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### Cover Page Footnote

J.D. 2018, The Catholic University of America, Columbus School of Law. The author would like to thank her mentors Eden Brown Gaines and Nicole C. Dillard for their invaluable guidance and support throughout this process. The author is also grateful to her colleagues at the Catholic University Law Review for their assistance in preparing this Note for publication.

# ANALYTICAL NIGHTMARE: THE MATERIALLY ADVERSE ACTION REQUIREMENT IN DISPARATE TREATMENT CASES

*Esperanza N. Sanchez*<sup>+</sup>

In his greatest written work,<sup>1</sup> “Letter from Birmingham Jail,” Dr. Martin Luther King Jr. argued that two types of laws existed—those that are just and those that are unjust.<sup>2</sup> Quoting Saint Augustine, he added that “an unjust law is no law at all,” describing an unjust law as any code that is “out of harmony with the moral law.”<sup>3</sup> He denounced all segregation statutes because such laws “distorted the soul and damaged the personality,” explaining that any law which degrades human personality is unjust.<sup>4</sup>

Dr. King wrote this letter in response to a statement issued in the Birmingham News by eight white clergymen criticizing the massive desegregation campaign led by Dr. King in the spring of 1963.<sup>5</sup> The desegregation campaign, which later became known as the Birmingham Campaign of 1963,<sup>6</sup> is credited as the catalyst for the Civil Rights Act of 1964 (Civil Rights Act)<sup>7</sup>—one of the most important pieces of legislation enacted in the twentieth century.<sup>8</sup> The Birmingham Campaign, which faced opposition from well beyond the eight clergymen,<sup>9</sup> was

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<sup>+</sup> J.D. 2018, The Catholic University of America, Columbus School of Law. The author would like to thank her mentors Eden Brown Gaines and Nicole C. Dillard for their invaluable guidance and support throughout this process. The author is also grateful to her colleagues at the *Catholic University Law Review* for their assistance in preparing this Note for publication.

1. David Benjamin Oppenheimer, *Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U.S.F. L. REV. 645, 662–63 (1995) (“That essay, the Letter from Birmingham Jail, is widely regarded as Dr. King’s greatest written work, and the most important statement of principles of the civil rights era.”).

2. Martin Luther King, Jr., *Letter from Birmingham Jail*, reprinted in 26 U.C. DAVIS L. REV. 835, 840 (1993).

3. *Id.*

4. *Id.*

5. *White Clergymen Urge Local Negroes to Withdraw from Demonstrations*, BIRMINGHAM NEWS, Apr. 13, 1963, at 2.

6. Oppenheimer, *supra* note 2, at 654.

7. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 28 U.S.C. and 42 U.S.C.); John F. Kennedy, *Special Message to the Congress on Civil Rights and Job Opportunities - June 19, 1963*, 1963 Pub. Papers 483, 483 (1963) (“[T]he events in Birmingham and elsewhere have so increased the cries for equality that no city or State or legislative body can prudently choose to ignore them.”).

8. Oppenheimer, *supra* note 2, at 645.

9. *See generally* TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954–63 (1988). The Birmingham Campaign began on April 3, 1963, as a campaign against local businesses, where small groups of protesters would stage sit-ins at local lunch counters and dress shops, but support for the movement was dismal. Local African-American-run media outlets

a massive, non-violent civil disobedience campaign led by Dr. King to oppose the immorality of segregation laws in the American South.<sup>10</sup> Dr. King believed that only by personally confronting segregation—at the expense of his own safety and liberty—could the world be forced to behold its immorality and change its laws and customs of inequality.<sup>11</sup>

In the wake of the Birmingham Campaign, President Kennedy sent a message to Congress urging legislative action to address the “growing moral crisis in American race relations.”<sup>12</sup> This moral call to action led to the longest debate in the Senate’s history to that point, testing the legislators’ attitudes of justice and equality.<sup>13</sup> Despite considerable Republican opposition,<sup>14</sup> Congress eventually passed the Civil Rights Act on July 2, 1964, and President Lyndon B. Johnson signed into law two days later.<sup>15</sup>

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treated the campaign as a “disturbing rumor and provided no firsthand coverage of the demonstrations,” while local white publications regarded both the segregationists and Dr. King as “blemishes on the civic reform movement.” *Id.* at 710.

10. In the wake of *Brown v. Board of Education*, 347 U.S. 483 (1954), the landmark decision that prohibited segregation in public schools, a new civil rights leadership emerged due to the narrow scope and painfully slow enforcement of the court-ordered desegregation. This new leadership, which included Dr. King, consisted of preachers who were “more militant and less dependent on the middle class” than the leading mainstream black civil rights organization, the National Association for the Advancement of Colored People (NAACP), and who believed that the path to equality could only be paved by non-violent confrontation rather than lobbying and litigation. Oppenheimer, *supra* note 2, at 647–48.

11. The integration process “prescribed by *Brown*” failed to materialize in any meaningful way due to violent resistance by southern segregationists. See MARTIN LUTHER KING, JR., *WHY WE CAN’T WAIT* 5–7 (1964) (“Yet the statistics make it abundantly clear that the segregationists of the South remained undefeated by the decision.”). After almost a decade of waiting for progress, Dr. King and other leaders of the civil rights movement decided that the time for direct action had come and chose Birmingham, which was regarded as having the “most implacable segregationists in the country,” as the stage for a massive, non-violent civil disobedience campaign that would confront the realities of segregation in the South. *Id.* at 37–59; accord Oppenheimer, *supra* note 2, at 659 (“The rigid segregation of Birmingham was held together by both the power of segregation laws and the power of racist violence . . . . During the period between 1957 and 1962 there were between sixteen to twenty reported bombings in Birmingham of black churches and civil rights leaders’ homes.”).

12. Kennedy, *supra* note 8, at 483 (“[T]he events in Birmingham and elsewhere have so increased the cries for equality that no city or State or legislative body can prudently choose to ignore them.”). He called on Congress to enact comprehensive civil rights law that would provide “the most responsible, reasonable, and urgently needed” solutions to the civil unrest. *Id.* at 484. He implored, “Justice requires us to insure the blessings of liberty for all Americans and their posterity—not merely for reasons of economic efficiency, world diplomacy, and domestic tranquility—but, above all, because it is right.” *Id.* at 494.

13. See Marjorie Hunter, *History of Bill: A Year of Words*, N.Y. TIMES (June 20, 1964), <http://www.nytimes.com/1964/06/20/history-of-bill-a-year-of-words.html>; see also 110 CONG. REC. 14,443, 14,443 (1964) (statement of Sen. Hubert H. Humphrey).

14. Llewellyn E. Thompson II, *The Civil Rights Act of 1964: Present at Its Birth*, 29 U.S.F. L. REV. 681, 681–82 (1995).

15. Thompson, *supra* note 15, at 690.

One of the most controversial provisions of the Civil Rights Act was the fair employment provision known as Title VII.<sup>16</sup> Opponents argued that Title VII was an unconstitutional extension of federal regulatory authority in the private enterprise of employment.<sup>17</sup> Those in favor of Title VII rejected any claims of unconstitutionality, calling to the Chamber's attention the purpose and urgent need for such legislation.<sup>18</sup> Addressing the divide, one senator proclaimed: "Two centuries ago, we initiated an experiment in popular freedom. A century ago, we emphasized that we meant it to be freedom for everyone, but the realization has been retarded."<sup>19</sup>

In the years following the Civil War and Reconstruction, African Americans were routinely denied access to employment, and when they did work, they were unabashedly underpaid.<sup>20</sup> The subsequent Jim Crow Era perpetuated this pattern of employment discrimination as a form of government-sanctioned racial oppression.<sup>21</sup> "These segregation statutes thrived in the South for almost a century, . . ." immorally excluding African Americans and other minority groups from equal opportunity in all aspects of life, including employment.<sup>22</sup> Congress prescribed Title VII to cure the evils that stemmed from decades of oppression perpetuated by unjust segregation statutes.<sup>23</sup>

However, employment discrimination continues, despite the enactment of Title VII, but often in subtler forms.<sup>24</sup> Federal courts have struggled to—and in some instances refused to—adapt to increasingly covert forms of discrimination.<sup>25</sup> Over the last fifty years, lower federal courts have interpreted

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16. Pub. L. 88-352, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. § 2000e).

17. 110 CONG. REC. 14,318, 14,319 (1964) (statement of Sen. Barry M. Goldwater); *see also* 110 CONG. REC. 14,318, 14,318 (1964) (statement of Sen. John J. Sparkman); 110 CONG. REC. 14,507, 14,507 (1964) (statement of Sen. James Strom Thurmond).

18. 110 CONG. REC. 14,448, 14,449 (1964) (statement of Sen. Paul Douglas) ("This bill is a work of love, not hate; a measure to help people surmount prejudice and not to marshal the law behind prejudice. It is a measure to furnish a standard beyond which individuals can go but below which they cannot fall.").

19. 110 CONG. REC. 14,276, 14,276 (1964) (statement of Sen. John Pastore).

20. ROY L. BROOKS ET AL., *THE LAW OF DISCRIMINATION: CASES AND PERSPECTIVES* 431 (2011).

21. Today, job segregation and pay differential remain as the "dominant form[s] of employment discrimination for all minorities." *Id.*

22. *See* David Pilgrim, *What Was Jim Crow*, JIM CROW MUSEUM (2012), <http://www.ferris.edu/jimcrow/what.htm>.

23. *See* 110 CONG. REC. 14,443, 14,443 (1964) (statement of Sen. Jack Javits) ("[F]or the first time in recent history the Congress of the United States will say in clear and unmistakable terms: 'There is no room for second-class citizenship in our country.' Let no one doubt the historical significance of this ringing affirmation which we now deliver to the Nation and to the World.").

24. *See* BROOKS, *supra* note 21, at 431 ("No longer does one encounter signs in store windows that read 'Latinos need not apply' or company rules that outright bar African American employees from being promoted. Employment discrimination today is far more complex.").

25. *See, e.g.*, Rosalie Berger Levinson, *Parsing the Meaning of "Adverse Employment Action" in Title VII Disparate Treatment, Sexual Harassment, and Retaliation Claims: What Should Be Actionable Wrongdoing?*, 56 OKLA. L. REV. 623, 624 (2003) ("Unfortunately, when

the statutory language of Title VII so narrowly that legislative intervention has been warranted on multiple occasions.<sup>26</sup> To illustrate the cyclical struggle between the legislature and the judiciary, one need look no further than the evolution of the disparate treatment theory.<sup>27</sup>

Under Title VII, an employer is barred from discriminating against an individual based on that individual's "race, color, religion, sex, or national origin."<sup>28</sup> Courts interpret this language as requiring a plaintiff prove two things: (1) the employer had an impermissible motive to discriminate; and (2) the employer took some adverse employment action against him.<sup>29</sup> Although the "adverse employment action" requirement is not found in the statutory language, courts have imported this requirement into Title VII jurisprudence, without clearly defining which employment actions qualify as "adverse."<sup>30</sup> This lack of clarity has resulted in analytical confusion, yielding anemic anti-discrimination protections that, in effect, shelter invidious employment practices from liability.<sup>31</sup> Yet, such an untenable result squarely contradicts both the letter and spirit of Title VII.

In the D.C. Circuit, for example, the employment discrimination plaintiff must show that the challenged action was "materially adverse" to his employment.<sup>32</sup> Actions leading to termination, diminution in pay, or demotion from supervisory roles present glaring examples of material adversity. However, the law is not as clear in actions involving more subtle changes in employment, such as the denial of a lateral transfer.

This Note explores the current analytical confusion generated by the adverse employment action requirement in disparate treatment cases. Part I establishes the foundation for this discussion by first outlining the operative statutory language. The discussion then identifies the two judicially imported

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discrimination takes on more subtle, less tangible forms, courts have faltered in enforcing Title VII's goal of achieving equal employment opportunity.").

26. See Henry L. Chambers, *Reading Amendments and Expansions of Title VII Narrowly*, 95 B.U. L. REV. 781, 783–84 (2015); see also Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 514–15 (2009) (discussing how federal courts continue to use precedents that amendments to Title VII are meant to address).

27. Title VII § 703(a) outlines two types of unlawful employment practices, with each one requiring distinct burdens, but this Note will focus on the disparate treatment theory governed by section 703(a)(1) as opposed to the disparate impact theory of section 703(a)(2). Pub. L. 88-352, 78 Stat. 255 (1964) (codified as amended in 42 U.S.C. § 2000e-2). For an in-depth discussion of the modern disparate impact theory, see Reva B. Siegel, *Race-Conscious but Race-Neutral: The Constitutionality of Disparate Impact in the Roberts Court*, 66 ALA. L. REV. 653 (2014).

28. 42 U.S.C. § 2000e-2(a)(1) (2012).

29. See *infra* Section I.B.

30. See *infra* Section I.B.2.

31. See Nancy Gertner, *Losers' Rules*, 122 YALE L.J. ONLINE 109, 109 (2012) ("Changes in substantive discrimination law since the passage of the Civil Rights Act of 1964 were tantamount to a virtual repeal. This was not so because of Congress; it was because of judges.").

32. *Dudley v. Wash. Metro Area Transit Auth.*, 924 F. Supp. 2d 141, 153 (D.D.C. 2013).

components for a disparate treatment claim, followed by an examination of some factors that have led to the analytical inconsistencies surrounding the adverse employment action requirement in lower federal courts. Part II analyzes a curious case out of the District of Columbia Circuit, to illustrate how anti-discrimination jurisprudence has created an analytical nightmare for jurists. Part III explains how, far too often, the confusion has resulted in a court-sanctioned barrier to the Civil Rights Act's promise of equal opportunity.

## I. DEVELOPMENT OF THE ADVERSE EMPLOYMENT ACTION

### A. *The Word and Spirit of Title VII*

Both the Supreme Court and the circuit courts have recognized Title VII's goal of eliminating discrimination in the workplace.<sup>33</sup> Yet, employment discrimination decisions by the federal courts have created a body of law that patently contradicts Title VII's aim of equal employment opportunity.<sup>34</sup> To explore such a development, one must first examine the substantive prohibitions outlined in the statutory language.

Section 703(a)(1) of Title VII renders an employment practice unlawful if an employer "discriminate[s] against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin."<sup>35</sup> Section 703(a)(2) renders an employment practice unlawful if an employer "limit[s], segregate[s], or classif[ies] his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his

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33. See e.g., *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 342 (2013) ("Title VII is central to the federal policy of prohibiting wrongful discrimination in the Nation's workplaces and in all sectors of economic endeavor."); *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 358 (1995) (positing that the ADEA and Title VII share the "common purpose [of] eliminat[ing] discrimination in the workplace"); *EEOC v. Shell Oil Co.*, 466 U.S. 54, 77 (1984) ("The dominant purpose of [Title VII], of course, is to root out discrimination in employment."); *Kremer v. Chem. Constr. Corp.*, 546 U.S. 461, 468 (1982) ("Congress enacted Title VII to assure equality of employment opportunities without distinction with respect to race, color, religion, sex, or national origin."); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973) ("[I]t is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise."); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) ("What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.").

34. See Marcia L. McCormick, *Let's Pretend that Federal Courts Aren't Hostile to Discrimination Claims*, 76 OHIO ST. L.J. FURTHERMORE 22, 28–29 (2015) (criticizing federal courts for, among other things, downplaying the importance of evidence such as blatantly racist and sexist speech that a reasonable jury would think is indicative of employment discrimination); see generally Henry L. Chambers, *The Supreme Court Chipping Away at Title VII: Strengthening It or Killing It?*, 74 LA. L. REV. 1161 (2014); Widiss, *supra* note 27, at 514–15; Levinson, *supra* note 26, at 623–24; accord Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L.J. 1121 (1998) (criticizing federal courts for permitting employers to commit "benign" discrimination against employees in contradiction of the spirit of Title VII).

35. 42 U.S.C. § 2000e-2(a)(1) (2012).

status as an employee, because of such individual's race, color, religion, sex, or national origin."<sup>36</sup> Although, Title VII's unequivocal prohibition of workplace discrimination based on protected characteristics is clear from the plain language of the statute, determining what constitutes discrimination is left to the courts.<sup>37</sup>

Two theories of discrimination exist under Title VII: disparate treatment and disparate impact.<sup>38</sup> Disparate treatment, which constitutes the focus of this Note, is the most easily understood type of discrimination—the employer intentionally “treats some people less favorably than others because of their race, color, religion, sex, or national origin.”<sup>39</sup> Disparate impact cases involve “facially neutral policies or practices, which, in operation, affect one group more harshly than another without the justification of a business necessity.”<sup>40</sup> Ultimately, the distinguishing factor between the two theories of discrimination is the presence of intent.<sup>41</sup>

### B. Disparate Treatment Theory

The compelling interest in extinguishing invidious employment practices aimed at racial minorities guided early judicial interpretations of Title VII, resulting in a broad reading of the statutory language.<sup>42</sup> In the half century since its passage, however, federal courts have moved toward an increasingly narrow reading of the statutory language, thereby imposing heavier burdens on aggrieved plaintiffs to weed out cases.<sup>43</sup> Thus, this discussion turns to a brief overview of the evolution of the modern disparate treatment theory in federal courts.

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36. *Id.* § 2000e-2(a)(2).

37. *See id.* § 2000e.

38. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

39. *Id.*

40. *Id.*

41. *See White*, *supra* note 34, at 1131–32.

42. *See e.g.*, *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971) (“We must be acutely conscious of the fact that Title VII of the Civil Rights Act of 1964 should be accorded a liberal interpretation in order to effectuate the purpose of Congress to eliminate the inconvenience, unfairness, and humiliation of ethnic discrimination.”); *Roberts v. Gen. Mills, Inc.*, 337 F. Supp. 1055, 1056 (N.D. Ohio 1971) (“[G]reat perspicacity is not required to realize that the Civil Rights Act of 1964 negates an employer's right to discriminate, classify, or otherwise make rules which are based upon race, religion, sex or national origin.” (emphasis added)).

43. *See, e.g.*, *Nichols v. S. Ill. Univ.-Edwardsville*, 510 F. Supp. 772, 779 (7th Cir. 2007) (requiring a “materially adverse employment action” to assert a disparate treatment claim to prevent ‘minor and even trivial employment actions’ from becoming the basis of such claims) (citations omitted); *Stewart v. Evans*, 275 F.3d 1126, 1133 (D.C. Cir. 2002) (“[N]ot all abusive behavior, even when it is motivated by discriminatory animus, is actionable.”). Although the need for a sustainability threshold is reasonable, critics have pointed out that any standard that permits discrimination violates both the word and spirit of Title VII, arguing that questions regarding the magnitude of the discrimination should “be addressed at the remedial stage” rather than foreclosing claims altogether. *See White*, *supra* note 34, at 1163–64, *accord Levinson*, *supra* note 26, at 636.

Disparate treatment discrimination may involve a single employee (individual disparate treatment) or affect numerous employees concurrently (systemic disparate treatment).<sup>44</sup> The scope of this Note will center on individual disparate treatment, exploring what a plaintiff must show to prove an employer violated Section 703(a)(1).<sup>45</sup> Because “simply treat[ing] some people less favorably than others” on the basis of a protected characteristic will render an employer’s actions unlawful, disparate treatment claims under Section 703(a)(1) require two components: (1) an impermissible motivation and (2) less favorable treatment.<sup>46</sup>

### 1. *Discriminatory Intent: Showing the Impermissible Motivation*

The Supreme Court’s first articulated legal standard for disparate treatment cases emerged nine years after the passage of Title VII in *McDonnell Douglas Corp. v. Green*.<sup>47</sup> Due to the inherent challenges of showing discriminatory intent,<sup>48</sup> the Court took a process-of-elimination approach to proving discrimination and laid out a three-step analysis that would eliminate “the most common nondiscriminatory reasons” for the challenged conduct.<sup>49</sup>

First, the plaintiff must show a prima facie case of discrimination by creating an inference of an employer’s discriminatory motive.<sup>50</sup> The inference of discrimination arises out of the presumption that the challenged conduct, if otherwise unexplained, is “more likely than not based on the consideration of impermissible factors.”<sup>51</sup> Once the plaintiff makes the prima facie case, the burden shifts to the defendant to “clearly set forth, through the introduction of admissible evidence, the [legitimate, nondiscriminatory] reasons for the plaintiff’s rejection.”<sup>52</sup> If the defendant carries its burden, “[t]he plaintiff must be given the opportunity to introduce evidence that the proffered justification is merely a pretext for discrimination.”<sup>53</sup>

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44. See BROOKS, *supra* note 21, at 481.

45. 42 U.S.C. § 2000e-2(a)(1) (2012).

46. See Raytheon Co. v. Hernandez, 540 U.S. 44, 52 (2003).

47. 411 U.S. 792, 802–03 (1973) (involving a black civil rights activist who filed suit against his former employer, alleging racial discrimination when his employer rejected his application for rehire).

48. See Tex. Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 255 n.8 (1981) (“In a Title VII case, the allocation of burdens and the creation of a presumption by the establishment of a prima facie case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.”).

49. *Id.* at 252–54.

50. *McDonnell Douglas*, 411 U.S. at 802. The Court later fleshed out the *McDonnell Douglas* four-prong prima facie test for employment discrimination cases by requiring only that a plaintiff create an inference of an employer’s discriminatory motive. See *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977) (explaining that the *McDonnell Douglas* prima facie standard demands that a plaintiff “create an inference that the [employer’s] decision was a discriminatory one”).

51. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978).

52. *Burdine*, 450 U.S. at 255 (explaining the *McDonnell Douglas* paradigm).

53. See *Furnco Constr. Corp.*, 438 U.S. at 578.

The Court refined the *McDonnell Douglas* paradigm in *Texas Department of Community Affairs v. Burdine*. Because the ultimate burden of persuasion “remains with the plaintiff at all times,” the *Burdine* Court held that the defendant only bears a burden of production in proffering a nondiscriminatory reason for the challenged conduct.<sup>54</sup> *Burdine* reinforced the principle that, at the preliminary stages of a disparate treatment claim, the defendant’s burden is far lower than the plaintiff’s burden. Moreover, once the defendant produced a nondiscriminatory reason for its action, the burden returned to the plaintiff to show pretext.<sup>55</sup>

Delivering the opinion of the Court, Justice Powell added that, once a discrimination claim reached the pretext phase of the analysis, a plaintiff may demonstrate pretext by discrediting the employer’s proffered explanation.<sup>56</sup> Consequently, in the wake of *Burdine*, many lower federal courts interpreted the plaintiff’s burden of persuasion as satisfied if the plaintiff disproved the defendant’s proffered explanation.<sup>57</sup> For these courts, the plaintiff proved her case as a matter of law whenever she simply disproved the employer’s proffered justifications for the challenged action.<sup>58</sup>

However, the Court rejected this view in *St. Mary’s Honor Center v. Hicks*.<sup>59</sup> In an ardent opinion by Justice Scalia, *Hicks* held that merely discrediting the employer’s reason as pretext fails to satisfy the plaintiff’s ultimate burden of persuasion; thus, the plaintiff must show “both that the reason was false, and that discrimination was the real reason.”<sup>60</sup> *Hicks* stood for the proposition that, coupled with the prima facie case, proof of pretext allowed the factfinder to draw the inference that the employer’s conduct was motivated by some impermissible factor, but did not necessarily prove “a pretext for discrimination.”<sup>61</sup>

Subsequently, lower federal courts read the *Hicks* decision as requiring a “pretext-plus” rule, where the plaintiff must produce evidence to make the prima facie case *plus* provide additional, independent evidence of discrimination.<sup>62</sup> As

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54. *Burdine*, 450 U.S. at 254 (reversing the Fifth Circuit decision for applying a burden of persuasion—rather than a burden of *production*—in their *McDonnell Douglas* analysis).

55. *Id.* at 255–56.

56. *Id.* at 256 (“She may succeed in this either directly or by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence.” (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804–05 (1973))).

57. See, e.g., *Williams v. Valentec Kisco, Inc.*, 964 F.2d 723, 728 (8th Cir. 1992) (“Nonetheless, *Burdine* clearly does not support a pretext-plus approach. We reject Valentec Kisco’s contention that Williams had to both discredit its stated reason for firing him and prove that age was a determining factor in Valentec Kisco’s decision.”).

58. *Id.* at 728–29.

59. 509 U.S. 502, 509 (1993).

60. *Id.* at 515.

61. *Id.* at 515–16 (emphasis added).

62. See, e.g., *Reeves v. Sanderson Plumbing Prods., Inc.*, 197 F.3d 688, 692 (1999).

a result, many disparate treatment plaintiffs could not survive summary judgment under the *Hicks*' pretext-plus rule.<sup>63</sup>

The Supreme Court, however, flatly rejected the pretext-plus standard in *Reeves v. Sanderson Plumbing Products*.<sup>64</sup> In applying the Title VII burden-shifting paradigm to an Age Discrimination Employment Act (ADEA) claim, Justice O'Connor relied on the analysis in *Hicks* to reiterate that circumstantial evidence arising from the prima facie case and paired with the factfinder's disbelief of the employer's proffered reason permits a finding of impermissible discrimination.<sup>65</sup> In effect, *Reeves* emphasized the probative value of circumstantial evidence at the pre-trial stage and highlighted possible inferences that could be drawn from it.<sup>66</sup> In other words, when questions of intent rely almost exclusively on circumstantial evidence, reasonable minds could differ as to the weight of the evidence. These cases, therefore, warrant a trial, where the merits of the case can be litigated.

## 2. *Less Favorable Treatment: The Adverse Employment Action*

Courts have imported the requirement of an adverse employment action into the "terms, conditions, or privileges of employment" language of Section 703(a)(1).<sup>67</sup> Early on, in *Hishon v. King and Spalding*, the Supreme Court recognized the "terms, conditions, or privileges of employment" clause as an expansive concept, encompassing any benefits that result from an employment relationship.<sup>68</sup> The Court elaborated that those benefits, which comprise the "incidents of employment," could not be "afforded in any manner contrary to Title VII."<sup>69</sup> Just two years later, in *Meritor Savings Bank, FSB v. Vinson*, the Court rejected the notion that Title VII was limited to "economic" or "tangible" discrimination.<sup>70</sup> Rather, the Court opined that "[t]he 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.'"<sup>71</sup>

But, by the late 1980s, lower federal courts began referring to actions that alter the "terms, conditions, or privileges of employment" as "adverse employment

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63. See Natasha T. Martin, *Pretext in Peril*, 75 MO. L. REV. 313, 331 (2010).

64. *Reeves*, 530 U.S. at 146 ("In so reasoning, the Court of Appeals misconceived the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence.").

65. *Id.* at 146-47.

66. See Martin, *supra* note 63, at 331-33.

67. See Ernest F. Lidge III, *The Meaning of Discrimination: Why Courts Have Erred in Requiring Employment Discrimination Plaintiffs to Prove that the Employer's Action Was Materially Adverse or Ultimate*, 47 U. KAN. L. REV. 333, 347 (1999).

68. *Hishon v. King & Spalding*, 467 U.S. 69, 75 (1984) ("A benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free under the employment contract simply not to provide the benefit at all.").

69. *Id.*

70. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986).

71. *Id.*

actions,” and this term of art evolved into a judicially constructed substantive requirement despite its absence from the statutory language.<sup>72</sup> Today, the plaintiff alleging disparate treatment must show not only that her employer altered the “terms, conditions, or privileges of [her] employment” based on some protected characteristic, but also that such a change resulted in a sufficiently adverse consequence.<sup>73</sup>

Although every jurisdiction requires an adverse employment action to seek a remedy under Section 703(a)(1), the circuits are split as to what degree of adversity is sufficient to make an employment action justiciable.<sup>74</sup> The D.C. Circuit, for example, requires a “materially adverse” standard,<sup>75</sup> while the Fifth Circuit requires that the employment action be “ultimate” in nature.<sup>76</sup> In seeking to determine which employment actions are actionable, the lower federal courts have aggressively narrowed the scope of the “terms, conditions, or privileges of employment” provision.<sup>77</sup> As a result, an inconsistent and confusing disparate-treatment jurisprudence emerged.<sup>78</sup>

Today, the lower federal courts continue to parse the jurisdiction-specific standards for adverse employment actions, thereby imposing increasingly higher burdens on disparate-treatment plaintiffs.<sup>79</sup> Regardless of whether the employment action need be “ultimate” in nature or “materially adverse,” these

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72. See Lidge, *supra* note 67, at 346–47; see, e.g., *Green v. Adm’rs of the Tulane Educ. Fund*, 284 F.3d 642, 657 (5th Cir. 2002) (requiring an ultimate employment action); *Brown v. Brody*, 199 F.3d 446, 457 (D.C. Cir. 1999) (requiring a “materially adverse” employment action).

73. See, e.g., *Abuan v. Level 3 Commc’ns, Inc.* 353 F.3d 1158, 1174 (10th Cir. 2003) (“[C]onduct constitutes adverse employment action under [Title VII] when it results in 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.”).

74. The Supreme Court has yet to define a standard for the purported adverse action requirement under Section 703(a)(1).

75. See, e.g., *Brown v. Brody*, 199 F.3d 446, 457 (D.C. Cir. 1999).

76. See, e.g., *Green v. Adm’rs of the Tulane Educ. Fund*, 284 F.3d 642, 657 (5th Cir. 2002) (“Adverse employment actions include only ultimate employment decisions such as hiring, granting leave, discharging, promoting, or compensating.”). For an in-depth discussion on the origins of the “ultimate employment decision” standard, see Lidge, *supra* note 67, at 358–66.

77. See *White*, *supra* note 34, at 1151–54. Some circuits have considered that some actions, although not ultimate in nature, may still have a substantial impact on an employee if such actions are made in a discriminatory manner. See, e.g., *Beyer v. Cty. of Nassau*, 524 F.3d 160, 165 (2d Cir. 2008) (requiring a dignity approach in which a discriminatory denial of transfer to materially more advantageous job is actionable); *Grayson v. City of Chi.*, 317 F.3d 745, 749 (7th Cir. 2003) (“Because [the plaintiff’s] position at the time of the hiring decisions was identical in all but title to the position he was denied, rejecting his application for promotion was not a materially adverse employment action.”). However, the parsing of what constitutes a “materially adverse action” has added to the analytical confusion. See *Levinson*, *supra* note 26, at 636.

78. 1 CHARLES A. SULLIVAN & LAUREN M. WALTER, *EMPLOYMENT DISCRIMINATION LAW AND PRACTICE* 59 (4th ed., 2009).

79. See *Levinson*, *supra* note 26, at 636; *Gertner*, *supra* note 32, at 110 (“It is hard to imagine a higher bar or one less consistent with the legal standards developed after the passage of the Civil Rights Act, let alone with the way discrimination manifests itself in the twenty-first century.”).

burdens have, in operation, created a safe harbor for invidious discrimination.<sup>80</sup> As the case study below will show, this trend has whittled the protections of Title VII to an untenable point. Accordingly, this discussion now turns to explore possible factors bearing on the judiciary that have led to this phenomenon.

### C. *Factors on the Judiciary*

Legal scholars in federal anti-discrimination law agree that any discrimination based on a protected trait contradicts the word and spirit of Title VII.<sup>81</sup> Yet, courts continue to chip away at the protections provided by the statute through an aggressively narrow reading of the language.<sup>82</sup> Despite legislative intervention to counter the narrowing, the practice of increasing the plaintiff's burden continues.<sup>83</sup> Legal scholars have noted the problem and offered solutions.<sup>84</sup> Similarly, members of the federal bench have acknowledged the alarming trend and offered insight into the cause of this phenomenon.<sup>85</sup>

Federal courts have, in some measure, interpreted Title VII “virtually, although not entirely, out of existence.”<sup>86</sup> Indeed, studies show that employment

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80. *See id.* at 631–32 (“Indeed, many courts are sending a message to employers and their supervisors that they can discriminate with impunity, provided that their conduct does not reach a particularly egregious or materially adverse level.”).

81. *See Chambers, supra* note 34, at 1191 (arguing that the Supreme Court’s interpretations of Title VII in several cases contradict Title VII’s expansive view); Levinson, *supra* note 26, at 632–37 (arguing that requirements of material adversity imposed by lower federal courts do not have any support in either Title VII’s language or in the Supreme Court’s decisions regarding Title VII); Lidge, *supra* note 67, at 373–75 (arguing that requirements for “adverse, materially adverse, or ultimate” employment actions contradict the “breathhtakingly simple” language of Title VII); White, *supra* note 34, at 1191 (arguing that, at most, courts should consider the adversity of an employment action to infer an unlawful motive behind the action, but should ultimately find adversity “irrelevant” when they determine that there was an unlawful motive).

82. *See McCormick, supra* note 34, at 25–26 (noting that Justice Ruth Bader Ginsburg has repeatedly criticized the Supreme Court for “parsimonious[ly]” interpreting Title VII and “warpl[ing]” its meaning); Chambers, *supra* note 34, at 1165–66 (arguing that the Supreme Court’s decisions have enabled employers to structure their activities so as to technically avoid violating Title VII despite discriminating against their employees).

83. *See McCormick, supra* note 34, at 25–26 (describing the absurd cycle of Congress having to amend its anti-discrimination statutes in response to the federal courts’ inevitable attempts to narrow the statutes’ impact); Chambers, *supra* note 27, at 781–82; Widiss, *supra* note 27, at 536–41 (attributing the lack of analytical clarity regarding Title VII to the tension resulting from the federal courts’ insistence on following precedents of which Congress has shown disapproval through various amendments of Title VII).

84. *See, e.g., McCormick, supra* note 34, at 31 (calling for more judicial education); Chambers, *supra* note 27, at 781–82 (recommending careful legislative intervention that is cognizant of how the federal courts will react).

85. *See, e.g., Gertner, supra* note 32, at 116–23.

86. Nancy Gertner, *The Judicial Repeal of the Johnson/Kennedy Administration’s “Signature” Achievement 1* (Mar. 9, 2014) (unpublished manuscript), <https://ssrn.com/abstract=2406671>.

discrimination plaintiffs fare significantly worse in federal court than plaintiffs in any other substantive area of federal law.<sup>87</sup> Scholars cite this phenomenon as evidence of judicial hostility toward employment discrimination plaintiffs.<sup>88</sup> Some members of the federal bench, however, attribute the plight of the employment discrimination plaintiff to unintended consequences of pre-trial procedural rulings.<sup>89</sup> Others point to an ideology of conservatism against the anti-discrimination plaintiff as the reason for this phenomenon.<sup>90</sup>

### 1. *Judicial Hostility Toward the Anti-Discrimination Plaintiff*

Many scholars have interpreted the increasing burden imposed on anti-discrimination plaintiffs by federal courts as a judicial hostility toward anti-discrimination claims.<sup>91</sup> Based on his four-decade career in employment discrimination litigation, Judge Mark W. Bennett acknowledges that “the federal judiciary has become increasingly unfriendly towards employment discrimination cases going to trial.”<sup>92</sup> This unfriendliness or hostility is most evident at the appellate level where summary judgment dismissals are overwhelmingly affirmed and verdicts for the anti-discrimination plaintiff are reversed more frequently than any other substantive area of federal law.<sup>93</sup>

### 2. *The Consequences of “Only Procedural” Rulings*

Early rulings on procedural threshold issues—such as summary judgment—can be outcome determinative, requiring a court to make substantive predictions about the merits of the case.<sup>94</sup> Through these procedural rulings, “more and more courts are weighing evidence, evaluating the credibility of claims and witnesses, and substituting their normative judgments for a jury’s

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87. Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL’Y REV. 103, 127 (2009).

88. See, e.g., Kerri Lynn Stone, *Shortcuts in Employment Discrimination*, 56 ST. LOUIS L.J. 111, 112 (2011); Gertner, *supra* note 32, at 109 (“Federal courts, I believed, were hostile to discrimination cases. Although the judges may have thought they were entirely unbiased, the outcomes of those cases told a different story.”).

89. See, e.g., Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1941 (1998); see also Gertner, *supra* note 32, at 109 (“One judge after another insisted that there was no hostility. All they were doing when they dismissed employment discrimination cases was following the law—nothing more, nothing less.”).

90. See Gertner, *supra* note 87, at 2–3.

91. See Stone, *supra* note 90, at 112.

92. Mark W. Bennett, *From the “No Spittin’, No Cussin’ and No Summary Judgment” Days of Employment Discrimination Litigation to the “Defendant’s Summary Judgment Affirmed Without Comment” Days: One Judge’s Four Decade Perspective*, 57 N.Y.L. SCH. L. REV. 685, 697 (2013).

93. See Clermont, *supra* note 88, at 108–14.

94. Elizabeth M. Schneider & Nancy Gertner, “Only Procedural”: *Thoughts on the Substantive Law Dimensions of Preliminary Procedural Decisions in Employment Discrimination Cases*, 57 N.Y. L. SCH. L. REV. 767, 768 (2012).

determination.”<sup>95</sup> As a result, these “only procedural” determinations have effectively revised the substantive law “through the back door.”<sup>96</sup>

Typically turning on nuances of intent, disparate treatment cases are factually complex. Because few employers openly admit to acts of intentional discrimination, plaintiffs must prove intent with circumstantial evidence, which rarely stands uncontested.<sup>97</sup> Nonetheless, the majority of employment discrimination cases end in summary judgment because trial courts improperly evaluate the merits of the case by weighing the credibility of the evidence. As a result, employment discrimination defendants enjoy greater success with summary judgment in federal court than defendants in any other substantive area of federal law.<sup>98</sup>

Judge Nancy Gertner describes this phenomenon as “Losers’ Rules,” suggesting that “asymmetrical decisionmaking” may be responsible for this trend.<sup>99</sup> When a judge grants summary judgment, typically for the defendant, an opinion is written.<sup>100</sup> When summary judgment is denied, on the other hand, the case simply proceeds to trial without a written opinion discussing why summary judgment was denied.<sup>101</sup> She explains that over time, “[i]f case after case recites the facts that do not amount to discrimination, it is no surprise that the decisionmakers have a hard time envisioning the facts that may well comprise discrimination.”<sup>102</sup>

### 3. *Conservatism: The Anti-Discrimination Plaintiff Bias*

Although asymmetrical opinion writing provides one plausible reason for the anti-discrimination plaintiff’s plight in federal court, Judge Gertner notes that standing precedent “hardly compels” courts to continue this practice.<sup>103</sup> She suggests that the phenomenon may also be ideologically driven by conservatism.<sup>104</sup> Conservatism in the judiciary refers to a practice where cases are decided based on either a political philosophy or a judicial philosophy.<sup>105</sup>

When a “conservative judge” is guided by a political philosophy, key policy issues before the court are decided in a manner consistent with the conservative

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95. *Id.*

96. *Id.*

97. *See* Gertner, *supra* note 32, at 113.

98. *See* Clermont & Schwab, *supra* note 89, at 109–13, 131–32.

99. Gertner, *supra* note 32, at 110.

100. *Id.* at 113–15.

101. *Id.*

102. *Id.* at 115.

103. *Id.* at 113.

104. *Id.* at 112.

105. Michael Kinsley, *What Is a Conservative Judge?*, THE ATLANTIC (Apr. 12, 2010), <https://www.theatlantic.com/politics/archive/2010/04/what-is-a-conservative-judge/38786/>.

political agenda.<sup>106</sup> Although both Democratic and Republican presidents have appointed judges likely to make decisions that are consistent with their political agendas,<sup>107</sup> conservative appointments have been criticized as hostile to civil rights. For example, as President Reagan filled an unprecedented number of vacancies on the federal bench with conservative appointments,<sup>108</sup> critics accused the Reagan appointees of “chipping away at protections against race and sex discrimination . . . and turning the federal clock back to earlier policies.”<sup>109</sup> Decisions of politically conservative judges are informed by the belief that employment discrimination is over because society has evolved into a post-

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106. *Id.* (asserting that such individuals are those “who will vote to overturn *Roe v. Wade*”).

107. See generally Graeme Browning, *Reagan Molds the Federal Court in His Own Image*, 71 ABA J. 60 (1985) (comparing President Franklin Delano Roosevelt’s appointments of Justices to the Supreme Court to the judicial appointments of President Reagan).

108. *Id.* at 61 (“The Constitution gives the president the power to make judicial appointments, conservative legal scholars say, so it is not only reasonable but expected that his choices will reflect his policies.”).

109. *Id.* at 60–61 (noting that despite the Reagan Administration’s claims that politically conservative judges were merely applying the law, the nomination and confirmation processes served to ensure the appointment of ideologically homogenous judges who were skeptical of governmental responses to past racial discrimination and fervent supporters of free-market economic theories). In January of 2017, President Donald Trump fulfilled his campaign promise to fill the Supreme Court vacancy left by the passing of Justice Antonin Scalia with Neil Gorsuch, a staunch conservative justice. In the wake of Justice Scalia’s death, Senate Republicans refused to hold hearings for any justice nominated under President Obama to prevent what “would have likely given the Court’s liberal wing its first five-justice majority since the Warren Court of the 1960s.” Matt Ford, *Trump Nominates Neil Gorsuch for the U.S. Supreme Court*, THE ATLANTIC (Jan. 31, 2017, 8:50 PM), <https://www.theatlantic.com/politics/archive/2017/01/gorsuch-trump-supreme-court/515232/>. Following the successful appointment of Neil Gorsuch to the Supreme Court, Republican leaders have aggressively sought to manipulate the judicial branch by filling vast numbers of vacancies on the federal bench with conservative judges. See Carl Hulse, *Trump and McConnell See a Way to Make Conservatives Happy*, N.Y. TIMES (Oct. 17, 2017), <https://www.nytimes.com/2017/10/17/us/politics/trump-mcconnell-judicial-nominees.html> (“Stymied legislatively, President Trump and Senator Mitch McConnell are turning their attention to one way they can skirt Democratic roadblocks and mollify unhappy Republicans—by filling scores of federal court vacancies.”); see also Charlie Savage, *Trump Is Rapidly Reshaping the Judiciary. Here’s How.*, N.Y. TIMES (Nov. 11, 2017), <https://www.nytimes.com/2017/11/11/us/politics/trump-judiciary-appeals-courts-conservatives.html> (“Republicans are systematically filling appellate seats they held open during President Barack Obama’s final two years in office with a particularly conservative group of judges with life tenure.”).

racial,<sup>110</sup> post-gender reality<sup>111</sup> and that the market is bias free,<sup>112</sup> despite substantial evidence to the contrary.<sup>113</sup>

“Judicial conservatism,” on the other hand, refers to “a strong belief in the principle of *stare decisis*, or respect for precedent.”<sup>114</sup> The inherent issue with this judicial philosophy arises when cases within a substantive area have inconsistent holdings. For example, “[d]oes that mean that a conservative judge must rule in favor of upholding all of the liberal rulings of the 1960s and 1970s? Even though many of them overturned earlier precedent?”<sup>115</sup>

Determining which conservatism guides the federal judiciary is of little consequence to the anti-discrimination plaintiff because evidence of bias against him remains. Indeed, courts often trivialize—even outright ignore—evidence of explicit bias.<sup>116</sup>

## II. *ORTIZ-DIAZ V. HUD*: ESCAPING A STIFLING MATERIALITY STANDARD

As discussed above, the analytical confusion in lower federal courts unjustly prevents an increasing number of disparate treatment cases from reaching trial by imposing heavier burdens on plaintiffs. A recent case from the D.C. Circuit,

110. Cf. Tanzina Vega, *Working While Brown: What Discrimination Looks Like Now*, CNN MONEY (Nov. 25, 2015, 12:04 AM), <http://money.cnn.com/2015/11/25/news/economy/racial-discrimination-work/index.html>; Dedrick Muhammad, *Racial Equality In and Out of the Workplace*, HUFFINGTON POST (Aug. 29, 2013, 10:38 AM), [https://www.huffingtonpost.com/dedrick-muhammad/racial-equality-in-and-ou\\_b\\_3836508.html](https://www.huffingtonpost.com/dedrick-muhammad/racial-equality-in-and-ou_b_3836508.html) (offering an example of disparate treatment faced by Ecuadorian workers who were barred from eating lunch in the workroom).

111. Cf. *Leach v. Nat'l R.R. Passenger Corp.*, 128 F. Supp. 3d 146, 156–57 (D.D.C. 2015) (claiming sex discrimination under Title VII).

112. Schneider & Gertner, *supra* note 96, at 776.

113. See generally Samuel R. Bagenstos, *Implicit Bias, “Science,” and Antidiscrimination Law*, 1 HARV. L. & POL’Y REV. 477 (2007) (arguing that antidiscrimination laws should account for the unconscious biases that lead to gender-based and racial disparities); Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 1006–07 (2004) (finding that employers uniformly discriminated against applicants with “African American sounding” names during the hiring process despite the applicants being equally qualified as applicants with “White” names); see also Julie Creswell & Tiffany Hsu, *Women’s Whisper Network Raises Its Voice*, N.Y. TIMES (Nov. 4, 2017), <https://www.nytimes.com/2017/11/04/business/sexual-harassment-whisper-network.html> (reporting on how social media has enabled women to come together and discuss the instances of gender-based discrimination they have experienced in their workplaces); Rebecca Hiscott, *White People Think One Black Person’s Success Proves Racism Is Over*, HUFFINGTON POST (June 10, 2014, 9:54 AM), [https://www.huffingtonpost.com/2014/06/10/racism-success-study\\_n\\_5474419.html](https://www.huffingtonpost.com/2014/06/10/racism-success-study_n_5474419.html) (“[R]ecent Supreme Court decisions made under the assumption that racial discrimination is a thing of the past suggest this view is already having potentially disastrous consequences.”).

114. Kinsley, *supra* note 109.

115. *Id.*

116. See, e.g., discussion *infra* Part II.

*Ortiz-Diaz v. U.S. Department of Housing and Urban Development (HUD)*,<sup>117</sup> illustrates the plight of the disparate treatment plaintiff and the eagerness of the courts to narrow the scope of Title VII.

The facts of the case involve the denial of a transfer request allegedly based on the plaintiff's race and national origin. Although the D.C. Circuit initially affirmed summary judgment for the defendant, the sharply divided panel vehemently disagreed on whether the Circuit's materiality standard barred the court from recognizing the denial of the plaintiff's transfer request as "materially adverse."<sup>118</sup> A year later—while the plaintiff sought review *en banc*—the original three-judge panel "decided *sua sponte* to reconsider the case and vacated its decision."<sup>119</sup> It is appropriate, then, to look at *Ortiz-Diaz* as a stark example of the injustice resulting from the analytical confusion in disparate treatment jurisprudence.

#### A. *Facts of the Case*

Samuel Ortiz-Diaz, a Hispanic man born in Puerto Rico, began his employment with the U.S. Department of Housing and Urban Development, Office of Inspector General (HUD OIG), as a criminal investigator in San Juan, Puerto Rico in 1998.<sup>120</sup> In 2000, Ortiz-Diaz was reassigned to Hartford, Connecticut, to be closer to his wife with whom he lived in Albany, New York.<sup>121</sup> In 2009, Ortiz-Diaz accepted a promotion to senior special agent in HUD OIG's headquarters in Washington, D.C.. His wife, however, remained in Albany, where the couple maintained the home they owned.<sup>122</sup>

At headquarters, Assistant Inspector General John McCarty, although not Ortiz-Diaz's immediate supervisor, was the senior manager charged with making personnel decisions that directly affected him.<sup>123</sup> For example, McCarty was the ultimate decision-maker regarding employee promotions and the approval or denial of transfer requests within HUD OIG. In fact, McCarty had previously exercised his transfer authority over Ortiz-Diaz in 2005.<sup>124</sup> Despite their protests, McCarty involuntarily transferred Ortiz-Diaz and an African American investigator to assist with Hurricane Katrina relief efforts in Mississippi, which was regarded as "a hardship assignment."<sup>125</sup> Notably, non-

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117. *Ortiz-Diaz v. U.S. Dep't of Hous. & Urban Dev.*, 831 F.3d 488 (D.C. Cir. 2016), *aff'g* 75 F. Supp. 3d 561 (D.D.C. 2014), *vacated*, 867 F.3d 70 (D.C. Cir. 2017). Throughout this Note, the 2016 decision by the D.C. Circuit will be labeled as *Ortiz-Diaz I* and the 2017 decision as *Ortiz-Diaz II*.

118. *Ortiz-Diaz I*, 831 F.3d at 494–500 (Kavanaugh, J., concurring & Rogers, J., dissenting).

119. *Ortiz-Diaz II*, 867 F.3d at 71.

120. *Ortiz-Diaz I*, 831 F.3d at 490.

121. *Id.*

122. *Ortiz-Diaz II*, 867 F.3d at 72.

123. *Id.*

124. *Id.*

125. Brief for Appellant at 7 n.4, *Ortiz-Diaz I*, 831 F.3d 488 (D.C. Cir. 2016) (No. 15-5008).

minority investigators who similarly protested were not forced to take the hardship assignment to Mississippi.<sup>126</sup>

Working at headquarters placed Ortiz-Diaz in close proximity to McCarty, where he noticed that McCarty exhibited discriminatory attitudes toward minority employees.<sup>127</sup> Specifically, McCarty made racially disparaging comments about Hispanics in the workplace such as, “Where is the hired help?” and called any individual who appeared to be Hispanic by the same name or by the names of other Hispanic employees, claiming that Hispanics “all look alike.”<sup>128</sup> McCarty was also the subject of an inordinate number of discrimination complaints.<sup>129</sup>

Based on McCarty’s discriminatory conduct and a suspicion that he harbored racial animus, Ortiz-Diaz grew concerned “that his career would suffer if he remained in close proximity to McCarty at headquarters.”<sup>130</sup> He began seeking transfer opportunities to work in regions he believed better positioned him for advancement within HUD OIG.<sup>131</sup> As a privilege of employment, HUD OIG offered a voluntary transfer program, whereby employees could request a transfer to duty stations of their choice for reasons other than specific staffing needs at no cost to the government.<sup>132</sup> Although request approvals were not guaranteed, the program had a history of generously enabling non-minority employees to transfer between offices, with HUD OIG even creating new positions to facilitate those transfers in some instances.<sup>133</sup>

After communicating with the Region 2 (New York) Special Agent in Charge Rene Febles, Ortiz-Diaz learned of important, high-profile work needing the attention of a capable agent in Albany.<sup>134</sup> Febles invited Ortiz-Diaz to consider filling that position, telling him that although there were no regularly stationed investigators in the Albany office, “it would be acceptable for Ortiz-Diaz to work either from his Albany home or from the Department’s Albany office.”<sup>135</sup> Shortly thereafter, Ortiz-Diaz also learned of a vacancy announcement in Hartford, Connecticut.<sup>136</sup> Hoping to enhance his promotion opportunities, Ortiz-Diaz approached his immediate supervisors to request transfers to either Albany

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126. Ortiz-Diaz further alleged that while he was working in Mississippi, “he learned several investigators volunteered for the transfer there and his involuntary transfer was unnecessary.” *Id.*

127. *Id.* at 6–7.

128. *Ortiz-Diaz II*, 867 F.3d at 72.

129. Brief for Appellant, *supra* note 128, at 7.

130. *Ortiz-Diaz II*, 867 F.3d at 72.

131. *Id.* at 72–73.

132. In fact, the HUD OIG policy mandated that the no cost transfer program be administered without regard to race, sex, color, national origin, age, or disability. *Ortiz-Diaz I*, 831 F.3d 488, 494 (D.C. Cir. 2016) (Rogers, J., dissenting).

133. Litigation later revealed that “McCarty was involved in each of those decisions.” *Ortiz-Diaz II*, 867 F.3d at 73.

134. Brief for Appellant, *supra* note 128, at 8.

135. *Ortiz-Diaz II*, 867 F.3d at 73.

136. Brief for Appellant, *supra* note 128, at 8.

or Hartford, but they advised him to make the requests with McCarty directly. McCarty, in turn, summarily denied both requests.<sup>137</sup>

Notably, shortly before denying Ortiz-Diaz's transfer request, McCarty approved the transfer request of a white female special agent from Hartford, Connecticut, to the Boston, Massachusetts, office because she planned to marry a Boston police officer.<sup>138</sup> Rather than filling the vacant special agent position in Hartford with Ortiz-Diaz, McCarty filled the vacancy with another white female special agent notwithstanding the fact that her supervisor—an African American employee who had previously complained of McCarty's racial animus—objected to the transfer.<sup>139</sup>

Believing that his transfer requests were denied because of his race and national origin, Ortiz-Diaz filed a disparate treatment claim in federal district court.<sup>140</sup> The government, with discovery disputes pending, moved for summary judgment on the grounds that Ortiz-Diaz suffered no adverse employment action, and the district court agreed.<sup>141</sup> Because Ortiz-Diaz never alleged a loss in “pay, supervisory responsibilities, or job opportunities as result of the [transfer] denials,” the court determined that the challenged action was based on the denial of “a purely lateral transfer,” which required a showing of a materially adverse consequence.<sup>142</sup> Concluding that Ortiz-Diaz failed to offer anything “beyond his own speculation” that transfer would have bettered his career opportunities, the court found that Ortiz-Diaz could not survive the summary judgment challenge.<sup>143</sup>

Despite Ortiz-Diaz's unresolved “motion to compel ‘full and complete responses’ to his discovery requests relating to potential comparators,” the court granted summary judgment in favor of the government.<sup>144</sup> Judge Royce Lamberth saw “no further need for discovery” because the information sought would not defeat summary judgment, positing that

even if Mr. Ortiz-Diaz uncovered . . . evidence that all white employees were granted voluntary transfers while all non-white white employees were refused them, that discriminatory statements were rampant, that dozens of complaints had been lodged—it would not alter the conclusion that the denial of a lateral transfer was not an adverse employment decision.<sup>145</sup>

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137. *Id.* at 9.

138. *Id.*

139. *Id.*

140. *Ortiz-Diaz v. U.S. Dep't of Hous. & Urban Dev.*, 75 F. Supp. 3d 561, 563 (D.D.C. 2014).

141. The government moved for summary judgment shortly after Ortiz-Diaz filed a motion to compel discovery, but the district court postponed settling the discovery dispute until resolution of the dispositive motions. *Id.* at 567–68.

142. *Id.* at 565.

143. *Id.* at 567.

144. *Ortiz-Diaz I*, 831 F.3d 488, 495 (D.C. Cir. 2016) (Rogers, J., dissenting).

145. *Ortiz-Diaz*, 75 F. Supp. 3d at 568.

B. Ortiz-Diaz I: *Immunizing Discrimination*

On appeal, D.C. Circuit Judge Karen LeCraft Henderson affirmed the district court's grant of summary judgment.<sup>146</sup> Citing the "materially adverse" standard as the legal standard for adverse employment actions in the D.C. Circuit, Judge Henderson concluded that, despite undisputed evidence of racial animus, Ortiz-Diaz failed to show that he suffered sufficient harm to warrant the resolution of his claim on the merits at trial.<sup>147</sup>

Judge Henderson characterized Ortiz-Diaz's claim of "material adversity" as a mere "dissatisfaction with the lack of reassignment," adding that he offered only a "bare assertion" that his career opportunities were "tangibly injured" based on a "belief that his promotion outlook would look rosier" under a different supervisor.<sup>148</sup> Ortiz-Diaz's "dissatisfaction," she reasoned, constituted only a subjective injury for which no legal remedy existed.<sup>149</sup> She dismissed Ortiz-Diaz's purported adversity as simply the loss of a "preference" not to work under a discriminatory supervisor and quipped, "If such a declaration were sufficient to raise a jury issue, our materiality requirement would be an empty vessel indeed."<sup>150</sup>

Curiously enough, however, Judge Henderson also filed a concurring opinion solely to take issue with "a disturbing hypothetical" posed in oral argument by Ortiz-Diaz's counsel.<sup>151</sup> Judge Henderson fervently rejected Counsel's contention that, in accepting the government's argument, the D.C. Circuit "would affirm dismissal of a suit challenging an employer's affixing a 'whites-only' sign to a water cooler because 'not a penny is lost by any worker . . . no one lost supervisory duties . . . [and it is] not in any way related to the actual workplace.'"<sup>152</sup> She dismissed the argument entirely as bearing "no relevance" to the D.C. Circuit precedent for the "materially adverse" standard.<sup>153</sup>

In a separate concurrence, Circuit Judge Brett Kavanaugh agreed with the affirmance of summary judgment for the government because, in his view, the majority opinion "faithfully" followed D.C. precedent that lateral transfers "are ordinarily not" adverse employment actions.<sup>154</sup> Still, he filed a concurring

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146. *Ortiz-Diaz I*, 831 F.3d at 490.

147. *Id.* at 492.

148. *Id.* at 491–92.

149. Judge Henderson cites *Forkkio v. Powell*, 306 F.3d 1127, 1130–31 (D.C. Cir. 2002), as the controlling authority, which stands for the proposition that "purely subjective injuries" such as "dissatisfaction with a reassignment" do not constitute adverse actions, while "purely subjective harms" such as "reassignment with significantly different responsibilities" do. *Ortiz-Diaz I*, 831 F.3d at 491–92.

150. *Ortiz-Diaz I*, 831 F.3d at 492.

151. *Id.* at 493–94 (Henderson, J., concurring).

152. *Id.* (Henderson, J., concurring) (alteration in original).

153. *Id.* (Henderson, J., concurring).

154. *Id.* at 494 (Kavanaugh, J., concurring).

opinion because the injustice of dismissing Ortiz-Diaz's claim did not sit well with him. He explained:

I write this concurrence simply to note my skepticism about those cases. In my view, a forced lateral transfer—or the denial of a requested lateral transfer—on the basis of race is actionable under Title VII. Based on our precedents, however, I join the majority opinion.<sup>155</sup>

Circuit Judge Judith Rogers, on the other hand, held nothing back in her scathing dissent, proclaiming: “Once again the court returns to the issue of the proper role of the district court at summary judgment but this time stumbles badly.”<sup>156</sup> After briefly noting that HUD OIG's no cost, voluntary transfer program was a “privilege of Ortiz-Diaz's employment,” she began her reproach of the majority's affirmance by listing the evidence in the record.<sup>157</sup>

Citing the Circuit's decision in *Stewart v. Ashcroft*,<sup>158</sup> Judge Rogers emphasized that material adversity could be satisfied by providing evidence that the challenged conduct curtailed the plaintiff's future career opportunities.<sup>159</sup> She contended that Ortiz-Diaz cleared the material adversity hurdle because sufficient evidence in the record existed to meet this standard.<sup>160</sup> Starting with Ortiz-Diaz's sworn declaration that identified and explained the career opportunities he stood to gain by the approval of his transfer requests, she then turned to the evidence of McCarty's more favorable treatment of white-employee comparators. After highlighting the corroborating accounts of McCarty's racial animus in the workplace, she closed her review of the record by pointing to the list of discrimination complaints launched against McCarty.<sup>161</sup>

In Judge Rogers' view, the majority plainly misapplied the summary judgment standard when nothing in the adverse employment action jurisprudence supported otherwise.<sup>162</sup> She concluded, “The court, although acknowledging that a ‘lateral transfer with increased promotion prospects *might* qualify’ as an adverse action, avoids this conclusion only by improperly discounting Ortiz-Diaz's sworn declarations.”<sup>163</sup> In the wake of *Ortiz-Diaz I*, an employer in the D.C. Circuit could openly base its decision to make or deny

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155. *Id.* (Kavanaugh, J., concurring).

156. *Id.* (Rogers, J., dissenting).

157. *Id.* (Rogers, J., dissenting).

158. 352 F.3d 422 (D.C. Cir. 2003).

159. *Ortiz-Diaz I*, 831 F.3d at 495–96 (Rogers, J., dissenting) (citing *Stewart*, 352 F.3d at 426–27).

160. *Id.* at 496–97 (Rogers, J., dissenting).

161. *Id.* (Rogers, J., dissenting).

162. *Id.* at 495–96 (Rogers, J., dissenting). She added that both the First and Seventh Circuits also recognized actions that impaired employment opportunities as adverse employment actions. *Id.* at 496.

163. *Id.* at 497 (Rogers, J., dissenting).

lateral transfers on the employee's race or national origin so long as the resulting injury remained sufficiently "subjective" to that employee.

### C. Ortiz-Diaz II: *A Shot Across the Bow*

Following the affirmance of summary judgment, Ortiz-Diaz filed a petition for rehearing *en banc* on September 16, 2016.<sup>164</sup> Eleven months later, "[b]efore that petition was resolved, the original three-judge court decided *sua sponte* to reconsider the case and vacated its decision."<sup>165</sup> Concluding that nothing in the D.C. Circuit's Title VII precedent barred Ortiz-Diaz from proceeding to trial and that he provided sufficient evidence to survive summary judgment, the court reversed and remanded the case to the district court.<sup>166</sup>

Writing the opinion for the court, Judge Rogers began her analysis by invoking the language of Title VII, calling attention to its primary objective to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."<sup>167</sup> She then provided the historical context that led to the passage of Title VII:

Title VII was enacted at a time when racially and ethnically biased supervisors left employees with two options: (1) quit their jobs, imperiling their ability to work and survive economically, or (2) endure the discrimination, and the attendant economic and professional toll it inflicted. Congress created a third option by empowering employees to demand equal treatment . . . .<sup>168</sup>

Thus, Ortiz-Diaz's claim that he was discriminatorily denied transfer away from a racially and ethnically biased supervisor landed squarely "within Title VII's heartland," and nothing in the D.C. Circuit precedent held otherwise.<sup>169</sup>

Noting that although the denial of a lateral transfer ordinarily does not constitute an adverse employment action under circuit precedent, the court made clear that "a showing of 'consequences affecting . . . future employment opportunities' could be sufficient" to meet the materiality standard.<sup>170</sup> Judge Rogers found that the Circuit lacked precedent directly on point because, beyond the lateral transfer context, nothing in the Circuit's precedent bore any resemblance to the "career-stifling transfer denials of which Ortiz-Diaz complained."<sup>171</sup>

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164. Petition for Rehearing En Banc, *Ortiz-Diaz I*, 831 F.3d 488 (No. 15-5008).

165. *Ortiz-Diaz II*, 867 F.3d 70, 71 (D.C. Cir. 2017).

166. *Id.*

167. *Id.* at 74 (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975)).

168. *Id.*

169. *Id.*

170. *Id.* (quoting *Brown v. Brody*, 199 F.3d 446, 457 (D.C. Cir. 1999)).

171. *Id.* at 74–75 ("In other words, under our Title VII precedent, Ortiz-Diaz's Title VII claims involve far more than a mere dislike of McCarty, *see Forkkio v. Powell*, 306 F.3d 1127, 1132 (D.C.

Given the particular facts of the case, Ortiz-Diaz's "burden to show harm arising from diminished career prospects [was] necessarily rooted in probabilities."<sup>172</sup> In other words, the stronger the evidence of McCarty's racial and ethnic bias, the higher the probability that remaining in headquarters with McCarty would have materially harmed his career. Thus, the fundamental question was whether Ortiz-Diaz provided sufficient evidence to allow a reasonable juror to find that "transfer away from McCarty to Febles' supervision would have improved his career prospects."<sup>173</sup>

Judge Rogers held that the district court committed a "fundamental error of law" when it discredited Ortiz-Diaz's sworn declarations as "his own speculation" because the declarations provided "objective, non-conclusory statements of fact."<sup>174</sup> Citing several cases from the D.C. Circuit, Judge Rogers made clear that "the declarations alone provided sufficient competent evidence" to "render summary judgment inappropriate" in Ortiz-Diaz's case.<sup>175</sup>

Furthermore, the court found that Ortiz-Diaz's proffered letter from a former co-worker alleging similar observations of McCarty's racial and ethnic bias, coupled with the government's acknowledgment of other discriminatory complaints lodged against McCarty, corroborated Ortiz-Diaz's contention that McCarty fostered a discriminatory work environment.<sup>176</sup> Thus, evidence showing that McCarty's personnel decisions were rooted in racial and ethnic bias, by extension, strengthened the inference that the denials of transfer away from McCarty resulted in materially adverse consequences for Ortiz-Diaz.<sup>177</sup>

Acknowledging that some evidence in the record cut against Ortiz-Diaz's claim, Judge Rogers reminded the court that its "role at summary judgment is not to find facts in lieu of a jury, particularly not against the non-moving party."<sup>178</sup> Rather, the court is solely tasked with determining "whether sufficient evidence exists for a reasonable jury to find in Ortiz-Diaz's favor, *i.e.*, that McCarty *did* harbor such a bias."<sup>179</sup>

Concurring in the judgment, Judge Henderson agreed that a genuine issue of material fact existed for trial but took issue with the "unwise" approach of the majority.<sup>180</sup> According to Judge Henderson, the critical question centered on whether HUD OIG's no-cost transfer program constituted a legally protected

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Cir. 2002), or a 'subjective preference' to work for Febles in Albany, *Brown v. Brody*, 199 F.3d 446, 457 (D.C. Cir. 1999).").

172. *Id.* at 75.

173. *Id.* at 75-76.

174. *Id.*

175. *Id.* at 76.

176. *Id.*

177. *Id.* at 77.

178. *Id.*

179. *Id.*

180. *Id.* at 77-78 (Henderson, J., concurring in the judgment).

“privilege” of employment.<sup>181</sup> Citing the Supreme Court’s decision in *Hishon v. King and Spalding*, Judge Henderson acknowledged that the “terms, conditions, or privileges of employment” clause of Title VII should be interpreted broadly.<sup>182</sup> “It can apply to everything from a security clearance, to a bonus, to eligibility for election to a law firm’s partnership,” she added.<sup>183</sup> Therefore, “in light of the particular features of HUD’s no-cost transfer program and its potential to aid Ortiz-Diaz’s professional development,” she agreed that the case should proceed to trial.<sup>184</sup>

Nonetheless, Judge Henderson remained deeply unsettled by the majority’s holding, charging that her colleagues “cherry-pick[ed] the factual record” to conclude that the denial of transfer away from McCarty was itself actionable under Title VII.<sup>185</sup> Denouncing the majority’s review of the evidence, she criticized that “they reach[ed] back twelve years” to consider McCarty’s decision to impose the temporary hardship assignment to Mississippi, yet ignored the fact that it was McCarty who subsequently approved Ortiz-Diaz’s promotion to special agent.<sup>186</sup> She also pointed out that “McCarty worked to find Ortiz-Diaz a different comparably attractive job” after awarding a position in New York for which Ortiz-Diaz applied to another Hispanic employee.<sup>187</sup>

In Judge Henderson’s reading of the record, McCarty’s “discriminatory bent [wa]s, at most, slight.”<sup>188</sup> She remained skeptical of the majority’s reliance on Ortiz-Diaz’s sworn declaration, arguing that the law surrounding the sufficiency of a sworn declaration at summary judgment was “hardly as clear as [the majority] suggest[ed].”<sup>189</sup> Finding that “McCarty’s alleged bias was hardly self-evident,” she concluded that she “would wait for a claim with more ‘objectively tangible harm’” before narrowing the precedent on lateral transfers.<sup>190</sup>

Judge Rogers issued a concurring opinion to address the case’s unconventional procedural history. Pleased with the court’s reversal, she acknowledged its significance and projected, “Perhaps our reconsideration will serve as a shot across the bow that courts in this Circuit must adhere to the summary judgment standard and not prematurely reject evidence that a jury could reasonably credit.”<sup>191</sup> Admittedly doubtful that such a result would occur, she added, “[O]ne can only marvel at Ortiz-Diaz’s escape from our otherwise

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181. *Id.* at 78–79 (Henderson, J., concurring in the judgment).

182. *Id.* at 79 (Henderson, J., concurring in the judgment) (citing *Hishon v. King & Spalding*, 467 U.S. 69, 75 (1984)).

183. *Id.* (Henderson, J., concurring in the judgment) (internal citations omitted).

184. *Id.* at 78–79 (Henderson, J., concurring in the judgment).

185. *Id.* at 79 (Henderson, J., concurring in the judgment).

186. *Id.* (Henderson, J., concurring in the judgment).

187. *Id.* (Henderson, J., concurring in the judgment).

188. *Id.* (Henderson, J., concurring in the judgment).

189. *Id.* at 79 n.4 (Henderson, J., concurring in the judgment).

190. *Id.* at 79–80 (Henderson, J., concurring in the judgment).

191. *Id.* at 80 (Rogers, J., concurring).

stifling materiality standard . . . I fear that the next plaintiff, alleging a similar wrong, may not be as fortunate.”<sup>192</sup> She concluded with a call for a definitive solution to the injustice:

Therefore, it remains long past time for the *en banc* court to join its sister circuits to make clear that transfers denied because of race, color, religion, sex, or national origin are barred under Title VII . . . and that any action by an employer to deny an employment benefit on such grounds is an adverse employment action under Title VII.<sup>193</sup>

Judge Kavanaugh issued a concurring opinion to join Judge Roger’s call to action.<sup>194</sup> Referencing the uncertainty surrounding “the line separating transfers actionable under Title VII from those that are not,” he urged the *en banc* court to definitively establish that all discriminatory transfers, or denial of requests for transfer, constitute adverse employment actions under Title VII.<sup>195</sup> In his view, such conduct “plainly constitutes discrimination with respect to ‘compensation, terms, conditions, or privileges of employment’ in violation of Title VII.”<sup>196</sup>

### III. AN ANALYTICAL NIGHTMARE LEADS TO AN UNJUST REALITY

*Ortiz-Diaz I* illustrates, as many legal scholars argue, how today’s disparate treatment jurisprudence diametrically opposes both the letter and spirit of Title VII. The D.C. Circuit initially denied *Ortiz-Diaz* a judicial remedy and effectively left *McCarty* free to maintain “a policy that, notwithstanding a concrete opportunity for professional advancement, no Hispanics need apply for the no-cost transfer program” at HUD OIG.<sup>197</sup> Judge Rogers highlights this anomaly in her admonishment of the majority opinion, deriding, “Yet no court could condone that result.”<sup>198</sup> How, then, do federal courts reconcile this paradox?

To answer this question, we must first examine Title VII’s requirement of an adverse employment action. The statute is completely void of such language.<sup>199</sup> Lower federal courts point to the “terms, conditions, or privileges of employment” clause of Section 703(a)(1) as the authority for the adverse employment action requirement.<sup>200</sup> However, in *Hishon*, the Supreme Court interpreted that language as an expansive concept, encompassing any benefits

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192. *Id.* at 80–81 (Rogers, J., concurring).

193. *Id.* at 81 (Rogers, J., concurring) (internal citation omitted).

194. *Id.* at 81 (Kavanaugh, J., concurring).

195. *Id.* (Kavanaugh, J., concurring).

196. *Id.* (Kavanaugh, J., concurring).

197. *Ortiz-Diaz I*, 831 F.3d 488, 498 (D.C. Cir. 2016) (Rogers, J., dissenting).

198. *Id.* at 498 (Rogers, J., dissenting).

199. 42 U.S.C. § 2000e-2(a)(1) (2012) (“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.”).

200. See discussion *supra* Section I.B.2.

that result from an employment relationship. The Court explicitly instructed, “A benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free under the employment contract simply not to provide the benefit at all.”<sup>201</sup>

It is no coincidence that Judge Rogers’ dissent in *Ortiz-Diaz I* cited *Hishon* when she reminded the court that “[the no-cost transfer] program was a privilege of Ortiz-Diaz’s employment.”<sup>202</sup> Likewise, Judge Henderson found—albeit only upon reconsideration in *Ortiz-Diaz II*—that the no-cost transfer program “could qualify as a ‘privilege’ of [Ortiz-Diaz’s] employment [under *Hishon*], raising a genuine issue of fact for jury resolution.”<sup>203</sup> So, if both Judge Rogers and Judge Henderson agree that the denial of an employment *privilege* amounts to an adverse employment action, then what explains all “[t]he ink that has been spilled over the course of [Ortiz-Diaz’s] appeal”?<sup>204</sup>

The lower courts imported the adverse employment action into the “terms, conditions, or privileges” clause, in large part, out of a desire for judicial economy.<sup>205</sup> Indeed, proponents of the adverse employment action argue that without a sustainability threshold, discrimination claims based on “every workplace slight” would overwhelm the courts.<sup>206</sup> Even accepting that the adverse employment action may be necessary, setting the bar at “materially adverse” results in manifestly unjust consequences.<sup>207</sup> As evidenced by *Ortiz-Diaz I*, the D.C. Circuit “so finely parsed” the adverse employment action requirement “that two judges initially concluded [the materially adverse action precedent] barred [Ortiz-Diaz] from a judicial remedy.”<sup>208</sup>

The panel relied heavily on *Stewart v. Ashcroft*,<sup>209</sup> which clarified *Brown v. Brody*,<sup>210</sup> the D.C. Circuit’s seminal case on lateral transfers, in both *Ortiz-Diaz I* and *Ortiz-Diaz II* to reach opposite conclusions. In *Brown*, the D.C. Circuit

201. *Hishon v. King & Spalding*, 467 U.S. 69, 75 (1984).

202. *Ortiz-Diaz I*, 831 F.3d at 494 (Rogers, J., dissenting).

203. *Ortiz-Diaz II*, 867 F.3d 70, 79 (D.C. Cir. 2017) (Henderson, J., concurring in the judgment).

204. *Ortiz-Diaz II*, 867 F.3d at 80 (Rogers, J., concurring).

205. See *Russell v. Principi*, 257 F.3d 815, 818 (D.C. Cir. 2001) (Rogers, J.) (“[N]ot everything that makes an employee unhappy is an actionable adverse action. . . . We take no issue with the ‘objectively tangible harm’ requirement, which guards against both ‘judicial micromanagement of business practices’ and frivolous suits over insignificant slights.” (internal citations omitted)).

206. See, e.g., *Taylor v. FDIC*, 132 F.3d 753, 765 (D.C. Cir. 1997) (“The federal courts cannot be wheeled into action for every workplace slight, even one that was possibly based on protected conduct.”); *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996) (“Otherwise every trivial personnel action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit.”).

207. See, e.g., *Ortiz-Diaz I*, 831 F.3d 488, 491 (D.C. Cir. 2016) (Henderson, J.) (“Under our Circuit precedent the action complained of must be ‘materially adverse’ to support a discrimination claim.” (citing *Ginger v. District of Columbia*, 527 F.3d 1340, 1343 (D.C. Cir. 2008))).

208. *Ortiz-Diaz II*, 867 F.3d at 80 (Rogers, J., concurring).

209. 352 F.3d 422, 426 (D.C. Cir. 2003).

210. 199 F.3d 446 (D.C. Cir. 1999).

defined lateral transfers as “one in which [the plaintiff] suffers no diminution in pay or benefits,” holding that neither the involuntary imposition nor denial of a lateral transfer amounted to an adverse employment action unless “some other materially adverse consequences affecting the terms, conditions, or privileges of [the plaintiff’s] employment or her future employment opportunities [existed,] such that a trier of fact could conclude that the plaintiff has suffered objectively tangible harm.”<sup>211</sup>

Four years after *Brown*, the D.C. Circuit revisited the issue of lateral transfers in the context of Title VII in *Stewart v. Ashcroft*.<sup>212</sup> In *Stewart*, the plaintiff, who worked as Senior Litigation Counsel for the Department of Justice, filed a disparate treatment action against his employer after “two separate incidents in which white candidates were selected over him” to serve as Chief.<sup>213</sup> The district court determined that Stewart’s non-selections amounted to denials of lateral transfer, rather than non-promotion, because transitioning from Senior Litigator to Chief amounted to no difference in pay or benefits.<sup>214</sup> Accordingly, to make a prima facie under *Brown*, the court required that Stewart show a “tangible employment action evidenced by firing, failing to promote, a considerable change in benefits, or a reassignment with significantly different responsibilities.”<sup>215</sup> Finding Stewart’s desire to become Chief as “mere idiosyncrasies of personal preference,” the district court determined that Stewart suffered no material consequences and granted summary judgement for the government.<sup>216</sup>

On appeal, the circuit court agreed that Stewart’s non-selection amounted to the denial of a lateral transfer and was therefore subject to the holding in *Brown*.<sup>217</sup> Analyzing the facts under the framework of *Brown*, the circuit court emphasized that “[t]he remaining language of *Brown* suggests that there *are* lateral transfers that could be considered adverse employment actions.”<sup>218</sup> In the court’s view, transitioning from Senior Litigation Counsel to Chief meant an advancement within the hierarchy of the organization, notwithstanding the fact that pay and benefits remained the same. Thus, denying Stewart such an opportunity for advancement resulted in “‘materially adverse consequences [for] the terms, conditions, or privileges’ of [his] employment.”<sup>219</sup>

Like the plaintiff in *Stewart*, the denial of Ortiz-Diaz’s transfer requests resulted in the denial of opportunities for advancement. Indeed, Ortiz-Diaz provided objective statements—which the government never disputed—about

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211. *Id.* at 457.

212. *Stewart*, 352 F.3d at 423–24.

213. *Id.* at 423.

214. *Id.* at 426.

215. *Stewart v. Ashcroft*, 211 F. Supp. 2d 166, 173 (D.D.C. 2002).

216. *Id.* at 175–76 (quoting *Brown v. Brody*, 199 F.3d 446, 457 (D.C. Cir. 1999)).

217. *Stewart*, 352 F.3d at 426.

218. *Id.*

219. *Id.* at 426–27.

the professional benefits he expected to gain had his transfer requests not been denied.<sup>220</sup> In *Ortiz-Diaz I*, no one disputed that *Stewart* controlled or that Ortiz-Diaz attributed his transfer requests to increased promotion prospects. Yet, the case resulted in a majority opinion that found no adverse employment action, two concurring opinions, and a dissent.

*Ortiz-Diaz I* chose the path of most resistance to determine that no material adversity existed. Perhaps this is a manifestation of Gertner's Losers' Rules theory, where an abundance of case law detailing what material adversity is not has left the majority hard-pressed to envision a set of facts that do meet the "materially adverse" standard.<sup>221</sup> After all, Judge Henderson made an elaborate effort to discuss all the ways that lateral transfers fail to meet the materiality standard under D.C. Circuit precedent.<sup>222</sup> Despite his "skepticism" of the result, Judge Kavanaugh joined in the majority opinion solely "because it faithfully follow[ed] [D.C. Circuit] precedents."<sup>223</sup>

Granted, the "asymmetric decisionmaking" of the Losers' Rules theory may be a contributing factor that led to the analytical confusion in *Ortiz-Diaz I*.<sup>224</sup> But, as Judge Rogers pointed out in *Ortiz-Diaz II*, nothing in the Circuit's lateral transfer precedent bore any "resemblance to the adversity Ortiz-Diaz faced" by remaining under the thumb of McCarty's alleged racial animus.<sup>225</sup> Thus, perhaps an ideology rooted in conservatism also contributed to the unfortunate results in *Ortiz-Diaz I*.

Indeed, Judge Kavanaugh's principled belief in *stare decisis* compelled him to compromise his personal objections to racially oppressive conduct in the workplace.<sup>226</sup> Noting his skepticism, he proceeded to deprive Ortiz-Diaz of a judicial remedy due to case law that regards lateral transfers as "*ordinarily not* changes in the 'terms, conditions, or privileges' of employment."<sup>227</sup> In concurring with the majority, Judge Kavanaugh woefully conflated "are ordinarily not" with "*are never*."

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220. *Ortiz-Diaz I*, 831 F.3d 488, 496–97 (D.C. Cir. 2016) (Rogers, J., dissenting) ("Ortiz-Diaz proffered evidence not merely that he would be more satisfied working in Albany or Hartford, but that he would be better positioned to advance within the Inspector General's Office.").

221. See Gertner, *supra* note 32, at 115 ("If case after case recites the facts that do not amount to discrimination, it is no surprise that the decisionmakers have a hard time envisioning the facts that may well comprise discrimination.").

222. *Ortiz-Diaz I*, 831 F.3d at 491–93 (Henderson, J.).

223. *Ortiz-Diaz I*, 831 F.3d at 494 (Kavanaugh, J., concurring).

224. See Gertner, *supra* note 32, at 113–15.

225. *Ortiz-Diaz II*, 867 F.3d 70, 75 (D.C. Cir. 2017) (Rogers, J.) ("But the relatively minor, attenuated harms rejected as a matter of law in *Forkkio* and *Russell* are a far cry from the career-stifling transfer denials of which Ortiz-Diaz complained." (citing *Forkkio v. Powell*, 306 F.3d 1127 (D.C. Cir. 2002); and *Russell v. Principi*, 257 F.3d 815 (D.C. Cir. 2001))).

226. *Ortiz-Diaz I*, 831 F.3d at 494 (Kavanaugh, J., concurring) ("In my view, a forced lateral transfer—or the denial of a requested lateral transfer—on the basis of race is actionable under Title VII.").

227. *Id.* (Kavanaugh, J., concurring) (emphasis added).

Or perhaps *Ortiz-Diaz I* was guided by the conservative belief that employment discrimination is over, that society has evolved into a post-racial, post-gender reality and that the market is bias-free.<sup>228</sup> Indeed, throughout both her majority opinion in *Ortiz-Diaz I* and her concurrence in *Ortiz-Diaz II*, Judge Henderson makes no attempt to hide her skepticism of McCarty's racial bias. Although she accuses the majority in *Ortiz-Diaz II* of "cherry-pick[ing] the factual record," she reads the record in such a way that allows her to conclude that McCarty's "discriminatory bent is, at most, slight."<sup>229</sup> She comes to this conclusion despite the government's acknowledgment that McCarty had been the subject of an inordinate number of discrimination complaints and despite a letter by another HUD OIG employee that corroborated the accounts of McCarty's discriminatory conduct.

Instead, she mocks the majority for "reach[ing] back twelve years" to credit McCarty's decision to impose the hardship assignment to Mississippi on Ortiz-Diaz. She also discredited the allegation of McCarty's racial bias by emphasizing that it was McCarty who approved Ortiz-Diaz's promotion to headquarters. Moreover, the evidence revealed that McCarty had awarded the position in New York "to another employee—who, again, was Hispanic." Thus, in Judge Henderson's view, "McCarty's alleged bias was hardly self-evident." However, her reproach of the majority's analysis in *Ortiz-Diaz II* makes no mention of the white comparators who McCarty permitted to use the no-transfer program freely.

No matter how you slice it, both *Ortiz-Diaz I* and *Ortiz-Diaz II* substantiate the claim of judicial hostility toward the anti-discrimination plaintiff in federal court. Ultimately, the reasoning behind the hostility is irrelevant when the resulting injustice is undeniable. Although Ortiz-Diaz managed to escape the "otherwise stifling materiality standard," the next anti-discrimination plaintiff "may not be as fortunate."<sup>230</sup>

Without resolving this paradox, fundamental principles of equality and justice will exist only in theory as federal courts continue to increase the burdens on anti-discrimination plaintiffs. Once again, government-sanctioned oppression will be the reality in this country as the courts effectively broaden the scope of permissible discrimination. This bar to justice contradicts both the plain language of Title VII and Supreme Court precedent. Therefore, the D.C. Circuit should resolve this paradox by heeding Judge Rogers' advice and joining its sister circuits in holding that: (1) transfers denied on any impermissible basis are barred under Title VII, and (2) the denial of any employment benefit on impermissible grounds is an adverse employment action under Title VII.

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228. See Schneider & Gertner, *supra* note 95, at 776.

229. *Ortiz-Diaz II*, 867 F.3d at 79 (Henderson, J., concurring in the judgment)

230. *Ortiz-Diaz II*, 867 F.3d at 80–81 (Rogers, J., concurring). On remand to district court, the parties reached a settlement agreement and dismissed the case. Order Adopting Stipulation of Dismissal at 1, *Ortiz-Diaz v. U.S. Dep't of Hous. & Urban Dev.*, No. 1:12-cv-00726-RCL (D.D.C. Apr. 11, 2018), ECF No. 40.

## IV. CONCLUSION

What set out to be the “embodiment of this Nation’s basic posture of common sense and common justice”<sup>231</sup> has been reduced to a hollow vessel that immunizes discriminatory conduct in the workplace. The existence of this trend has been well documented for decades, yet federal courts continue to whittle away the protections designed to safeguard equality and justice. Regardless of whether it is ideologically driven by conservatism or merely the by-product of advances in judicial economy, the resulting injustice is undeniable.

The inconsistency in disparate treatment jurisprudence among the federal circuits has yielded an analytical confusion that acts as a court-sanctioned barrier to equal employment opportunity in this country. The Supreme Court should seek the opportunity to restore the aims of the Civil Rights Act by making it clear that impermissible motivation alone will render the denials of any employment benefits or lateral transfers as actionable under Title VII. In the words of a legislator who helped pass the Civil Rights Act, “[W]e should insist that this law be a reality, and not merely something on the statute books which is ignored and not put into effect.”<sup>232</sup>

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231. John F. Kennedy, *Special Message to the Congress on Civil Rights and Job Opportunities - June 19, 1963*, 1963 Pub. Papers 483, 493 (1963).

232. 110 CONG. REC. 14,448, 14,449 (1964) (statement of Sen. Paul Douglas).

