No. 18-1401

In The
Supreme Court of the United States

DAVID D. PETERSON,

Petitioner,

v.

LINEAR CONTROLS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the unpublished court of appeals' opinion affirming summary judgment against Petitioner presents a suitable case for this Court to define the scope of the terms, conditions, or privileges of employment under Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) where the Petitioner failed to raise or brief that issue in the district or circuit court, and where the differences in the courts of appeals' definitions of these terms is slight, and refinement of the definition is not dispositive of Petitioner's case.

CORPORATE DISCLOSURE

In accordance with Sup. Ct. R. 29.6, Respondent Linear Controls, Inc. discloses it is a privately held corporation. There are no publicly held corporations or publicly held entities that own an interest of ten percent (10%) or more in Respondent Linear Controls, Inc.

RELATED CASES

- *Peterson v. Linear Controls, Inc.*, No. 6:16-cv-00725, U.S. District Court for the Western District of Louisiana, Lafayette Division. Judgment entered September 5, 2017.
- *Peterson v. Linear Controls, Inc.*, No. 17-30790, U.S. Court of Appeals for the Fifth Circuit. Judgment entered February 6, 2019.

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JURISDICTIONAL STATEMENT

Respondent Linear Controls, Inc. does not dispute the Court's jurisdiction over this case under 28 U.S.C. § 1254(1) but denies that this case satisfies the standards under Supreme Court Rule 10.

STATEMENT OF THE CASE

A. Procedural History

Linear Controls employed Petitioner David D. Peterson as an offshore electrician to work on oil rigs. (App.2a). Peterson also periodically performed offshore maintenance work. (App.19a). In September 2015, Peterson voluntarily resigned his employment from Linear Controls explaining, in a letter he submitted, that he intended to continue his education as an electrician. (App.2a, 18a). Peterson did so after he resigned. (App.2a, 18a).

Approximately one month later, on October 21, 2015, Peterson filed a charge of discrimination with the Equal Employment Opportunity Commission against Linear Controls. (App.2a). In his EEOC charge, Peterson alleged that during his last job assignment with Linear Controls, at Fieldwood Energy's East Breaks 165 platform from July 15, 2015 to August 22, 2015, Linear Controls discriminated against Peterson on the basis of his race, African American, in violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e). (App.2a). The EEOC investigated Peterson's allegations, "ruled in Linear Controls' favor and found that

the evidence did not establish a violation of Title VII on either the race or religious discrimination claims." (App.11a-12a).

On May 25, 2016, Peterson filed suit against Linear Controls in the United States District Court for the Western District of Louisiana, Lafayette Division, asserting, among other claims, racial discrimination under Title VII. (App.12a). In due course, Linear Controls moved for summary judgment and the district court granted summary judgment on all claims in favor of Linear Controls. (App.1a, 12a, 43a-45a).

Peterson appealed his Title VII racial discrimination claim to the United States Court of Appeals for the Fifth Circuit. (App.3a). In a *per curiam* unpublished opinion issued on February 6, 2019, the Fifth Circuit found no dispute in the evidence regarding any material fact and affirmed the final judgment in Linear Controls' favor. (App.10a).

On May 7, 2019, Peterson filed a petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit seeking discretionary review of Peterson's Title VII racial discrimination claim. (Peterson's Pet. for Writ of Certiorari).

B. Relevant Facts

On October 28, 2008, Linear Controls hired Peterson as a helper earning $9.00 per hour. (App.16a). On that date, and again on March 28, 2012, Peterson signed a written acknowledgement stating he received

Linear Controls' *Equal Employment Opportunity Policy*. (App.16a).

Consistent with federal and state law, Linear Controls publishes and distributes company policies prohibiting discrimination and harassment in the workplace and alerting all employees of their rights in this regard. (App.5a). Linear Controls' EEO policy states, in pertinent part, that:

> Linear Controls, Inc. provides equal employment opportunities without regard to race, color, age, sex, national origin, religion, disability or veteran status. Linear Controls, Inc.'s commitment to equality extends to all personnel actions including: recruitment, advertising or soliciting for employment, selection for employment, determining rates of pay or other forms of compensation, performance evaluation, upgrading, transfer, promotion, demotion, selection for training or education, discipline, suspension, termination, treatment during employment, and participation in social and recreational programs.

(App.15a).

Linear Controls also prominently displays EEO posters published by the U.S. Department of Labor. (App.15a). These posters demonstrate that discrimination, harassment, and retaliation are prohibited and the posters further provide employees with contact information for the U.S. Department of Labor, Equal Employment Opportunity Commission. (App.15a). Linear Controls also has a written grievance or complaint

policy and Linear Controls' management maintains an open door policy under which employees may raise complaints or concerns with any supervisor or with Linear Controls' human resources department. (App.15a-16a).

While employed by Linear Controls, Peterson never complained of, or reported, any form of discrimination, harassment, or retaliation. (App.2a, 7a, 11a, 18a). Peterson does not contend his job performance ever deteriorated during his employment by Linear Controls. Peterson testified, otherwise, that his performance improved throughout his employment. (App.20a). Linear Controls employed Peterson for approximately six years, but his claim of alleged discrimination concerns only a five week period of his employment. (App.2a, 11a, 16a).

During the time period relevant to this litigation, Peterson worked primarily offshore for Linear Controls as an electrician on a construction crew. (App.16a). Linear Controls' job description for an electrician, such as Peterson, on a construction crew called for working outdoors including exposure to "**a typical offshore site**" and requires the "**ability to work in a work area where work temperatures may be affected by outside temperatures**." (App.19a) (emphasis added). Working in an outdoor environment on a typical offshore site was part of Peterson's written job description and regular job duties. (App.19a).

Although Peterson was an electrician and member of a construction crew, Linear Controls also

periodically assigned Peterson maintenance projects from time to time, when the work was within Peterson's capabilities. (App.19a). In response to Peterson's request, Linear Controls had offered Peterson a maintenance position within his capabilities and qualifications. (App.19a). Peterson declined Linear Controls' offer of the maintenance position because Peterson would have potentially made less money working in maintenance even though the maintenance job paid $1.00 more per hour. (App.19a).[1] Calvin J. Broussard, Jr., an African American man, accepted the maintenance position Peterson declined. (App.20a).

On July 14, 2015, Linear Controls assigned Peterson to work in his defined role as an offshore electrician on Fieldwood Energy, LLC's East Breaks 165 platform in the Gulf of Mexico (App.2a, 16a-17a), beginning July 16, 2015. (App.18a). Peterson worked on Fieldwood's East Breaks 165 platform from July 16, 2015 to July 26, 2015 and from August 2, 2015 to August 22, 2015. (App.18a). Peterson was scheduled off from July 27, 2015 to August 1, 2015. (App.18a-19a).

On September 15, 2015, Peterson called Tim Davis, Linear Controls' Construction Project Manager.

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[1] Generally, Linear Controls' construction crew electricians work longer shifts (more than 14 days) and more hours per day than workers on a maintenance job. Also, in a full-time maintenance position, Peterson generally would not have had the opportunity to work as an electrician when not working on a maintenance job because Linear Controls assigns its electricians to work on specific projects. (App.20a).

(App.17a-18a). Peterson requested that Davis terminate Peterson's employment with Linear Controls. (App.17a-18a). Davis declined Peterson's request because Linear Controls was not conducting layoffs at the time and needed Peterson to work on an upcoming project. (App.17a-18a). On September 23, 2015, Peterson submitted his letter of resignation to Linear Controls. (App.18a). Peterson's letter stated, in pertinent part, that "I will [sic] like to resign from Linear Control's, due to I am continuing my education as an electrician to further my career." (App.18a).

Peterson's resignation letter did not reference or even intimate any discriminatory acts or unlawful conduct whatsoever. (App.18a). After he resigned his employment by Linear Controls, Peterson continued his education and he received additional training through the International Brotherhood of Electrical Workers and other sources. (App.2a, 18a).

On October 28, 2015, Peterson filed a charge of discrimination with the EEOC. (App.2a, 18a). Among other things, Peterson alleged Linear Controls discriminated against Peterson on the basis of his race, African American, in violation of Title VII of the Civil Rights Act of 1964. (App.2a, 12a, 18a). In his EEOC charge, Peterson alleged Linear Controls subjected him to "different terms and conditions of employment." (App.2a). Specifically, Peterson alleged in his EEOC charge that he was on a team of five white employees and five black employees, and that the black employees had to work outside and were not permitted water breaks, while the white employees worked inside with

air conditioning and were given water breaks. (App.2a). After completing its investigation, the EEOC made a finding that the evidence did not establish any violation of Title VII. (App.12a). On February 22, 2016, the EEOC issued a Notice of Right to Sue in response to Peterson's request. (App.2a, 18a).

On May 25, 2016, Peterson sued Linear Controls in the U.S. District Court for the Western District of Louisiana. (App.12a). Peterson alleged in his lawsuit complaint, in pertinent part, that Linear Controls discriminated against Peterson based on his race, in violation of Title VII. (App.12a). Peterson also asserted other claims alleging a hostile work environment, religious discrimination, retaliation, and harassment under Title VII and Louisiana law (App.12a), but Peterson does not here contest claims other than racial discrimination. (Pet. at 4 n.2).

On May 25, 2017, Linear Controls moved for summary judgment on all of Peterson's claims. (App.12a). In support of its summary judgment motion, Linear Controls submitted sworn declarations from several Linear Controls employees, and Peterson's deposition testimony. (App.2a-3a, 15a-20a). Peterson filed a response opposing Linear Controls' summary judgment motion and submitted declarations from Archie Mouton, another electrician whom Linear Controls employed on the East Breaks 165 platform, and Jimmy Cox, a safety representative employed by United First Safety, a separate company. (App.12a, 35a-36a).

The district court painstakingly analyzed Peterson's pleading allegations against the evidentiary record. (App.13a-20a). The district court sustained Linear Controls' objections to the Mouton and Cox declarations. (App.38a). The district court found "[t]he declarants have not laid the proper foundation to demonstrate their presence on the platform during the relevant time period or that they had personal information in order to establish that the alleged disparity between the crew members was based on a comparison of similarly situated employees." (App.38a). In his deposition testimony, Peterson identified only one instance where he claims a Linear Controls superior instructed Peterson, *during a water break*, to return to work *after Peterson had been sitting inside safety-man Cox's office drinking water*. (App.34a). The district court held Peterson's "Complaint and his deposition testimony offer nothing more than general claims that Caucasian workers were treated better than him." (App.35a).

The district court held that the uncontroverted evidence established that Peterson failed to offer any direct evidence of discrimination and, upon application of the framework this Court established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973), the district court further held Peterson failed to establish a prima facie case of racial discrimination. (App.31a, 38a-40a). The district court held that Peterson failed to identify evidence of any "similarly situated Caucasian employee who performed the same work [Peterson] performed and was allowed to work exclusively indoors" (App.35a), and, likewise that

Peterson failed to identify evidence of "a similarly situated Caucasian co-worker performing his same work who was allowed to take a water break like the one [Peterson] was allegedly denied." (App.35a). The district court further held that, even if Peterson had identified a similarly situated Caucasian employee who had been assigned to work exclusively indoors and/or allowed to take a longer water break inside, Peterson's racial discrimination claim, nonetheless, failed because neither Linear Controls' alleged assignment of outdoor work, nor Linear Controls' alleged denial of a lengthier inside water break is an adverse employment action. (App.38a-40a). On September 5, 2017, the district court granted Linear Controls' motion for summary judgment and entered final judgment in Linear Controls' favor. (App.11a).

Contrary to Peterson's mere allegations, the uncontroverted evidence in the summary judgment record demonstrates that Peterson and several other African American employees worked inside on the East Breaks 165 platform from time to time and several Caucasian employees worked both outside and inside. (App.34a-35a). The admitted evidence also showed that Linear Controls permitted all employees to take water breaks when needed and allowed them all to take water and Gatorade from refrigerators or coolers at any time. (App.35a). Linear Controls' managers also regularly and routinely handed out water to all Linear Controls' outside employees (App.35a), and Peterson's supervisor, Robert Walker, testified neither he nor Peterson's other supervisor, Chad Duhon, "got

onto workers for stopping to get a drink of water." (App.35a).

After filing a notice of appeal, Peterson sought appellate review on his racial discrimination claim. (App.1a). Peterson urged the Fifth Circuit to reverse the well-reasoned and well-supported final judgment of the district court on Peterson's Title VII racial discrimination claim (App.11a-47a), based solely on two arguments. (App.4a). "Peterson contends that the magistrate judge improperly excluded witness declarations that identified (1) similarly situated comparators and (2) direct evidence of discrimination sufficient to escape the *McDonnell Douglas* framework and defeat summary judgment" existed. (App.4a).

Peterson did not assert as a point of error in the Fifth Circuit, let alone establish, that the legal standard the Fifth Circuit or district court applied to assess the summary judgment record was constitutionally invalid. Instead, in the Fifth Circuit Peterson only pursued the very different contentions that the district court erred in assessing the admissibility of evidence when the district court sustained objections to the Mouton and Cox declarations, and that the Fifth Circuit should analyze Peterson's claim under the standard applicable to cases of direct evidence of discrimination, instead of as a claim that required Peterson to establish a prima facie showing of discrimination under *McDonnell Douglas supra*. (App.4a-6a).

Based on the issues Peterson raised in the Fifth Circuit, that court evaluated the record for direct

evidence of discrimination. (App.4a-6a). In that regard, the court found "Peterson's deposition testimony belies the allegations in his complaint." (App.5a). The Fifth Circuit did not rule the district court had abused its discretion when it sustained the objections to the Mouton and Cox declarations or that the district court's ruling in that regard affected Peterson's substantial rights. (App.1a-10a). The Fifth Circuit affirmed the district judgment on the basis that "[a]ssuming the [Mouton and Cox] declarations identify similarly situated comparators, Peterson still cannot satisfy Title VII's adverse employment action requirement" (App.4a), an issue Peterson failed to raise, brief, support, or assign error to in the Fifth Circuit or district court.

SUMMARY OF THE ARGUMENT

This Court should deny Peterson's petition because a supervisor assigning Peterson to perform his work outdoors on an offshore oil rig in accordance with Peterson's written job description and regular job duties, and a supervisor once directing Peterson to shorten his indoor water break and return to work, are not adverse employment actions which constitute discrimination with respect to compensation, terms, conditions, or privileges of employment under 42 U.S.C. § 2000e-2(a).

Even Peterson does not contend the genuine facts underlying his suit supports his claim of discrimination. Instead, Peterson asks this Court to entirely

disregard the district court's analysis and identification of the admissible summary judgment evidence. The district court determined there is no direct evidence of discrimination; Peterson failed to establish a prima facie case of discrimination; there is no evidence of any "similarly situated Caucasian employee who performed the same work [Peterson] performed and was allowed to work exclusively indoors"; and, no evidence of "a similarly situated Caucasian co-worker performing his same work [as Peterson] who was allowed to take a water break like the one [Peterson] was allegedly denied." (App.35a). Peterson asks this Court to entirely disregard the summary judgment evidence and requirements of FED. R. CIV. P. 56, grant discretionary review, and decide this case based on unsupported allegations that conflict with the factual evidence.

Additionally, Peterson waived the issue he asks this Court to consider. The first time Peterson suggested any error in the legal standard applied to evaluate the summary judgment record was when Peterson filed his petition in this Court. Peterson did not object to the standard applied in the Fifth Circuit or district court, Peterson did not inform the Fifth Circuit or district court of any legal authority Peterson relies on in this Court, so Peterson did not provide the Fifth Circuit or district court any opportunity to rule on the question Peterson has raised for the first time in this Court. (App.4a-6a). For all of these reasons, this case simply does not present an appropriate vehicle for addressing the question Peterson has presented.

Peterson seeks this Court's discretionary review based on an argument the *general standard* the Fifth Circuit applies to determine whether action attributable to an employer with respect to compensation, terms, conditions, or privileges of employment, of *some employee* could theoretically violate Section 703(a) of Title VII. The record establishes that Peterson does not present this Court with evidence which shows that the standard the Fifth Circuit applied to the evidence in Peterson's case would support a claim of discrimination through 42 U.S.C. § 2000e-2(a) under this Court's precedents or the legal measure any other circuit court utilizes to evaluate such claims. Peterson is not litigating his case, instead, he asks the Court to consider a hypothetical case.

In this evidentiary and procedural posture, the Court will not have an appropriate record for thoroughly analyzing the slightly different methods the courts of appeals have applied in discrimination cases under Section 703(a). The Court would be evaluating a theoretical claim under general terms which would not have any application in Peterson's suit because resolution of the question Peterson has presented is not dispositive of his case.

Furthermore, Peterson has greatly overstated the degree and claimed significance of minor differences among the circuit courts' interpretations of the legal standard at issue. The relevant legal standards utilized in most, if not all, courts of appeals would construe the record in Peterson's case to require the same judgment the Fifth Circuit affirmed. Thus, the Fifth

Circuit has not decided an important federal question in a way that conflicts with the relevant decisions of this Court or any other United States court of appeals on the same important matter, and the Fifth Circuit's unpublished decision does not depart from the accepted and usual course of judicial proceedings so as to call for exercise of this Court's supervisory power. For each of these reasons, Peterson's petition fails to satisfy Rule 10 so the Court should not grant the petition.

REASONS FOR DENYING THE PETITION

I. This is not an appropriate case to address the question Peterson presented.

A. Peterson seeks review of a question the evidence does not present.

The bald *allegations and arguments* the EEOC, district court, and Fifth Circuit have determined *the evidence disproves* provide a poor factual basis for this Court's discretionary review. Contrary to Peterson's grandiose arguments regarding the claimed significance of the Fifth Circuit's unpublished opinion in this case,[2] the opinion does not invoke any basis for this Court's review. Peterson urges this Court to grant his petition based upon unsupported "allegations," instead of the factual evidence on which the EEOC, district

[2] The Fifth Circuit did not select its opinion in this case for publication so the opinion has no precedential value or broad significance.

court, and Fifth Circuit have determined fail to evidence a violation of Title VII. Peterson's regular duties, and published job description, called for him to work both outdoors and inside oil rigs, like the uncontroverted evidence shows the other Black and Caucasian workers routinely did. All of the workers were regularly provided access to hydration so they could effectively perform their work. The evidence disproves the allegation Peterson, or any other Black employee, was systematically denied access to water. Peterson's own testimony proves that only once did a supervisor direct Peterson to shorten the indoor water break he was enjoying and return to work, and on that lone occasion, Peterson had drank water before his supervisor gave Peterson the direction to return to work. This evidence is a far cry from the allegations and arguments Peterson relies on in requesting this Court to grant the petition.

Peterson seeks to avoid this evidence that refutes his claims and allegations by citing, barren of relevant context, an excerpt from *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 76 (1998), "[b]ecause this case was decided on [a] motion for summary judgment, this Court 'must assume the facts to be as alleged by petitioner.'" (Pet. at 3 n.1). However, this passage does not support Peterson's argument the Court may accept Peterson's unsupported allegations over the evidence that disproves the allegations. *See Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248, 106 S.Ct. 2505 (1986). "[A] party opposing a properly supported motion for summary judgment 'may not rest upon the mere

allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.'" At the summary judgment stage, facts must be viewed in the light most favorable to the non-moving party – but only if there is a "genuine" dispute as to those facts. FED. R. CIV. P. 56(c); *Scott v. Harris*, 550 U.S. 372, 380, 127 S.Ct. 1769, 1776 (2007). Where the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial. *Anderson*, 477 U.S. at 247-248. When opposing parties tell two different stories, one of which is contradicted by the record such that no reasonable jury could believe it, the court does not adopt that version of the facts. *Scott*, 550 U.S. at 380.

Throughout this litigation, Peterson has urged every court to accept Peterson's broad allegations and factually insupportable arguments over the actual evidence, but the courts have refused to do so. (App.5a, 33a-38a). The facts evident in the appendix of Peterson's petition establish that Peterson cannot support a claim under the legal standard any circuit court applies under Section 703(a) of Title VII. No term, condition, or privilege of employment altered Peterson's obligation to perform his assigned duties in accordance with his written job description, provided Peterson a license to extend his indoor water breaks beyond reasonable limitations, or relieved Peterson of his obligations to perform offshore work within his typical duties.

This Court should not consider a non-existent claimed *conflict* between the Fifth Circuit's

unpublished opinion and opinions of other courts of appeals regarding the type of employer conduct that qualifies as an adverse employment action in Peterson's circumstances because Peterson's conduct could not support a claim under any reasonable interpretation of terms, conditions, or privileges of employment. Notably absent from Peterson's petition is any case opinion applying Section 703(a) of Title VII to facts like those in Peterson's case that found discrimination. *See Harris v. AG United States*, 687 Fed. Appx. 167, 169 (3d Cir. 2017) (noting such a failure of authority). The only opinion Peterson cites that has remotely comparable facts supports summary judgment. *See Stewart v. Union County Board of Education*, 655 Fed. Appx. 151 (3d Cir. 2016), discussed fully *infra*.

Peterson's argument that analysis of the facts in this case under standards from other circuits would be "outcome determinative," is accurate only to the extent it would affirm judgment against Peterson. The analysis in Section II of this brief analyzes the failure of evidence, direct or circumstantial, showing Peterson is a victim of racial discrimination under any circuit's relevant standard. Peterson has presented a straw man argument based on unsupported allegations, without even attempting to support his argument with any actual evidence. Peterson seeks review of whether a fictional evidentiary record analyzed through *some different* legal standard could theoretically support a claim. Since the facts do not present the question Peterson proposes, this case is not a suitable case for this Court's review.

B. Peterson waived review of the question he attempts to first present in this Court.

In addition to evidentiary reasons discussed *supra*, Peterson's case is not appropriate for this Court's review because Peterson failed to preserve the issue he attempts to first present in this Court. Peterson did not raise, brief, or allow the Fifth Circuit or district court any opportunity to rule on the question Peterson brings to this Court. In the Fifth Circuit, Peterson challenged the district court judgment on only two issues. First, Peterson contended he had presented direct evidence of racial discrimination, but Peterson has now entirely abandoned that contention in this Court. The second issue Peterson raised in the Fifth Circuit was his objection the district court erred in analyzing the admissibility of testimony presented through declarations from Mouton and Cox. (App.4a).

Peterson did not prevail in the Fifth Circuit on either of the two bases for his appeal, and contrary to Peterson's argument in this Court, the district court did not "refuse[] to consider the two affidavits from other Linear Controls employees." (Pet. at 5 n.3). The district court's order demonstrates the district court did consider Mouton's and Cox's testimony (though United Fire Safety, not Linear Controls, employed Cox), and after the district court evaluated the content of the Mouton and Cox declarations, the district court sustained Linear Controls' objections to the proposed testimony because the content of those declarations is inadmissible. (App.37a-38a).

Peterson did not seek review in the Fifth Circuit on whether: (1) working in "a typical offshore site" in a "work area where work temperatures may be affected by outside temperatures," consistent with Peterson's job description (App.19a, 34a, 40a), constituted an adverse employment action; or (2) Linear Controls' supervisor instructing Peterson, on a single occasion to return to work during a water break (App.34a, 40a), constituted an adverse employment action.

To the contrary, in his Fifth Circuit brief, Peterson expressly acknowledged, without challenging the issue, that in the district court "it was questionable whether [Peterson] raised the issue that he was subjected to an adverse employment decision." (Appellant's Br. at 24, Nov. 11, 2017; Case No. 17-30790). Consistent with Peterson's concession and his failure to identify any objection to the issue, the Fifth Circuit concluded that, even if the Mouton and Cox declarations had identified similarly situated comparators, Peterson "still cannot satisfy the Title VII's adverse employment action requirement." (App.4a). Peterson waived review of the issue he brings to this Court.

Peterson's various mutating theories of liability through this litigation further demonstrate that he waived review in this Court. In the district court, Peterson claimed that circumstantial evidence provided by the Mouton and Cox declarations supported a claim. (App.31a-34a).[3] The district court properly held the

[3] Peterson's EEOC charge, complaint, and opposition to Linear Controls' motion for summary judgment do not advance a

Mouton and Cox declarations failed to identify a "similarly situated comparator." (App.38a). The district court held further that Peterson also failed to *allege or testify to* any adverse employment action. (App.38a-40a).

On appeal to the Fifth Circuit, Peterson fundamentally changed the basis of the alleged discrimination to a direct evidence theory, arguing, the Mouton and Cox declarations identified "direct evidence of discrimination sufficient to escape the *McDonnell Douglas* framework and defeat summary judgment." (App.4a). The Fifth Circuit held "Peterson's arguments fail to revive his claim" (App.4a), and that "Peterson still cannot satisfy Title VII's adverse employment action requirement." (App.4a).

In this Court, Peterson reverts to a circumstantial evidence theory, but abandons his former argument the Mouton and Cox declarations identify similarly situated comparators. Instead, Peterson now argues that Linear Controls' alleged assignment of outdoor work and Linear Controls' alleged denial of an inside water break constitute adverse employment actions – not because of any direct or circumstantial evidence, but because the Fifth Circuit's interpretation of "adverse employment action" is too narrow (Pet. at 21-22), a

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direct evidence theory of liability at all. (ROA.17-30790.582-701). In fact, Peterson's opposition to Linear Controls' motion for summary judgment fails to even mention the term "direct evidence," much less establish a direct evidence theory of liability. *Id*.

theory Peterson never raised before filing his petition in this Court.

This Court does not ordinarily consider issues that were not raised and decided in the district or circuit court. *Cf., Clingman v. Beaver*, 544 U.S. 581, 598 (2005). *See also*, *e.g.*, *Cooper Industries, Inc. v. Aviall Services, Inc*., 543 U.S. 157, 168 (2004). "These principles help to maintain the integrity of the process of *certiorari*." *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992).[4] Review of this previously un-briefed question is not appropriate in this Court because a party who fails, as Peterson has here, to appropriately brief an issue in the court of appeals fails to preserve the issue for decision in that court. *Compare* FED. R. APP. P. 8(a)(9)(A); *Kohler v. Englade*, 470 F.3d 1104, 1114 (5th Cir. 2006); *L & A Contracting Co. v. S Concrete Services, Inc.*, 17 F.3d 106, 113 (5th Cir. 1994); *Brinkmann v. Dallas County Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987). This Court should not consider Peterson's question because he waived this Court's review of that issue when he failed to raise it before filing his petition.

[4] In other words, Peterson "cannot change horses in midstream, arguing one theory below and a quite different theory on appeal." *Ahern v. Shinseki*, 629 F.3d 49, 58 (1st Cir. 2010).

II. Peterson overstates the degree and significance of differences among the circuit courts' interpretation of adverse employment action.

McDonnell Douglas, 411 U.S. at 798, established "the standards governing the disposition of an action challenging employment discrimination" in order to address "a notable lack of harmony, to state the applicable rules as to burden of proof and how this shifts upon a making of a prima facie case." *Id*. at 801. The "critical issue before" the Court was "the order and allocation of proof in a private [] action challenging employment discrimination." *Id.* at 800. In the absence of direct evidence of unlawful discrimination, an employee claiming discrimination must carry the initial burden of establishing a prima facie case of discrimination. *Id*. at 802. This has remained the well-settled law for more than 40 years. *Young v. United Parcel Service, Inc*., 135 S.Ct. 1338, 1344 (2015).

To establish a prima facie case of discrimination under § 703(a) of Title VII using the *McDonnell Douglas* framework, a plaintiff must demonstrate;

> (1) he is a member of a protected class, (2) he was qualified for the position at issue, (3) he was the subject of an adverse employment action, and (4) he was treated less favorably because of his membership in that protected class than were other similarly situated employees who were not members of the protected class, under nearly identical circumstances.

Cf., Paske v. Fitzgerald, 785 F.3d 977, 985 (5th Cir.), *cert. denied*, 136 S.Ct. 536 (2015).

As the Fifth Circuit correctly determined (App.4a), the question of whether Peterson was subjected to an adverse employment action, is distinct from the different question of whether evidence exists which shows that Peterson was treated less favorably than another person based on Peterson's race. *Id*. "[A]dverse employment action" is a judicially coined term for the actual language of § 703(a)(1), which states the action must affect the employee's compensation, terms, conditions, or privileges of employment under 42 U.S.C. § 2000e-2(a)(1). *Thompson v. City of Waco*, 764 F.3d 500, 503 (5th Cir. 2014).

In *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), this Court considered "how harmful an act of retaliatory discrimination must be in order to fall within the [antiretaliation] provision's scope." *White*, 548 U.S. at 61-64. Before *White*, many courts used the same standard to determine whether a plaintiff sufficiently showed an adverse employment action for both Section 703 discrimination claims and Section 704 retaliation claims. *See*, *e.g.*, *McCoy v. City of Shreveport*, 492 F.3d 551, 559 (5th Cir. 2007). *White* held Section 704 and Section 703 could not be read together because they differed in language and purpose. *White* at 62. The Section 703 discrimination provision "seeks to prevent injury to individuals" in employment based on that individual's race, color, religion, sex, or national origin. *Id.* at 63. The Section 704 antiretaliation provision, however, "seeks to prevent harm to

individuals based on what" the employer does, meaning the employer's conduct in punishing plaintiffs for opposing the employer's practices that the plaintiff reasonably believes may violate Section 703. *Id*. Accordingly, this Court concluded the antiretaliation section, unlike the antidiscrimination section, "is not limited to discriminatory actions that affect the terms and conditions of employment." *Id*. at 64.

Since *White*, the courts of appeals have derived definitions and tests for evaluating claimed adverse employment actions for Title VII § 703 discrimination claims. Some variances exist among the measures the courts of appeals utilize but no difference is significant in Peterson's case. Even under a broader definition of adverse employment action than the Fifth Circuit applied, Peterson's claim still fails. No intractable circuit split exists regarding the evidentiary and legal issues that apply to Peterson's claim.

Observing that "[t]he concept of a tangible [adverse] employment action appears in numerous cases in the Courts of Appeals discussing claims involving race, age, and national origin discrimination, as well as sex discrimination," this Court has held that "a tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefit." *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761, 118 S.Ct. 2257 (1998).

The Fifth Circuit standard predated, but is consistent with *Ellerth*. *Compare Ellerth supra with Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir. 1995) (citing *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir.) (en banc), *cert. denied*, 454 U.S. 892, 102 S.Ct. 388 (1981). The Fifth Circuit construes adverse employment actions to include "ultimate employment decisions" such as hiring, firing, demoting, promoting, granting leave, and compensating. *Cf., McCoy*, 492 F.3d at 560. "[A]n employment action that 'does not affect job duties, compensation, or benefits' is not an adverse employment action," in discrimination claims. *Pegram v. Honeywell, Inc*., 361 F.3d 272, 282 (5th Cir. 2004) (quoting *Banks v. E. Baton Rouge Parish Sch. Bd.*, 320 F.3d 570, 575 (5th Cir. 2003)). While the Fifth Circuit held the "adverse employment actions" Peterson alleged did not concern ultimate employment decisions under controlling Fifth Circuit precedent, the adverse employment actions Peterson alleged would have failed under the *Ellerth* Court's definition of "tangible employment action" as well as many, if not all of the other circuit courts' definitions of "adverse employment action." Peterson was not subjected to an adverse employment action under any existing standard.[5] Rather, the undisputed evidence proves Peterson failed to establish that Linear Controls' alleged assignment of outdoor work consistent with Peterson's job description, or Linear

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[5] Apparently recognizing this obvious impediment to Peterson's claim, Amici Curiae suggest this Court create a new "meaningful harm on the employee" standard that no identifiable court has ever utilized.

Controls' alleged shortened inside water break are actionable adverse employment actions.

The First Circuit has held "[a]n 'adverse employment action' is one that 'affect[s] employment or alter[s] the conditions of the workplace,'" *Morales-Vallellanes v. Potter*, 605 F.3d 27, 35 (1st Cir. 2010) (quoting *White*, 548 U.S. at 61-62), and "typically involves discrete changes in the terms of employment, such as '**hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits**.'" *Id*. (emphasis added) (quoting *Ellerth*, 524 U.S. at 761). In *DeNovellis v. Shalala*, 124 F.3d 298, 311 (1st Cir. 1997), the court held being assigned to undesirable jobs or positions a plaintiff considers below her qualifications is not akin to an adverse employment action. Peterson's argument fails because it does not involve 'hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits.'" *Morales-Vallellanes supra*.

The Second Circuit defines adverse employment action as a "materially adverse change" in the terms and conditions of employment. *Cf., Sanders v. N.Y. City Human Res. Admin*., 361 F.3d 749, 755 (2d Cir. 2004). *See also*, *e.g.*, *Richardson v. New York State Dep't of Corr. Serv*., 180 F.3d 426, 446 (2d Cir. 1999). To be materially adverse, a change in working conditions must be "more disruptive than a mere inconvenience or an alteration of job responsibilities." *Sanders*, 361 F.3d at 755. Similar to the Fifth Circuit test, examples of such

a change include "termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices . . . unique to a particular situation." *Id*. The record does not evidence any materially adverse change in the terms and conditions of Peterson's employment. *Compare id.*

In accord with *Ellerth*, 524 U.S. at 761, the Third Circuit has held "[a] tangible [adverse] employment action is 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." *Cardenas v. Massey*, 269 F.3d 251, 266 n.10 (3d Cir. 2001) (citing *Ellerth*, 524 U.S. at 761). *See also Storey v. Burns Int'l Sec. Servs.*, 390 F.3d 760, 764 (3d Cir. 2004). Peterson concedes the Third Circuit's "test produces the same results as the Fifth Circuit's 'ultimate employment decisions' standard." (Pet. at 11). Peterson even discusses the Third Circuit's opinion in *Stewart supra*, because the Third Circuit reached the same conclusion, on strikingly similar factual allegations, as the Fifth Circuit. (Pet. at *id*.). The Third Circuit affirmed summary judgment against Billy Stewart because, under *Ellerth* and controlling circuit precedent, the Union County Board of Education's assignment of outdoor duty to Stewart, an African American security guard, did not constitute an adverse employment action when the Board had previously assigned the same duty to Stewart and "the assignment to outdoor duty had no impact

on his compensation or status." *Compare id*. at 155, *with* (App.19a).

As Peterson concedes, the Fourth Circuit like the Third Circuit, has also applied *Ellerth's* list limiting adverse employment actions to hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." (Pet. at 17) (citing *Jensen-Graf v. Chesapeake Emp'rs' Ins. Co.*, 616 Fed. Appx. 596, 597-98 (4th Cir. 2015)). *See also*, *e.g.*, *Hoyle v. Freightliner, LLC*, 650 F.3d 321, 337 (4th Cir. 2011). "Title VII 'has consistently focused on the question whether there has been discrimination in what could be characterized as *ultimate employment decisions* such as hiring, granting leave, discharging, promoting, and compensating.'" *Smith v. First Union Nat'l Bank*, 202 F.3d 234, 248 n.11 (4th Cir. 2000) (emphasis added) (citing *Page*, 645 F.2d at 233).

Contrary to Peterson's argument, in *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371 (4th Cir. 2004), the Fourth Circuit did not reject the "ultimate employment decisions" test in discrimination cases. (Pet. at 18). *James* cited a retaliation case, *Gunten v. Maryland*, 243 F.3d 858, 865 (4th Cir. 2001), in the abstract through mere dicta that "[c]onduct short of 'ultimate employment decisions' *can* constitute adverse employment action." *James*, 368 F.3d at 375-76 (emphasis added) (citation omitted). After *James*, the Fourth Circuit and district courts continue to apply Fourth Circuit precedent in discrimination claims. "The Fourth Circuit has *mandated* that in order to

satisfy a prima facie case for a discrimination claim, a plaintiff must show an 'ultimate employment action.'" *Scott v. Health Net Fed. Servs., LLC*, 807 F. Supp. 2d 527, 534 n.2 (E.D. Va. 2011) (emphasis added) (quoting *Brockman v. Snow*, 217 Fed. Appx. 201, 206 (4th Cir. 2007)). *See also*, *e.g.*, *Doe v. Brennan*, 980 F. Supp. 2d 730, 739 (E.D. Va. 2013); *Williams v. Brunswick County Bd. of Educ*., 725 F. Supp. 2d 538, 547 (E.D.N.C. 2010); *Dawson v. United States*, 549 F. Supp. 2d 736, 751 (D.S.C. 2008).

The Sixth Circuit defines an adverse employment action as a "materially adverse change in the terms or conditions of employment because of the employer's actions." *Michael v. Caterpillar Fin. Servs. Corp*., 496 F.3d 584, 593 (6th Cir. 2007). Materially adverse changes in the terms and conditions of employment include "a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Kuhn v. Washtenaw County*, 709 F.3d 612, 625 (6th Cir. 2013) (citing *Michael*, 496 F.3d at 593). "[A] materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities." *Hollins v. Atlantic Co*., 188 F.3d 652, 662 (6th Cir. 1999). "A plaintiff's subjective belief of discrimination is insufficient," *Noble v. Brinker Int'l, Inc.*, 175 F. Supp. 2d 1027, 1041 (S.D. Ohio 2001), to establish any element of a Section 703 claim, much less an adverse employment action. *Cf.,*

Mitchell v. Toledo Hosp., 964 F.2d 577, 585 (6th Cir. 1992).[6] In accord, the district court held "an employee's 'subjective belief of discrimination' alone is not sufficient to warrant judicial relief." (App.33a) (citations omitted).

Courts applying the Sixth Circuit's standard have held an alleged denial of a water break, *Harris v. Burger King Corp*., 993 F. Supp. 2d 677, 685 (W.D. Ky. 2014), or even a restroom break, *Worthy v. Materials Processing, Inc.*, 433 Fed. Appx. 374, 375-76 (6th Cir. 2001), is not an adverse employment action. *See also*, *e.g.*, *Eberhardt v. First Centrum, LLC*, No. 05-71518, 2007 U.S. Dist. LEXIS 10405, *19 (E.D. Mich. Feb. 15, 2007). Peterson has not identified evidence of any materially adverse change in the terms or conditions of his employment.

The Seventh Circuit applies a broad standard to determine adverse employment actions evaluating

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[6] The circuit courts agree a plaintiff's subjective belief is insufficient to support a claim of discrimination under Section 703. *See*, *e.g.*, *Tyree v. Foxx*, 835 F.3d 35, 42 (1st Cir. 2016); *Walsh v. N.Y. City Hous. Auth*., 828 F.3d 70, 90 n.18 (2d Cir. 2016); *Jackson v. University of Pittsburgh*, 826 F.2d 230, 236 (3d Cir. 1987); *Williams v. Cerberonics, Inc.*, 871 F.2d 452, 459 (4th Cir. 1989); *Lawrence v. University of Texas Med. Branch*, 163 F.3d 309, 313 (5th Cir. 1999); *Mitchell v. Toledo Hosp*., 964 F.2d 577, 585 (6th Cir. 1992); *Kizer v. Children's Learning Center*, 962 F.2d 608, 613 (7th Cir. 1992); *Brannum v. Mo. Dep't of Corr*., 518 F.3d 542, 549 (8th Cir. 2008); *Steckl v. Motorola, Inc*., 703 F.2d 392, 393 (9th Cir. 1983); *Kendrick v. Penske Transp. Servs*., 220 F.3d 1220, 1232 n.10 (10th Cir. 2000); *Holifield v. Reno*, 115 F.3d 1555, 1565 (11th Cir. 1997); *Johnson v. District of Columbia*, 947 F. Supp. 2d 123 (D.D.C. 2013).

actions involving "the employee's current wealth, his career prospects, or changes to work conditions that include humiliating, degrading, unsafe, unhealthy, or otherwise significant negative alteration in the workplace." *Boss v. Castro*, 816 F.3d 910, 917 (7th Cir. 2016). Under that standard, in *Hobbs v. City of Chicago*, 573 F.3d 454, 464 (7th Cir. 2009), the Seventh Circuit held that **a reasonable jury could not find that being assigned to perform duties that were part of an employee's job description constituted discrimination, however undesirable those duties might be**. Similarly, in *Brown v. Ameritech Corp.*, 128 F.3d 605, 608 (7th Cir. 1997), the Seventh Circuit held a changed set of duties, still within the plaintiff's job description, did not amount to an adverse employment.[7] *See also*, *e.g.*, *Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993). Here, Peterson's job description included working in "a typical offshore site" in a "work area where work temperatures may be affected by outside temperatures" (App.19a), would defeat Peterson's claim under even the broad Seventh Circuit standard.

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[7] Like Peterson, the plaintiff in *Brown* argued "[Defendant] Ameritech systematically treated its White employees better than its African-American employees." *Brown*, 128 F.3d at 608. However, the district court held and the circuit court affirmed that "what is most notable about Brown's allegations is the lack of concrete information about the racial composition of the relevant part of Ameritech's work force." *Id*. Here, the district court held Peterson's "Complaint and his deposition testimony offer nothing more than general claims that Caucasian workers were treated better than him." (App.35a).

Similarly, the Eighth Circuit has articulated a standard that provides "an adverse employment action is a tangible change in working conditions that produces a material employment disadvantage." *Clegg v. Ark. Dep't of Corr.*, 496 F.3d 922, 926 (8th Cir. 2007). "'Minor changes in duties or working conditions, even unpalatable or unwelcome ones, which cause no materially significant disadvantage, do not' rise to the level of an adverse employment action." *Id*. (quoting *Higgins v. Gonzales*, 481 F.3d 578, 584 (8th Cir. 2007)).

District courts applying the Eighth Circuit's test have consistently held, as the Fifth Circuit and district court below, that an employer does not discriminate by requiring its employees to perform the work for which they were hired under conditions the employee understood when he took the job. *See*, *e.g.*, *Hawkins v. Vantage Point Behavioral Health, LLC*, No. 5:13-CV-5224, 2014 U.S. Dist. LEXIS 168373, *18-19 (W.D. Ark. Dec. 2, 2014); *Anderson v. Wal-Mart Stores, Inc*., No. 4:05-CV-00432 AGF, 2008 U.S. Dist. LEXIS 64990, *2-4 (E.D. Mo. Sept. 15, 2006); *Turner v. Honeywell Fed. Mfg. & Techs*., L.L.C., No. 00-0868-CV-W-REL, 2002 U.S. Dist. LEXIS 26541, *13-14 (W.D. Mo. Oct. 24, 2002).

The Ninth Circuit, conflating two concepts this Court differentiated in *White*, discrimination and retaliation, has defined an adverse employment action as "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity," *Schlosser v. Potter*, 248 Fed. Appx. 812, 817 (9th Cir. 2007) (quoting *Ray v. Henderson*, 217 F.3d 1234, 1243

(9th Cir. 2000)), but the Ninth Circuit has cautioned "there must be some adverse effect on the employee's work or status." *Id.* "Otherwise, every minor employment action that an employee did not like could become the basis of a discrimination suit. The better approach is to determine whether a reasonable person in the same situation would view the action as disadvantageous." *Vasquez v. County of L.A.*, 307 F.3d 884, 891 (9th Cir. 2002).

Peterson would struggle to establish that Linear Controls subjected him to any adverse employment action. Peterson's dislike of his assignment as an offshore electrician on the East Breaks 165 Platform or Peterson's dislike of his supervisor instructing Peterson, on one occasion during an indoor water break, to return to work, would not suffice under the Ninth Circuit's standard. The evidence does not show that Linear Controls' actions affected Peterson's work or status.

In assessing whether an employee has suffered an adverse employment action, the Tenth Circuit "examine[s] claims of adverse action on the basis of race . . . discrimination on a case-by-case basis, 'examining the unique factors relevant to the situation at hand.'" *Piercy v. Maketa*, 480 F.3d 1192, 1203 (10th Cir. 2007) (quoting *Sanchez v. Denver Pub. Sch.*, 164 F.3d 527, 532 (10th Cir. 1998)). The Tenth Circuit has defined adverse employment action "liberally," i.e., whether the action carries "a significant risk of humiliation, damage to reputation, and a concomitant harm to future employment prospects." *Annett v. Univ. of Kan.*, 371 F.3d 1233, 1239 (10th Cir. 2004). Under its standard,

the Tenth Circuit "will not consider a mere inconvenience or an alteration of job responsibilities to be an adverse employment action," *Sanchez*, 164 F.3d at 532 (internal quotation marks omitted), and, thus, "not everything that makes an employee unhappy is an actionable adverse action." *MacKenzie v. Denver*, 414 F.3d 1266, 1279 (10th Cir. 2005). The Tenth Circuit applies *Ellerth* limiting adverse employment actions to hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. *Cf., Piercy v. Maketa*, 480 F.3d 1192, 1203 (10th Cir. 2007) (citing *Hillig v. Rumsfeld*, 381 F.3d 1028, 1032-33 (10th Cir. 2004)). *See also*, *e.g.*, *Sanchez*, 164 F.3d at 532. Therefore, Peterson's claim would likely fail under the Tenth Circuit's case-by-case approach wherein Peterson has demonstrated, at most, an inconvenience – the denial of one water break or Linear Controls assigning Peterson to work outside in accordance with Peterson's job description. *Compare, e.g.*, *Sanchez*, 164 F.3d at 532.

The Eleventh Circuit has held consistently that "**Title VII is not designed to make federal courts 'sit as a super-personnel department that reexamines an entity's business decisions**.'" *Davis v. Town of Lake Park, Fla.*, 245 F.3d 1232, 1239 (11th Cir. 2001) (emphasis added) (quoting *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991)). *See also*, *Combs v. Plantation Patterns*, 106 F.3d 1519, 1543 (11th Cir. 1997). "[B]ecause work assignment claims strike at the very heart of an employer's business judgment and expertise, absent unusual

circumstances, they typically do not constitute adverse employment actions." *McCone v. Pitney Bowes, Inc.*, 582 Fed. Appx. 798, 800 (11th Cir. 2014) (quoting *Davis*, 245 F.3d at 1239). The record establishes that Peterson was not assigned to unusual work.

The D.C. Circuit has defined an adverse employment action, in accord with *Ellerth*, as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits." *Aliotta v. Bair*, 614 F.3d 556, 566 (D.C. Cir. 2010) (citing *Douglas v. Preston*, 559 F.3d 549, 552 (D.C. Cir. 2009)). "Thus, not everything that makes an employee unhappy is an actionable adverse action." *Id*. As discussed *supra*, Peterson's attempt to establish an adverse employment action would not survive the scrutiny of *Ellerth* or the D.C. Circuit standard. Indeed, in *Hussain v. Gutierrez*, 593 F. Supp. 2d 1, 7 (D.D.C. 2008), the district court held complaints about undesirable job responsibilities insufficient to show discrimination.

Despite the minor differences in definitions and interpretations of adverse employment actions, these opinions from various circuits demonstrate that Peterson's claim would fail if this Court applied any circuit's standard. The legal standard the Fifth Circuit applied in Peterson's case is not the reason his claim fails. Peterson has no claim because, among other reasons discussed in different sections of this brief, Peterson was not subjected to any adverse employment action.

III. Even if he had been subjected to an adverse employment action, Peterson's claim still fails because he did not identify any similarly situated person of a different race who was treated more favorably than Peterson.

Furthermore, further refinement of the definition of adverse employment action would not be dispositive in this case. Even if, *arguendo*, this Court were to hold the Fifth Circuit's interpretation of adverse employment action is too strict, and this Court further held that Peterson's appeal demonstrated a cognizable adverse employment action under a different standard, Peterson's claim would still fail because he has not identified any similarly situated person of a different race who was treated more favorably than Peterson. *Cf., Paske*, 785 F.3d at 985. The district court analyzed the evidence and determined Peterson had failed to identify any similarly situated employee who received more favorable treatment in the relevant context. (App.38a). The district court found that Peterson's *only* purported evidence of similarly situated comparators, from the Mouton and Cox declarations, "fail[ed] to comply with the requirements of Rule 56(c)(4)" (App.38a), because neither declarant "laid the proper foundation to demonstrate their presence on the [East Breaks 165] platform during the relevant period of time or that they had personal information in order to establish that the alleged disparity between the crew members was based on a comparison of similarly situated employees." (App.38a). Therefore, the only "evidence"

Peterson even argues supports his claim has been ruled inadmissible.

Moreover, even if the district court had abused its discretion by making that evidentiary ruling and the ruling could be determined to affect Peterson's substantial rights, the district court correctly alternatively held the Cox and Mouton declarations offered nothing more than "general claims" that Linear Controls treated Caucasian workers better than Peterson. (App.35a). Mouton's declaration actually contradicted Peterson's bare argument that African American employees were not allowed water breaks. In his declaration, Mouton described taking at least three regularly scheduled breaks per day. (ROA.17-30790.595 at ¶ 2).

As this Court held in *Anderson*, 477 U.S. at 252, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; *there must be evidence* on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252 (emphasis added). Further, as discussed *supra* at n.6, the circuit courts agree that a Title VII plaintiff's subjective or conclusory belief or inferences, including a plaintiff's own testimony, are insufficient evidence to establish a claim of discrimination as a matter of law. Therefore, even if Peterson could establish an actionable adverse employment action, his claim would still fail. This case is a poor vehicle to address the question Peterson presented.

CONCLUSION

Discretionary review is not warranted because the district court properly entered, and the Fifth Circuit correctly affirmed, summary judgment in Linear Controls' favor. Peterson was not a victim of discrimination, he waived the issues he brings to this Court, and the Fifth Circuit has not entered a decision which conflicts with any decision of this Court or any other United States court of appeals on the same important matter.

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