "adverse employment action" requirement to establish a prima facie case of disparate treatment. While several courts follow the premise that a wide array of disadvantageous changes in the workplace can constitute adverse employment actions,[7] other courts, like the Fifth and Third Circuits, strongly disagree, interpreting Title VII's substantive prohibition on discrimination to reach only "ultimate employment decisions."[8] Such ultimate employment decisions encompass only hiring, granting leave, discharging, promoting, or compensating.[9] The Supreme Court in *Burlington Northern* made it clear that courts could not apply an "ultimate employment decision" requirement for retaliation cases, stating that Congress intended for the retaliation provision to remain broader in order to encompass retaliatory conduct *outside* of the

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3 *Id.*

4 *Id.*

5 *Id.*

6 Petition for Writ of Certiorari, Revised Mot. to Dismiss Pursuant to Rule 46, Peterson v. Linear Controls, Inc., No. 18-1401 (5th Cir. 2020), https://www.supremecourt.gov/DocketPDF/18/18-1401/147114/20200707133208845_Revised%20Rule%2046%20Motion%20to%20Dismiss.pdf.

7 Ray v. Henderson, 217 F.3d 1234, 1240 (9th Cir. 2000).

8 *See generally Peterson*, 757 F. App'x. at 373.

9 McCoy v. City of Shreveport, 492 F.3d 551, 559–60 (5th Cir. 2007).

workplace.[10] However, the Court did not expand this holding to encompass disparate treatment cases in which adverse employment actions are taken within the workplace but may not necessarily appear as a tangible or ultimate employment decision. As a result, the Court has left the interpretation of "adverse employment actions" and what constitutes the "terms and conditions" in relation to those adverse actions up to each circuit.

The Court should take the next possible opportunity, using cases similar to *Peterson*, to clarify what kinds of employer actions may be considered adverse, and expand the "adverse employment action" requirement to encompass a wide array of disadvantageous changes in the workplace, rather than limit it to ultimate employment decisions. In *Burlington*, the Court went as far as to say that, as a practical matter, not all adverse actions are necessarily employment related.[11] It differentiated between Title VII's anti-discrimination provision, which prohibits discrimination as to "terms and conditions of employment," and Title VII's anti-retaliation provision, which prohibits "discrimination" but is not limited by the additional phrase "terms and conditions of employment."[12]

However, there remains a stringent burden on Title VII plaintiffs bringing substantive disparate treatment claims. Using the same logic in *Burlington*, the harmfulness of each adverse employment action should be an objective standard that would examine whether a "reasonable employee" would view the harm as significant, since only significant, as opposed to "trivial" harms, are actionable.[13] This way, the context of the alleged adverse action must be considered on a case-by-case basis and not automatically dismissed if there is no evidence of an ultimate employment decision.[14]

Part II of this Comment provides background information regarding Title VII, its purpose, and the ways in which it has expanded to meet the needs of our changing society. This particular section analyzes the fact that Title VII was created to halt the racial discrimination and segregation that was pervasive in our nation, and still exists today in many, and newer, forms. Afterward, Part II goes on to explain the "adverse employment action" requirement in Title VII when establishing a prima facie case of disparate treatment. Here, the circuit split is introduced. Part III will discuss *Peterson* in more depth, as well as elaborate on the circuit split in more detail, organized by approach. Part IV briefly explains why cases like *Peterson* present the ideal facts for the Supreme Court to resolve the question of whether it is necessary to show an "ultimate employment decision" when

10 Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53 (2006).

11 *Id.*

12 *Id.*

13 *Id.*

14 *See id.*

establishing a prima facie case of discrimination. Afterward, Part V of this Comment analyzes how the Supreme Court should rule when faced with this question presented.

II. BACKGROUND

A. The Emergence and Expansion of Title VII

Since Reconstruction, Title VII of the Civil Rights Act of 1964 was the first significant civil rights act to come into effect. Title VII was created during a time of urgency and unrest, in which racial discrimination and segregation were pervasive in our nation. Title VII makes it unlawful to (1) "fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee,[15] because of such individual's race, color, religion, sex, or national origin."[16] Title VII applies to employers in both the private and public sectors that have fifteen or more employees, as well as to the federal government, employment agencies, and labor organizations.[17]

In 1991, amendments to Title VII authorized claims for damages and jury trials.[18] As a result, employers had no other choice but to abide by this legislation, completely changing the face of the American workplace. Since 1991, Title VII has seen many improvements, encompassing discrimination that the authors of Title VII did not originally anticipate the need to include. But just as the original authors of Title VII did not anticipate the need to

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15 42 U.S.C. § 2000e(f) (2000).

> The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

16 42 U.S.C. § 2000e-2(a) (2020).

17 *Title VII of the Civil Rights Act*, JUSTIA, https://www.justia.com/employment/employment-discrimination/title-vii/ (last updated Apr. 2018).

18 *The Civil Rights Act of 1991*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Nov. 21, 1991), https://www.eeoc.gov/civil-rights-act-1991-original-text.

include protections for discrimination based on things like disability status, pregnancy, or sexual orientation, other groups of individuals with new, particularized issues have emerged; the need for Title VII to adapt as discrimination in the workplace changes its form is crucial to achieving exactly what it seeks to protect: a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status.[19] As overt discrimination has become less common, unconscious bias[20] has grown more prominent amongst employers, and the need for clarity on these modern issues is critical.

Further, Title VII of the Civil Rights Act of 1964 also created the U.S. Equal Employment Opportunity Commission (EEOC), a federal agency that enforces the laws against job discrimination and harassment. Today, the EEOC processes about 80,000 job discrimination complaints and works with about 94 state and local agencies that investigate approximately 50,000 additional job discrimination complaints.[21] One vital function of the EEOC is to issue "EEOC Guidance" documents. While these guidance documents are not binding law, they should be looked upon for clarity concerning the law or EEOC policies.[22] As discrimination in the workforce has grown subtler, the EEOC's role in clarifying these policies is as important as ever. Within these guidelines, the EEOC has in fact included how the "adverse action" requirement should generally be interpreted, stating

> The most obvious types of adverse actions are denial of promotion, refusal to hire, denial of job benefits, demotion, suspension, and discharge.[23] Other types of adverse actions may include work-related threats,[24] warnings, reprimands,[25] transfers,[26] negative or lowered evaluations,[27] transfers to less prestigious or desirable work or work locations.[28]

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19 McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800–01 (1973).

20 *See* Valerie Martinelli, *The Truth About Unconscious Bias in the Workplace*, TALENT CULTURE (Mar. 31, 2017), https://talentculture.com/the-truth-about-unconscious-bias-in-the-workplace/.

21 *What Is the EEOC?*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/youth/aboutwho.html (last visited Mar. 10, 2021).

22 *EEOC Guidance*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www1.eeoc.gov/guidance/index.cfm (last visited Apr. 25, 2020).

23 Roberts v. Roadway Express, 149 F.3d 1098, 1104 (10th Cir. 1998).

24 Planadeball v. Wyndham Vacation Resorts, Inc., 793 F.3d 169 (1st Cir. 2015).

25 Millea v. Metro-North R.R., 658 F.3d 154, 165 (2d Cir. 2011).

26 Kessler v. Westchester Cty. Dep't of Soc. Servs., 461 F.3d 199, 209 (2d Cir. 2006).

27 *See, e.g.*, Walker v. Johnson, 798 F.3d 1085, 1095 (D.C. Cir. 2015).

28 *EEOC Enforcement Guidance on Retaliation and Related Issues*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Aug. 25, 2016), https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues.

However, each circuit has still interpreted Title VII's adverse employment action requirement for disparate treatment cases drastically differently. This presents a newfound need for more straightforward guidance from the Supreme Court. The Supreme Court should grab at the next opportunity to further expand Title VII to encompass those it is meant to protect but have been overlooked: employees bringing disparate treatment claims that cannot necessarily point to an "ultimate employment decision."

B. Adverse Employment Actions

In order for a plaintiff to make out a prima facie case of discrimination, the plaintiff must demonstrate that he or she has suffered an adverse employment action.[29] The dividing line between actionable and non-actionable conduct—for claims of both retaliation or status-based discrimination—concerns the presence, or absence, of an adverse employment action.[30] To make a prima facie case of disparate treatment discrimination, the courts apply the paradigm set forth in *McDonnell Douglas*. The plaintiff must show that he or she: (1) belongs to a protected class; (2) was qualified for the job; and (3) was subjected to an adverse employment action; and (4) that the employer gave better treatment to a similarly-situated person outside the plaintiff's protected class.[31] This adverse employment action outlined in the third prong must be something more disruptive than a mere inconvenience or alteration of job responsibilities.[32] Examples of adverse employment actions *may* include termination, demotion with significantly less pay, etc.

As briefly explained earlier, the adverse employment action requirement has been interpreted differently in Title VII's substantive discrimination provision, Section 703,[33] and its retaliation provision, Section 704.[34] In the retaliation context, for instance, the definition of adverse employment action is explicitly not limited to discriminatory acts that affect the terms and conditions of employment, but rather it covers harms that well might have dissuaded a reasonable worker from making or supporting a charge of

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29 *See* Davis v. Team Elec. Co., 520 F.3d 1080, 1089 (9th Cir. 2008); Demoret v. Zegarelli, 451 F.3d 140, 151 (2d Cir. 2006); Farrell v. Butler Univ., 421 F.3d 609, 613 (7th Cir. 2005); Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1062 (9th Cir. 2002); Geraci v. Moody-Tottrup, Int'l, 82 F.3d 578, 580 (3d Cir. 1996).

30 MJPOSPIS, *What Is an "Adverse Employment Action?"*, POSPIS LAW PLLC (Sept. 6, 2016), https://pospislaw.com/blog/2016/09/06/what-is-an-adverse-employment-action/.

31 *See Davis*, 520 F.3d at 1089; *Demoret*, 451 F.3d at 151; *Farrell*, 421 F.3d at 613; *Villiarimo*, 281 F.3d at 1062; *Geraci*, 82 F.3d at 580.

32 Harris v. Forklift Sys., 510 U.S. 17, 21 (1993).

33 42 U.S.C. § 2000e-2(a) (2020).

34 42 U.S.C. § 2000e-3(a) (1994).

discrimination.[35] This distinction took place after the Supreme Court case *Burlington Northern v. White*.[36] In *Burlington*, the Court focused on the linguistic difference between Section 703(a) and Section 704(a), stating that the underscored words in 703(a)— "hire," "discharge," "compensation, terms, conditions or privileges of employment," "employment opportunities," and "status as an employee"— "explicitly limited the scope of that provision to actions that affected employment or altered the conditions of the workplace."[37] The *Burlington* Court stated that because Congress rid the retaliation provision of these words, Congress intended to encompass adverse actions not directly related to a plaintiff's employment, as well as harms caused *outside* the workplace, for retaliation claims.[38]

However, while the Supreme Court in *Burlington* correctly expanded Title VII's reach regarding retaliation claims, it did not necessarily *limit* the disparate treatment claims that can be brought, like many circuits seem to believe it has. In other words, yes, *Burlington* stated that Title VII's substantive discrimination provision is limited to employer actions that affect employment or alter the conditions of the workplace; however, nowhere in *Burlington's* holding does the Court limit disparate treatment claims to only "ultimate employment decisions." Rather, the *Burlington* Court merely recognized that the Courts of Appeals have treated discrimination claims in this rigid way and held that retaliation claims should not be treated alike because a provision limiting employment-related actions would not deter the "many forms that effective retaliation can take."[39] This, however, has left the circuits without guidance and has created a circuit split regarding what exactly constitutes an "adverse employment action" for substantive discrimination claims.

Some circuits claim to construe the meaning strictly, while others construe the term more loosely. For example, in *Nakis v. Potter*, the court explained that there are no bright-line rules for determining which employment actions meet the "adverse" threshold.[40] There, for example, the court held that the denial of plaintiff's request to retake an Excel class was sufficiently "adverse" for plaintiff's Title VII discrimination claim, since it appeared to "bear on plaintiff's opportunities for professional growth and

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35 *See* Davis v. Team Elec. Co., 520 F.3d 1080, 1089 (9th Cir. 2008); Demoret v. Zegarelli, 451 F.3d 140, 151 (2d Cir. 2006); Farrell v. Butler Univ., 421 F.3d 609, 613 (7th Cir. 2005); Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1062 (9th Cir. 2002); Geraci v. Moody-Tottrup, Int'l, 82 F.3d 578, 580 (3d Cir. 1996).

36 Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53 (2006).

37 *Id.*

38 *Id.* at 63.

39 *Id.* at 64.

40 Nakis v. Potter, 422 F. Supp. 2d 398, 420 (S.D.N.Y. 2006).

career advancement."[41] In that case then, the court did not require that an "ultimate employment decision" be taken against the plaintiff. Several circuits, including the Ninth Circuit, follow this interpretation of an adverse employment action. For instance, the Judicial Council of California Civil Jury Instructions (2017 edition) outline an adverse employment action as follows:

> Adverse employment actions are not limited to ultimate actions such as termination or demotion. There is an adverse employment action if [name of defendant] has taken an action or engaged in a course or pattern of conduct that, taken as a whole, materially and adversely affected the terms, conditions, or privileges of [name of plaintiff]'s employment. An adverse employment action includes conduct that is reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion. However, minor or trivial actions or conduct that is not reasonably likely to do more than anger or upset an employee cannot constitute an adverse employment action.[42]

Other circuits, however, greatly disagree with the court in *Nakis* and with the Ninth Circuit.[43] The Fifth Circuit, for example, stresses the need for an employer to take such an "ultimate employment decision" in order for the plaintiff to have an actionable claim of discrimination. These circuits claim to take a stricter approach, encompassing only hiring, granting leave, discharging, promoting, or compensating into their "ultimate employment decision" requirement.[44]

III. *PETERSON V. LINEAR* AND THE CIRCUIT SPLIT

A. Requiring an Ultimate Employment Decision

The Fifth Circuit's decisions have consistently limited what counts as an "ultimate" decision to only "hiring, granting leave, discharging,

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41 *Id.*

42 JUDICIAL COUNCIL OF CALIFORNIA CIVIL JURY INSTRUCTIONS (2017), https://www.courts.ca.gov/partners/documents/Judicial_Council_of_California_Civil_Jury_Instructions.pdf.

43 *Id.*

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

promoting, or compensating."[45] In February of 2019, the Fifth Circuit in *Peterson v. Linear Controls Inc*. stated that the court would construe an adverse employment action more "strictly" by looking to see if an "ultimate employment decision" was taken. The Fifth Circuit in *Peterson* ruled that where black employees' job duties were changed to working outside in the Louisiana summer heat without access to water, while their white counterparts remained inside in the air conditioning, this did not constitute an adverse employment action.[46] The court reasoned that because the employees did not suffer an "ultimate employment decision" such as discharge or change in compensation, their differences in work environments were not actionable under Title VII.[47]

Recently, the plaintiff in the *Peterson* case petitioned the Supreme Court for a writ of certiorari, asking the Court:

> Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual" with respect to "compensation, terms, conditions, or privileges of employment" because of the individual's race, religion, sex, or other protected status. 42 U.S.C. § 2000e-2(a)(1). Are the "terms, conditions, or privileges of employment" covered by Section 703(a)(1) limited only to hiring, firing, promotions, compensation, and leave?[48]

In *Peterson*, the plaintiff, Mr. Peterson, alleged that even after the black employees requested to their white supervisors that they rotate from outside to inside among the white and black employees, no action was taken.[49] Further, when black employees attempted to take breaks indoors, including indoor water breaks, they were "cursed and yelled at" and ordered back to work.[50] As a result, Mr. Peterson quit his job and filed a charge with the EEOC for employment discrimination.[51] Ultimately, Mr. Peterson filed suit, and the court held that Mr. Peterson's race discrimination claim failed "as a matter of law" because he had not alleged "any" employment practice that violated Title VII.[52] The district court noted that binding authority from the

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45 *Id*.

46 Peterson v. Linear Controls, Inc., 757 F. App'x 370, 373 (5th Cir. 2019).

47 *Id.*

48 *Id*.

49 *Id.*

50 *Id.*

51 *Id.* at 371.

52 *Id.* at 374.

Fifth Circuit took a "narrow view" of what constitutes prohibited discrimination under Section 703(a), explaining that prohibited discrimination included only ultimate employment actions such as hiring, granting leave, discharging, promoting, or compensating. On appeal, the Fifth Circuit affirmed.[53]

Section 703(a) prohibits discrimination as to the "terms, conditions, or privileges of employment."[54] The Fifth Circuit, however, stated that while the events were "disturbing," the working conditions that the petitioner was subjected to were not against the statute.[55] Rather, had the petitioner been discharged, denied leave or promotion, or paid differently than his white counterparts, only then would he have had an actionable claim under Title VII in the Fifth Circuit.

Similar to the case at bar, the Fifth Circuit has also held that a race discrimination claim cannot survive where a black applicant was subject to drug testing after a workplace incident, unlike his white counterpart after a similar incident.[56] The Fifth Circuit's reasoning was that simply being subjected to a drug test, without more, would not constitute an "ultimate employment decision" because a drug test does not affect an employee's duties, compensation, or benefits.[57] Likewise, the Fifth Circuit has rejected race discrimination claims in which black employees alleged to have been subjected to heavier workloads while being denied assistance when compared to their counterparts.[58] Again, applying its rigid "ultimate employment decision," the Fifth Circuit held that imposing heavier workloads that other employees were not subjected to cannot constitute an adverse employment action under Title VII.[59]

Cases such as *Peterson* and the rest of the aforementioned Fifth Circuit holdings should make one consider the questions: Is this what the substantive discrimination provision of Title VII was created to accomplish? Could a civil rights act specifically aimed at preventing workplace discrimination seek to maintain such a narrow scope, aimed only at remedying "ultimate employment actions"? And, is it truly inconceivable that Section 703(a) reaches beyond these tangible forms of discrimination to encompass the form

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53 *Id.* at 376.

54 42 U.S.C. § 2000e-2(a) (2019).

55 *Peterson*, 757 F. App'x at 375.

56 Johnson v. Manpower Prof'l Servs., Inc., 442 F. App'x 977, 983 (5th Cir. 2011).

57 *Id.*

58 *See* Wesley v. Yellow Transp., Inc., No. 3:05-CV-2266-D, 2008 U.S. Dist. LEXIS 101476, at *6 (N.D. Tex. Dec. 12, 2008); Ellis v. Compass Grp. USA, Inc., 426 F. App'x 292, 296 (5th Cir. 2011); *see also* Benningfield v. City of Hous., 157 F.3d 369, 376–77 (5th Cir. 1998).

59 *See Wesley*, 2008 U.S. Dist. LEXIS 101476, at *6; *Ellis*, 426 F. App'x at 296.

of discrimination we see most of in today's age: differential treatment masked behind what deceivingly appears as equal footing?

In its attempt at better refining what constitutes an adverse employment action, the Third Circuit asks whether a particular discriminatory act is "serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment."[60] The Third Circuit has heard a case almost identical to *Peterson*, in which a black employee failed to make a prima facie case of race discrimination. In the Third Circuit, a black employee brought suit claiming that he was required by his employer to work outdoors, regardless of the dangerously high temperatures.[61] Quite similarly to *Peterson*, the white counterparts in this Third Circuit case were allowed to stop their outdoor work while the black employees continued.[62] There, the Third Circuit held that the plaintiff did not make out a prima facie case of race discrimination because the employer had not acted with respect to the plaintiff's "compensation, terms, conditions, or privileges of employment."[63] The Third Circuit even went on to include in its decision that while the court did not "doubt Harris's characterizations of the conditions outside" nor did they "minimize the seriousness of any injury that Harris incurred," they nevertheless could not conclude that the plaintiff showed an adverse employment action and thus failed to make out a prima facie case of race discrimination.[64]

The very problem lies in the fact that courts are able to do away with these cases with such ease. A court should not be able to recognize the gravity of the injury caused on the one hand yet dismiss the claim because a plaintiff cannot point to something as tangible, or "ultimate," as a firing or change in pay. Rather, these instances of differential treatment should be analyzed as themselves being changes in "employment terms and conditions," which Title VII explicitly allows for. We cannot expect to rid the workplace of all forms of discrimination if we do not treat differential treatment that lacks an "ultimate employment decision" with the same attention and skepticism that we do when we see a demotion with a change in pay, a firing, or an undesirable transfer.

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60 Cardenas v. Massey, 269 F.3d 251, 263 (3d Cir. 2001) (quoting Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997)).

61 Harris v. AG United States, 687 F. App'x 167, 168 (3d Cir. 2017).

62 *Id.* at 168–69.

63 *Id.* at 169 (quoting Storey v. Burns Int'l Sec. Servs., 390 F.3d 760, 764 (3d Cir. 2004)).

64 *Id.* at 169.

B. Rejecting the Stringent "Ultimate Employment Decision" Requirement

The great majority of the circuits, including the Second, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits, have rejected the strict approach that requires a plaintiff to show that an employer took an ultimate employment decision in order to prevail on a Title VII discrimination claim. Instead, these circuits recognize that there are a number of disadvantageous changes that can occur in the workplace that can constitute adverse employment actions.

The Second Circuit has previously stated that "courts must pore over each case to determine whether the challenged employment action reaches the level of 'adverse'" because there is no "bright-line rule."[65] Take, for instance, the scenario described earlier in which an employee complains that he is unfairly overworked in comparison to his counterparts.[66] The rigid standard utilized in *Peterson*, or in the Fifth and Third Circuits generally, does not allow for a system that recognizes an unfair distribution of work as adverse treatment simply because the work is a part of the employees' "job duties" or job description.[67] In fact, the defendants in *Peterson* explicitly argued that Mr. Peterson's allegations did not implicate the "terms, conditions, or privileges" of his employment because working outdoors was part of his job description.[68] The Second Circuit, however, has rejected these inflexible standards, holding that "performance of normal job duties can amount to an adverse employment action if they are divvied between co-workers in a discriminatory fashion."[69] The Second Circuit has explained that a "[d]isproportionately heavy workload could perhaps be an adverse action, if the additional work significantly changed the employee's responsibilities so as to diminish that worker's role or status, or exposed the worker to dangerous or extreme conditions not appropriate to her job classification."[70] In these previous holdings, the Second Circuit has referred to the showing of an adverse action in order to make a prima facie case of discrimination as a "low threshold."[71]

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65 Wanamaker v. Columbian Rope Co., 108 F.3d 462, 466 (2d Cir. 1997).

66 *See* Wesley v. Yellow Transp., Inc., No. 3:05-CV-2266-D, 2008 U.S. Dist. LEXIS 101476, at *6 (N.D. Tex. Dec. 12, 2008); Ellis v. Compass Grp. USA, Inc., 426 F. App'x 292, 296 (5th Cir. 2011); *see also* Benningfield v. City of Hous., 157 F.3d 369, 376–77 (5th Cir. 1998).

67 Peterson v. Linear Controls, Inc., 757 F. App'x 370, 373 (5th Cir. 2019).

68 *Id.*

69 Lopez v. Flight Servs. & Sys., 881 F. Supp. 2d 431, 441 (W.D.N.Y. 2012); *see also* Young v. Rogers & Wells LLP, No. 00-Civ-8019(GEL), 2002 WL 31496205, at *5 (S.D.N.Y. Nov. 06, 2002).

70 *Young*, 2002 U.S. Dist. LEXIS 21541, at *5.

71 *Id.*

Likewise, the Sixth Circuit is not concerned with whether an employer has taken an ultimate employment decision, such as a firing.[72] The Sixth Circuit has explained that while *Burlington*'s holding went great lengths to distinguish Title VII's anti-discrimination provision with its retaliation provision, it did not alter the Sixth Circuit's initial understanding of the adverse employment action requirement in Section 703.[73] The Sixth Circuit has defined an adverse employment action:

> [A] materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.[74]

The Sixth Circuit fully rejects the notion that only ultimate employment decisions can be materially adverse, both for the purposes of retaliation claims as well as discrimination claims,[75] expanding its reach to allow for unique and particular situations to be heard,[76] rather than quickly discarded at summary judgment.

The Seventh Circuit has divided the kinds of cases in which adverse employment actions appear into three groups:

> 1. Cases in which the employee's compensation . . . benefits, or other financial terms of employment are diminished, including . . . termination of employment.[77]
> 2. Cases in which a nominally lateral transfer with no change in financial terms significantly reduces the employee's career prospects by preventing him from using the skills in which he is trained and experienced, so that the skills are likely to atrophy, and his career is likely to be stunted.[78]
> 3. Cases in which the employee is not moved to a different job or the skill requirements of his present job altered, but the *conditions* in which he works are changed in a way that

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72 Michael v. Caterpillar Fin. Servs. Corp., 496 F.3d 584, 594 (6th Cir. 2007).

73 *Id.*

74 Ford v. GMC, 305 F.3d 545, 553 (6th Cir. 2002).

75 *Michael*, 496 F.3d at 594; *Ford*, 305 F.3d at 553.

76 *Ford*, 305 F.3d at 53.

77 *See, e.g.*, Simpson v. Borg-Warner Auto., Inc. 196 F.3d 873, 876 (7th Cir. 1999).

78 *See, e.g.*, Flaherty v. Gas Research Inst., 31 F.3d 451, 456–57 (7th Cir. 1994).

> subjects him to a humiliating, degrading, unsafe, unhealthful, or otherwise significantly negative alteration in his workplace environment—an alteration that can fairly be characterized as objectively creating a hardship, the classic case being that of the employee whose desk is moved into a closet.[79]

The third category of cases identified by the Seventh Circuit allows for an employee, like the plaintiff in *Peterson*, to bring a discrimination claim against their employer when they are being subjected to unsafe, or otherwise negative, conditions in their workplace,[80] without having to necessarily face a tangible change in the status of their job. This approach focuses on the *conditions* of the workplace that the employee in a protected class is being subjected to when compared to the rest of the employees not in that protected class. In 2004, the Seventh Circuit held that a group of black employees suffered an adverse employment action when their employer changed their job assignments to working outdoors for the majority of their time.[81] The court specified that the plaintiffs were subjected to harsher working conditions, which was in fact an adverse employment action.[82]

The Eighth[83] and Ninth Circuits follow the same line of reasoning and reject the Fifth and Third Circuits' holdings. The Ninth Circuit, in reference to the Supreme Court case of *Oncale*, has elaborated on the fact that Title VII reaches beyond "terms and conditions" in the contractual sense and "evinces a congressional intent to strike at the entire spectrum of disparate treatment . . . in employment."[84] Most memorably, the Ninth Circuit has compared the requirement of showing an ultimate employment decision to that of the rationale behind "separate but equal."[85] The Ninth Circuit brought this comparison in 2011, when the court found that a group of black employees did in fact establish an adverse action when they were assigned to different workplaces than their white counterparts.[86] The Ninth Circuit stated that the defendants' contention that "segregation, without more, does not constitute an adverse employment action" is "reminiscent of a 'separate but equal'

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

80 *Id.*

81 Tart v. Ill. Power Co., 366 F.3d 461, 475 (7th Cir. 2004).

82 *Id.*

83 *See, e.g.*, Wedow v. City of Kan. City, 442 F.3d 661 (8th Cir. 2006).

84 Chuang v. Univ. of Cal. Davis, 225 F.3d 1115, 1125 (9th Cir. 2000) (quoting Oncale v. Sundowner Offshore Servs. Inc., 523 U.S. 75, 78 (1998)).

85 DeWeese v. Cascade Gen. Shipyard, Civil No. 08-860-JE, 2011 WL 3298421, at *10–*11 (D. Or. May 9, 2011).

86 *Id.*

model of racial equality that federal courts have long rejected."[87] Under the Ninth Circuit's broader standard, "a wide array of disadvantageous changes in the workplace [may] constitute adverse employment actions."[88] Essentially, under this approach, an employer cannot escape liability by masking a segregated workplace behind what deceptively looks like equal job opportunities. In other words, an employer may be paying all employees equally and assigning the same kinds of tasks, but at the same time, that employer could exclusively subject a group of minority employees to harsher working conditions, like those in *Peterson*, while allowing members outside of that protected class to work in bearable conditions. The Ninth Circuit's expansive approach saves itself from falling into a system that cannot fathom that this sort of discrimination exists and has permeated today's workplace.

Under this same kind of expansive approach, the Tenth[89] and Eleventh Circuits have avoided adopting a stringent rule, opting to examine "the unique factors relevant to the situation at hand."[90] The Eleventh Circuit has stated, for instance, that reassigning employees to new job duties, regardless of whether the change still remained a part of the job's description, would in fact constitute an actionable claim for discrimination if the plaintiff could show that the job reassignment constituted a loss of prestige and responsibility.[91]

C. The Undecided

The remaining circuits have not taken sides on the circuit split and have not adopted their own uniform system for interpreting adverse employment actions. The Fourth Circuit, however, has found that reducing a current employee's voluntary overtime opportunities, regardless of whether there was a reduction in overall income, could be considered an adverse employment action.[92] The Fourth Circuit, however, did not rule on whether every situation involving a reduction in voluntary overtime would be an adverse employment action, but rather, it is up for a jury to decide.[93]

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87 *Id.* (citing Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).

88 Ray v. Henderson, 217 F.3d 1234, 1240 (9th Cir. 2000); Delacruz v. Tripler Army Med., 507 F. Supp. 2d 1117, 1123 (D. Haw. 2007); Lewis v. UPS, No. C 05-02820 WHA, 2005 U.S. Dist. LEXIS 23488, at *6 (N.D. Cal. Oct. 13, 2005).

89 Sanchez v. Denver Pub. Schs., 164 F.3d 527, 532 (10th Cir. 1998); Barone v. United Airlines, Inc., 355 F. App'x 169, 181 (10th Cir. 2009).

90 *See Sanchez*, 164 F.3d at 532; *Barone*, 355 Fed. Appx. at 181; Hinson v. Clinch Cty. Bd. of Educ., 231 F.3d 821, 830 (11th Cir. 2000); Doe v. Dekalb Cty. Sch. Dist., 145 F.3d 1441, 1448 (11th Cir. 1998).

91 *See Doe*, 145 F.3d at 1448; *Hinson*, 231 F.3d at 830.

92 *See e.g.*, Ray v. Int'l Paper Co., 909 F.3d 661 (4th Cir. 2018).

93 *Id.*

Lastly, when deciding cases involving lateral transfers, the D.C. Circuit has stuck to the idea that a lateral transfer is not an adverse employment action where it does not result in material changes in the "terms, conditions, or privileges of employment."[94] However, the D.C. Circuit has opined that where the purpose of the transfer would be to escape a racially-biased supervisor who could negatively impact the employee's career advancement, such transfer would represent a change in the "terms, conditions, or privileges of employment."[95]

Interestingly enough, Justice Kavanaugh, then a D.C. Circuit judge, gave a particularly pro-employee concurring opinion in the case of *Ortiz-Diaz*.[96] In *Ortiz*, the court found that discriminatory transfers are sometimes actionable, including under the circumstances alleged in this specific case involving a racially biased supervisor. Judge Kavanaugh, however, wrote in his concurring opinion:

> Uncertainty will remain about the line separating transfers actionable under Title VII from those that are not actionable. In my view, the en banc Court at some point should go further and definitely establish the following clear principle: All discriminatory transfers (and discriminatory denials of requested transfers) are actionable under Title VII. As I see it, transferring an employee because of the employee's race (or denying an employee's requested transfer because of the employee's race) plainly constitutes discrimination with respect to "compensation, terms, conditions, or privileges of employment" in violation of Title VII.[97]

Although characterized as a conservative judge, here, Kavanaugh expressed a view many would hold as pro-employee. This observation sparks a new thought: how would, and of course, how should the Supreme Court rule on this issue, given the nature of the current bench? Primarily, three of the Supreme Court justices are currently classified as "left-leaning," which typically hold a pro-employee ideology. However, given Justice Kavanaugh's strong stance on employee transfers, it is possible that future plaintiffs who find themselves in a position similar to Peterson could succeed on a racial discrimination claim, using the right arguments.

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94 42 U.S.C. § 2000e-2(a) (West, Westlaw through Pub. L. No. 117-1 (excluding Pub. L. No. 116-283 and 116-315)).

95 Ortiz-Diaz v. United States Dep't of Hous. & Urban Dev., Office of Inspector Gen., 867 F.3d 70, 81 (2016).

96 *Id.*

97 *Id.*

IV. IT IS TIME TO DECIDE THIS ISSUE

Currently, the Supreme Court has ruled on what constitutes an "adverse employment action" in the context of retaliatory discrimination.[98] In *Burlington Northern*, the plaintiff brought charges against her employer for assigning her to less desirable duties after she complained of sexual harassment.[99] The lower court found that this did not constitute an adverse employment action for purposes of Title VII because she was not fired, demoted, denied a promotion, or denied wages.[100] When brought before the Supreme Court, the Court found that though the duties were within the same classification and the pay was eventually reinstated, the action was nevertheless sufficiently harsh to constitute retaliatory discrimination.[101] After *Burlington Northern*, it was made clear that courts could not apply an "ultimate employment decision" requirement to retaliation cases.[102] The Supreme Court, however, has failed to give clearer guidance on the meaning of "adverse employment actions" when it comes to disparate treatment cases or when it comes to analyzing discriminatory acts generally. The varying interpretations of each circuit illustrate the drastic need for a more concrete understanding.

The Supreme Court, on October 19, 2019, invited the Solicitor General to file a brief in the *Peterson* case to express the views of the United States.[103] Oftentimes, this is an indication that the Court is interested in hearing the case.[104] In fact, studies have indicated a petition is over thirty-seven times more likely to be granted following a call for the views of the Solicitor General.[105] As of March 20, 2020,[106] the Solicitor General filed his brief in which he indicated that the Court should grant certiorari in the *Peterson* case because the United States has a substantial interest in the Court's resolution of the question presented.[107] The Solicitor General went on to fortify that the Fifth Circuit was incorrect in holding that Section 703(a)(1) prohibits

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98 *See generally* Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53 (2006).

99 *Id.* at 58.

100 *Id.* at 59.

101 *Id.* at 71.

102 *Id.* at 67.

103 *Peterson v. Linear Controls, Inc.*, SCOTUS BLOG, https://www.scotusblog.com/case-files/cases/peterson-v-linear-controls-inc/ (last visited Apr. 25, 2020).

104 David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 GEO. MASON L. REV. 237, 273 (2009).

105 *Id.*

106 *Peterson v. Linear Controls, Inc.*, *supra* note 103.

107 Brief for United States as Amicus Curiae, Peterson v. Linear Controls, Inc., 757 F. App'x 370, 373 (5th Cir. 2019) (No. 18-1401).

discrimination only in "ultimate employment decisions," stating that this requirement has no foundation in Title VII's text, Congress's purpose, or the Court's precedents.[108]

According to EEOC statistics, between the years 2010 and 2019, the EEOC had received between 15,000 and 19,000 Title VII charges alleging discrimination as to the terms or conditions of employment;[109] this represents more than a quarter of Title VII cases the EEOC receives in a fiscal year.[110] Proper guidance from the Court regarding the interpretation of Section 703(a) would thus greatly impact employment discrimination litigation, as this is a recurring issue in Title VII claims.[111]

Peterson had presented itself as the ideal case to settle the proper interpretation of Section 703 and whether it prohibits discrimination only in ultimate employment decisions. As the Solicitor General describes *Peterson*, "the facts alleged here present the kind of extreme scenario that would typically arise only as a hypothetical to illustrate the flaws in respondent's interpretation of the statute."[112] Unfortunately for anti-discrimination plaintiffs, in July 2020, the Supreme Court dismissed the petition for writ of certiorari after the petitioner, Peterson himself, moved to dismiss the case. Without the Court's guidance, many plaintiffs who find themselves in a circuit that takes the restrictive approach of requiring an ultimate employment action will be continuously deterred from filing cases; attorneys in these circuits are unlikely to pursue cases unless there is an automatic showing of an ultimate employment decision. Surely, the Supreme Court has a pressing interest in protecting Title VII's foundational goals and Congress's intent in enacting the legislation; the Court's interest calls for a need to act with urgency in order to prevent discrimination plaintiffs with valid segregation claims to be disposed of at summary judgment. Therefore, if given a similar opportunity in the near future, the Supreme Court should jump at such an opportunity in order to provide guidance to lower courts.

V. HOW SHOULD THE SUPREME COURT RULE?

The Supreme Court should find that the "terms, conditions, or privileges of employment" covered by Section 703(a)(1) of Title VII of the Civil Rights

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108 *Id.* at 6.

109 *Statutes by Issue (Charges filed with EEOC), FY 2010–FY 2019,* EEOC, https://go.usa.gov/xdBBu (last visited June 22, 2021).

110 *Title VII of the Civil Rights Act of 1964 Charges (Charges filed with EEOC), FY 1997–FY 2019*, EEOC, https:// go.usa.gov/xdBK3 (last visited June 22, 2021).

111 *Id.*

112 Brief for United States as Amicus Curiae at 9, Peterson v. Linear Controls, Inc., 757 F. App'x 370, 373 (5th Cir. 2019) (No. 18-1401).

Act of 1964 are *not* limited only to hiring, firing, promotions, compensation, and leave. With any question of statutory interpretation, the Court looks to the plain language of the statute to derive its intent.[113] When discovering a statute's intent or when defining undefined terms within the statute, courts look to the usual and ordinary meaning of the statute's words.[114] The relevant verbiage in Section 703(a) makes it unlawful for a private employer or a state or local government "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."[115] In application, courts have condensed this provision to the notion that employers cannot take "adverse employment actions" because of an individual's protected class.[116] In interpreting the plain meaning of the "terms and conditions" of employment, it is difficult to imagine that Congress did not intend to include the physical conditions of everyday employment such as the work location, work assignments, rotation between employees, breaks, and everything else that makes up the day-to-day workplace. The term "working conditions" is defined as the working environment and all existing circumstances affecting labor in the workplace, including job hours, physical aspects, legal rights, and responsibilities.[117] It would not make sense for Title VII's fundamental goal to be to eradicate all forms of discrimination in the workplace but not protect against adverse actions as to the most basic component of the workplace: the physical *conditions* that employees are subjected to day in and day out. It cannot be rational to come to the conclusion that subjecting black employees to work outside, without access to water, when their white counterparts enjoy bearable working conditions, does *not* constitute a term or condition of employment.

When looking to the statutory text of Section 703(a), it is clear that the term "ultimate employment decision" appears nowhere.[118] Rather, it reads that discrimination as to the "terms, conditions, or privileges of employment" is prohibited.[119] The Supreme Court in *Meritor* held that "the phrase 'terms, conditions or privileges of employment' in Title VII is an expansive concept which sweeps within its protective ambit the practice of creating a working

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113 *See, e.g.*, Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986).

114 *See, e.g.*, Taniguchi v. Kan Pac. Saipan, Ltd., 566 U.S. 560, 566 (2012); Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 62–64 (2006).

115 42 U.S.C. § 2000e-2(a) (2020).

116 Ricci v. DeStefano, 557 U.S. 557, 579 (2009) (citing 42 U.S.C. § 2000e-2(a)); *see also* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

117 *Working Condition Law and Legal Definition*, US LEGAL, https://definitions.uslegal.com/w/working-condition/ (last visited Mar. 5, 2020).

118 42 U.S.C. § 2000e-2(a) (2020).

119 *Id.*

environment heavily charged with [discrimination]."[120] Consequently, to find that Section 703(a) cannot reach the kinds of discriminatory events that occurred in *Peterson* simply does not align with the Supreme Court's interpretation of the statute.[121] While Section 703(a) begins by specifying that employers cannot "fire, or fail or refuse to hire" an individual based on their race, sex, national origin, color, or religion,[122] the text continues to state that it is unlawful "otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment."[123] The text itself clearly indicates that there is something more that makes up the employment practices Title VII aims to prevent—something beyond a harm that is easily measured by a financial change.

Today, much of the discrimination that pervades our workplace, and our society, generally, is unconscious or subconscious. At this point, we cannot afford to ignore it. Unconscious and subconscious bias, if left unchecked, will turn into blatant discrimination.[124] These biases can manifest themselves in work evaluations, decision-making, and even career advantages if preferential treatment is given to only a certain demographic of individuals. But less obvious are the kinds of subconscious and unconscious bias that the law is hesitant to regulate because it cannot be measured by numbers or a paper trail; it is the kind of bias we see in *Peterson*.[125] By rejecting the Fifth Circuit's stringent "ultimate employment action" requirement seen in *Peterson*, the Supreme Court holds the perfect opportunity to regulate these subtle forms of discrimination that permeate today's workplace.

Laws are meant to adapt in order to form a society that protects the rights of every citizen. To find that a situation in which black employees are forced to work outside in the summer heat, deprived of air conditioning and water, while their white counterparts enjoy such luxuries, is not only irresponsible on behalf of the judiciary, but it is reminiscent of a period of time that simply did not care about the rights of an entire demographic of people. The inconsistencies seen throughout the circuits create an unfair and unbalanced system. A plaintiff who would be able to succeed on a discrimination claim within the Ninth Circuit[126] may not be able to succeed on the same claim by virtue of bringing the case in the Fifth Circuit.[127] While this is true of every circuit split, the issue we see here is extremely problematic for society.

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120 Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986).

121 *See id.*

122 § 2000e-2(a).

123 *Id.*

124 *See* Martinelli, *supra* note 20.

125 Peterson v. Linear Controls, Inc., 757 F. App'x 370, 373 (5th Cir. 2019).

126 *See* Davis v. Team Elec. Co., 520 F.3d 1080, 1090–91 (9th Cir. 2008).

127 *See, e.g.*, *Peterson*, 757 F. App'x at 373.

Without a holding from the Supreme Court, courts like the Fifth Circuit will continue deciding cases as if Title VII cannot protect employees from employers who segregate by subjecting a certain protected class to more undesirable working conditions if those conditions are not coupled with an ultimate employment decision.

VI. CONCLUSION

In February of 2019, the Fifth Circuit in *Peterson* ruled that where black employees' job duties were changed to working outside in the Louisiana summer heat without access to water, while their white counterparts remained inside in the air conditioning, this did not constitute an adverse employment action.[128] The court reasoned that because the employees did not suffer an "ultimate employment decision" such as discharge or change in compensation, their change of duties was not actionable under Title VII.[129]

Currently, courts remain split on their interpretations of the "adverse employment action" requirement to establish a prima facie case of disparate treatment. While several courts follow the premise that a wide array of disadvantageous changes in the workplace can constitute adverse employment actions,[130] other courts, like the Fifth Circuit, strongly disagree, interpreting Title VII's substantive prohibition on discrimination to reach only "ultimate employment decisions."[131] These ultimate employment decisions encompass only hiring, granting leave, discharging, promoting, or compensating.[132]

With discrimination changing its form from the blatant discrimination Title VII initially was enacted to eradicate, to more subtle and masked forms of discrimination, the Supreme Court should expand Title VII's reach to eliminate discrimination as to the physical *conditions* of the workplace. The Supreme Court has previously held that "the phrase 'terms, conditions, or privileges of employment' in Title VII is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with discrimination."[133] To hold that only "ultimate employment decisions" fit squarely within Title VII's reach is contrary to the Supreme Court's own interpretation of the statute.[134]

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128 *Id*.

129 *Id.*

130 Ray v. Henderson, 217 F.3d 1234, 1240 (9th Cir. 2000).

131 *See generally Peterson*, 757 F. App'x at 373.

132 McCoy v. City of Shreveport, 492 F.3d 551, 559–60 (5th Cir. 2007).

133 Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986).

134 *Id*.

Lastly, the words "ultimate employment decision" appear nowhere in Section 703.[135] The Supreme Court has been clear that limits on the reach of a statute come from the text of the statute itself, not from "add[ing] words to the law to produce what is thought to be a desirable result."[136] In fact, limits on the scope of Section 703 already exist in that the discrimination must be connected to the workplace, and "merely offensive" conduct alone does not violate Section 703(a)(1) as that does not sufficiently alter an employee's job conditions.[137] As a result, rejecting the stringent "ultimate employment decision" requirement would not open the floodgates to baseless or frivolous claims, it would simply open the door to plaintiffs with on-the-job racial segregation claims.

135 42 U.S.C. § 2000e-2(a) (2020).

136 EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 774 (2015).

137 Harris v. Forklift Sys., 510 U.S. 17, 21 (1993).