21-7851

No._____

ORIGINAL

In THE

Supreme Court of the United States

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

JOSEPH CHHIM,

Petitioner,

v.

City of Houston, Luna Nelson, In the Official Capacity,

Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual " with respect to "compensation, terms, conditions, or privileges of employment " because of the individual's race, religion, sex, or other protected stattus' 42 U.S.C. § 2000e-2(a)(1). The question presented is:

Are the "terms, conditions, or privileges of employment" covered by Section 703(a)(1) limited only to hiring, firing, promotions, compensation, and leave?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Joseph Chhim respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for Fifth Circuit in Joseph Chhim v.City of Houston No.20-20568 (October 29, 2021).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at the above Fed. Appx. Pursuant to 5th Circuit Rule 47.5, the court has determined that this opinion should not be published . The district court 's memorandum Joseph Chhim will take nothing from the City of Houston and Luna Nelson. The Omnibus Opinion and Order of the District Court without upholding the jury verdict from the trial Court is not the Matter of Law.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 2021. This Court has jurisdiction pursuant to 28 U.S. C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 703(a) of Title VII the Civil Rights Act of 1964, 42 U.S.C § 2000e-2, provides:

(a) Employer practices

It shall be an unlawful employment practice for an employer.

(1) to fail or refuge to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin ; or

individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual;s race, color, religion, sex, or national origin.

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employments .... because such individual.... has any practice made unlawful by this section or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any matter in an investigation, proceeding, or litigation under this chapter.

INTRODUCTION

Title VII of he Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. prohibits a range of employment practice s. As is relevant here, Section 703(a)(1) of that Title forbids racial discrimination with respect to an employee's "terms, conditions, or privileges of employment. "42 U.S.C §2000e-2(a)(1).

The ADEA is firmly grounded in and an integral part of this nation's civil rights legacy. Its enactment in 1967 was "part of an ongoing

congressional effort to eradicate discrimination in the workplace," and " reflects a societal condemnation of invidious bias in employment decision," McKennon v. Nashville Banner Co., 513 U.S. 352, 357 (1995). "The ADEA is but part of a wider statutory scheme to protect employees in the workplace nationwide." Id. (listing other civil rights statutes that, along with ADEA, protect employees from discrimination in the workplace). The Court of Appeals majority erroneously narrowed - and thus, threaten to drastically impede the effectiveness of - a remedial statute that this Court has long recognized as a key building block of the nation's civil rights edifice. The Fifth Circuit's ruling risks rendering largely meaningless this Court's recent efforts, in Smith and Meacham, to reaffirm the vitality of the ADEA as anti-discrimination law. The United States of Appeals for the Fifth Circuit should reverse all the decision of the district court because the decision of this court during the summary judgment hearing there was only the judgment in this case was not based on a trial, or other evidentiary hearing, but on the Report and Recommendation of the Assistant City Attorney opposing parties which ignored the Age and retaliation had been exhausted with the EEOC in his complaint.

Plaintiff was not permitted to prove the statement disputed facts that should be the material fact really needed to prove for summary judgment hearing

During the summary judgment hearing the district court failed by not allowing Plaintiff to respond the

Defendant alleging that there is no genuine disputes as to any material fact in this case . Plaintiff raised his hand several times to respond he has the Statement of Material Facts a list of all important facts proving to the court that he has enough case out there that a court can find support for any determination.

Plaintiff, Pro Se,should obtain all documents,including, the plaintiff' personnel records, prior complaints or EEOC charges; internal investigation materials; the company handbook; and the company's policies regarding discrimination, harassment, and retaliation as well as any policies relied on with regard to the adverse decision. Plaintiff should oppose the motion for the Summary Judgment during the hearing . Chhim was not received the deposition therefore, Plaintiff has nothing to attach to this document any pieces of evidence that support his facts. Because this Court did not allow him to Oppose to Motion for Summary Judgment for his evidence of Material Facts that he should claim to support his side of the case but Judge Hughes the District Court failed to allow him he has nothing go against the other side's .

STATEMENT OF THE CASE

In this case, respondent received a group of its applicants Hispanic, Latino to interview or hired them not hiring Chhim (Cambodian-Asian).The Fifth Circuit held that it denied Forma Pauperis (IFP), after applying and Chhim was qualified. Chhim demonstrated and met under Title VII of the Civil Rights Act of 1964 for discrimination on the basis of race and national origin and under the Age

Discrimination in Employment Act (ADEA) for discrimination on the basis of his age. Chhim a 74 -. year- old Asian male original from Cambodia, alleged that he was not interviewed, not considered or hired as custodian with the City of Houston (the City) despite he has met qualifications for the position. Chhim also contended that he was not hired by the City in retaliation for his earlier complaints submitted to the Equal Employment Opportunity Commission (EEOC) and Chhim had filed previous federal lawsuit with Fifth Circuit Court. Finally, Chhim asserted the City breached of a 1994 Settlement Agreement entered by the City and Chhim, and this Settlement did before the Judge Rosenthal and her Magistrate Judge jurisdiction .Therefore, this Settlement Agreement, the City Aviation paid Chhim $5000 just allowed him to apply job with the City different department excepted the City Aviation. Settlement Agreement did not state Chhim should be investigated his termination background 1995, but the Settlement Exhibit " A" RELEASE , Paragraph No. 2 attached on Appeal's brief United States District Court Southern District of Texas Record Excerpts No. 5 that Chhim agreed that the City and Department of Aviation DO NOT ADMIT ANY FAULT IN ANY MATTER AND THAT THIS SETTLEMENT IS ONLY TO MAKE PEACE AND ALLOW ME TO START FRESH IN MY NEW POSITION.

The Fifth Circuit also help this action did not violate Section 703(a) because the different treatment of Chhim who was founded terminated by the City 1995 alleging by performance stated by Human

Resources Luna Nelson, and because Chhim was terminated 1995 by performance trouble stated by District Court Judge who did not state because of retaliation after Chhim filed prior EEOC claim against the City show: (a) he is a member of protected class, (b) he was qualified for his position , he suffered an adverse employment action,and (d) other information was provided for Chhim's bird of date on 1945 and he is Cambodian, Asian, Documented (CHHIM-COH-000014(REV) which was provided by the City of Houston. In fact, age is not included in the application stated by the district court is not appropriate because Chhim can show that he was discriminated against by the City based on his age, discrimination claim is true so that the City hired Bocanegra for the janitor job showing she is younger than Chhim. Bocanegra is Hispanic or Latino, and Chhim is Cambodian, Asian so we have different protected class.

The district Court stated that Chhim offers no facts to the contrary. Chhim was merely an applicant who was not interviewed because the City fired him in 1995 for performance troubles stated by the district court and supported by the Fifth Circuit is the reasons for granting the Writ of Certiorari. Appellant opposes that when applying Custodial Leader with the City Convention Center, Chhim was hired on 1995, he should be the stronger one applicant so Chhim should do background check from the past, he was past yearly performance at least standard performance, when he worked more than 10 years as a Laborer at Hobby Airport and at Intercontinental Airport the City of Houston.

It is unbelievable that the City of Houston hired Chhim after background checked and founded he had performance trouble and supported by the fifth circuit.

Another fact, Chhim applied Custodial Leader for City Public Works Engineering (PWE) he was qualified and he called by (PWE) to interview that it proved that the City had the conflicted hiring policies which is proving to the Fifth Circuit but this Circuit failed to raise this contradiction hiring policies because when applying Human Resources General Services Department (GSD) Luna Nelson did never called or referred him to interview because alleging Chhim was screened and founded he was terminated in 1995 by performance

For discrimination on the basis of his 74-year of age from Cambodia that he was not interviewed or hired as custodian with the City of Houston("The City"), Chhim has the qualifications for custodian position and that the City hired younger Hispanic or Latino for the position did not violate Section 703(a) because the differential treatment of Asian applicant and Hispanic or Latino applicant that did not affect their terms or conditions of employment further entrenches a long standing conflicted Section 703(a)(1) ? And the Fifth Circuit's consistent limitation of that provision to what it has termed "ultimate employment decision hiring, granting leave, discharging, promoting, compensating" is flatly inconsistent with the plain text of Section 703(a).

Every year, thousands of employees bring constructive discharge claims under Title VII of the

Civil Rights Act of 1964 and related statutes prohibiting workplace discrimination. Under constructive discharge doctrine, if those employees "resign because of unendurable working conditions," they are entitled to the same remedies available to employee who have been formally discharged in violation of those anti-discrimination status Pa. State Police v. Suders, 542 U.S. 129, 141 (2004). To bring such claims to court, employees must first seek redress in mandatory administrative proceeding.

Yet the federal courts of appeals are intractably divided over when employees must initiative those proceedings. Five courts of appeals have held that the filing period for a constructive discharge claim begins when the employee resigns, defined as the date when he gives "definite notice" of the decision to leave. Flaherty v. Metromail Corp., 235 F. 3 133, 138 (2d Cir. 2000). This is the earliest date that the claim is complete and actionable. By contrast, three other courts of appeals, including the Tenth Circuit below, start filing period with the employer's last discriminatory act allegedly giving rise to the resignation before the constructive discharge claim exists.

The federal government itself has provided conflicting answers to the question presented. The Equal employment Opportunity Commission (EEOC) has taken a position consistent with the majority rule, but the proceedings below the United States Postal Service, represented by the Department of Justice, argued for the minority's last-act rule.

This case in which the choice between these two timeliness rules is outcome - determinative provides the Court with an ideal vehicle to restore uniformity to the legal landscape, ensuring that constructive discharge claims will no longer turn on geographical happenstance.

Petitioner was hired as Laborer at Hobby Airport on October 5, 1981. After Chhim was transferred to as Laborer in Building Services Intercontinental Airport. Chhim several months working Building Services at Intercontinental Airport, and he was transferred to Physical Plain Maintenance Department as laborer.

After five years working as laborer with the City Physical Plan Maintenance, he applied for Semi-skilled Laborer several times, but he was not promoted. Having several years working with Physical Plan Maintenance as Laborer, Chhim has two years Training as Executive Housekeeping and Management from Houston Community College, and he has another three years College with (80) Credit Semester Hours as Building Maintenance Technology from San Jacinto College. When applying Semi-Skilled Laborer, and sometime he applied Maintenance Mechanic I and other Mechanic II but Chhim never get the promotion with the City Aviation Department. After 10 years experience with Houston Airport, Chhim has very severe mental depression, Chhim met with Physical Plan Maintenance Superintendent he worked with about he has been denied from promotions. Superintendent told Chhim that you have thick accent English and

he assigned Chhim to go Speech Therapy School using Aviation Department times and the City paid the school speech therapy class in about few months . After speech therapy classes, he applied semi-skilled laborer, maintenance mechanic I, and maintenance II but Chhim was not promoted from laborer to semi-skilled laborer. Chhim feel having a very severe mental

depression from the City Aviation Department 's constructive discharge doctrine treats " an employee's reasonable decision to resign because of unendurable working conditions " as a termination by employer. Pa. State Police v. Suders, 542 U.S. 129, 141 (2004); see also Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 894 (1984). Because the City Aviation Department used its coercion of unendurable working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign. Therefore, Chhim resigned from the City Aviation Department on November 16, 1992.

Chhim's Prior Suit against the City of Houston

1. Shortly, after the assignment ended, petitioner resigned from City of Houston Physical Plan Maintenance, Chhim then continued to apply job with the City on the different departments but he was not rehired. Chhim also filed a timely charge with Equal Employment Opportunity Commission (EEOC). Chhim received the rights to sue with the District Court, and continued to appeal with the Fifth Circuit Court.

2. P rior suits filed against City of Houston he filed a suit styled Civil Case No. H-93-1964, he then filed Chhim v. Texas Workers Compensation Case No . 634974 in Harris County at Law No. 2, consolidated Civil Action H-90-1760 and H-90-374, that was on appeal to Fifth Circuit (cause No. 94-20037) all of which on the above cases and claim were filed against the City after he received the severe mental depression after Chhim requested to resign on November 16, 1992 he then shortly went to see the the Diploma American Board Psychiatry.

3. It is related to present suit filing with District Court, and appealed to Fifth Circuit because Chhim saw

" Patel Biren, MD on 4/13/2020 at Kelsey-Clinic clinic with major depressive disorder and generalized anxiety disorder should not be overlooked because it has been pleaded since Plaintiff filing original complained and Chhim continued to see Patel Biren who evaluated him on April 22, 2020"with which Chhim attached it with Appellant 's Motion to allow attachment to rehearing on Exhibit - F ".

Based from the different cases and the Texas Workers Compensation claim showing on the above, the City of Houston requested Petitioner to do Settlement Agreement, so that the parties agreed that the terms and conditions of this agreement will be put on the record in front of the Judge " Rosenthal or her designated Magistrate Judge with all parties the City and Petitioner Chhim presented. On this the 20 day of October, 1994, all Parties Agreed and Signed before the Records of Judge Rosenthal and her designated Magistrate Judge that this settlement acknowledge before Notary Public and for the State of Texas

that all Parties including with the District Court's Records that all Parties Do Not admit Any "Fault " In Any Matter And that this Settlement Is Only to Make Peace and Allow Me To Start Fresh in my New position. Chhim signed for Acknowledgment on 20th October, 1994 before Notary Public in and for The State of Texas. Therefore, the District Court handling Chhim present case has no Jurisdiction to change this Settlement Agreement under the decision of Judge Rosenthal recording a Settlement witnesses. The City requested to do settlement Agreement to dismiss suits and complaints by Chhim ,but the settlement did not put that Chhim will not interview or rehire because of previous dispute or any alleging because dissatisfied performance. All parties agreed that the settlement the City agreed to pay Chhim Five Thousand ($5000) to dismiss all the above disputes complained by Chhim the reason for Chhim not re-apply jobs with the Aviation Department but he can apply jobs with the City of Houston different Department that it showed the City breached settlement because after applying and qualifying he has not been interviewed or hired by GSD in violation of settlement.

4. The fact was that Chhim did not tell the parties about he applied custodial lead at the City Convention Center. Two weeks before the settlement meeting, Chhim was called by the City Human Resources Department that Chhim was hired by the City of Houston Convention Center, Chhim should do background check and drug test . Chhim was past the above tests and he started working with Convention Center on October 21, 1994 one day after the Settlement Agreement was meeting on October 20, 1994. After Five to six months working with the City Convention Center, Chhim was called by the

Secretary of Gerard J. Tollett, Director Civic Center to meet him at his office and then talked with Mr. Marcuss Dobbs by telephone who was the City Attorney representing the City of Houston's case against petitioner. After a month later, Chhim received a conclusory terminated letter alleging the dissatisfied performance when he worked with Convention seven months from the hiring date October 21, 1994 to the termination on July 20, 1995.

5. After termination by Convention, Chhim applied jobs several years with the City of Houston, but Nelson, Human Resources representative did not send Chhim's applications to recruited department because Luna Nelson alleged Chhim was founded he was terminated 1995 by performance and Luna continued to hire different inside and outside applicants without considering Chhim who applied and qualified. When Chhim applied Custodial Lead with the City of Houston Public Work and Engineering Department ("PWE"), Chhim applied and qualified for supervisory position on the above the City PWE called him to do the interview this position showing Luna Nelson Human Resources failed to use the City hiring policies because Chhim was qualified but General Service Department (GSD) or Human Resources Representative used the pretext hiring policies, it did not refer his applications to recruiter to interview until the present case that Chhim applied Custodian and qualified, but Chhim's application was not considered because Luna Nelson find out that Appellant was terminated 1995 by performance alleging by Nelson.

Therefore, the declaration of Warren C. Davis, JR, the Director of Human Resources City of Houston declared he did not consider Chhim's applications is immaterial affidavit when PWE considered Chhim's job application application by interviewing him when he applied the custodian lead and Chhim interview by (PWE) so that it indicated that the City has the conflicted hiring policies.

Chhim Present Suit Against The City of Houston

Appellant, Joseph Chhim, a former employee of Appellee. He had been terminated by City of Houston in 1995 for alleging performance issues. Chhim applied PN 21627, (Custodian) position, but his application was not processed to the hiring manager to interview the reason GSD alleging Chhim was terminated in 1995 by performance. Chhim then filed charge with EEOC for employment discrimination and retaliation. The current lawsuit, Chhim filed charge with EEOC, on October 28, 2019, and Chhim received Rights to Sue letter on October 28, 2019, as same charge filing date without EEOC's investigation.

EEOC permitted the charging parties to used documents from prior Chhim Joseph 's discrimination charge. Chhim's current charge lawsuit, he applied PN#21627 (Custodian), application, Page.2, skilled knowledge all applicants should be filled the language: speak, read, and write. Beside English, Chhim filled speak, read, write Cambodian language (ROA, 20-20568.325.326). After receiving Rights to Sue letter on October 28, 2019, Petitioner then filed suit in the U.S. District Court for Southern District of Texas. As is relevant here, the complaint alleged that respondent had violated Title VII

because when Chhim applied PN# 10208 Custodian Lealer with the City of Houston Public Works Department showing Chhim applied and qualified because he was interviewed by the recruiter manager, but when he applied PN# 21627 (Custodian), Chhim was not called by Luna Nelson to do interview for position custodian alleging Chhim was founded he was terminated 1995 by performance.

The letter July 24, 2013, from Deidra A.Norris, Assistant City Attorney submits her position statement in response to the EEOC charge of discrimination filed by complainant Joseph Chhim, charge No. 846-2013-20998 which was filed on May 1, 2013 that Deidra stated that Chhim applied jobs with the City that his applications should not refer to interview because Chhim was founded he was terminated in 1995 by performance.

Chhim applied PN# 10208 (Custodian Leader) showing he applied and qualified because he was interviewed by the recruiter manager from Public Works (PWE) showing the City of Houston General Service Department (GSD) has the conflicted hiring policies because when Chhim applying more than 10 different positions and qualified, but Luna Nelson (GSD) did not consider Chhim's qualifications and 11 applicants applying with Luna Nelson (GSD) were interviewed and hired that this is indicating that the City of Houston General Service Department (GSD) violated its hiring policies when Human Resources or GSD under Luna Nelson had failed to consider the qualified Chhim's applicant instead to hire Hispanic or Latino applicants by using the conflicted hiring policies between the City of Houston Public Works and the City of Houston GSD.

After filing suit with the U.S. District Court for the Southern District of Texas , Houston Division. As is relevant here, Chhim present suit against the City of Houston :

Judge Lynn Hughes on introduction, Chhim sued the City of Houston and Luna Nelson as Official Capacity (a) breach of settlement, (b) age discrimination, (c) national origin discrimination, and (d) retaliation. The City has moved for summary judgment saying it did not breach the settlement, no decision maker were aware of his age, national origin, or protected activity, and no relevant adverse employment action occurred. The district court granted respondent's motion for summary judgment

On appeal, the Fifth Circuiut affirmed

Appellant Joseph Chhim, Cambodian - American, appeals the dismissal of his claims of employment discrimination and retaliation under Title VII, 42 U. S. C. §2000, et seq., and breached of Settlement Agreement, against Appellee the City of Houston. Aracelly Bocanegra, Hispanic or Latino, was hired by the City of Houston in July 29, 2020 as custodian for General Service Department (GSD). Chhim, proceeding pro se, requested to file an appeals for forma pauperis (IFP) on his appeal because the district court denying Chhim complained under Title VII of the Civil Right Act of 1964 for discrimination on the basis of race and national origin and under Age

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• Pursuant to 5th Circuit Rule 47.5, the court ha s determined opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH Circuit Rule47.5.4.

Discrimination in Employment Act (ADEA) for discrimination on basis of his age. Chhim a 74-year-old Asian male original from Cambodia, alleged that he was not interviewed or hired as a custodian with the City of Houston despite having qualifications for the position and that the City instead hired a younger Hispanic or Latino for the position. The Fifth Circuit Erred When Stating Chhim Was Not Hired As Custodian Despite Having Superior Qualifications, And This Court stated He Has No Evidence To Support Chhim Was More Qualified That the Hispanic or Latino Was hired As Custodian .Chhim asserted that all Chhim's brief from district court to fifth circuit court, he was never ever filed he was more qualified than the other promoted or hired applicants. The Fifth Circuit concluded that petitioner had failed to allege a prima facie case of disparate treatment. The basis for the court of appeals' holding was longstanding circuit precedent that "strictly construes Section703(a)'s prohibition on disparate treatment to reach"ultimate instead employment decisions," granting leave, discharging, promoting, or compensating employees. (Quoting McCoy v. City of Shreveport, 492 F.3d 551, 559-60 (5th Cir. 2007)). Because petitioner had not been discharged , denied leave or promotion, or paid differently from other workers, Title VII had nothing to say.

REASONS FOR GRANTING THE WRIT

There is an intractable split over which employment practices can form the basis for a Section 703(a) claim.

Section 703(a) of Title VII makes it an "unlawful employment practice" to "discriminate against any individual " with respect to "terms, conditions or privileges of employment because of such individual's, race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a) (1). In short, employers cannot take adverse employment actions because of an individual's race." Ricci v. DeStefano, 557 U.S 557, 579 (2009) (citing 42 U.S.C. §2000e-2(a)); see also McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802(1973).

In this case, the Fifth Circuit adhered to its longstanding rule that only "ultimate" employment practices (such as hiring and firing) fall within Section 703(a)'s prohibition on discrimination.

A. The split stems from a gap in the Court precedents.

In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Court articulated the basic framework for plaintiffs seeking to establish a disparate treatment claim under Section 703(a) through circumstantial evidence. The plaintiff in that case challenged a covered employment practice because he showed that[1] "despite his qualifications he was rejected" when he applied for a job Id. At 802.

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[1] The Court explained that the plainttiff could establish his prima facie case "by showing (I) that he belongs to a racial minority (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." McDonnell Douglas, 411 U.S. at 802.

In later cases, plaintiffs challenged employer actions other than failure to hire. So lower federal courts came to describe Section 703(a) as requiring the plaintiff to show some "adverse employment action." See, e.g. Craff v. Metromedia, Inc., 766 F.2d 1205, 1211 n.5 (8th Cir. 1985) (challenging a job reassignment). But although "hundreds if not thousands of decisions say that an adverse employment action is essential to the plaintiff's prima facie case, that term does not appear" anywhere in Section 703(a). Minor v. Centocor, Inc 457 F.3d 632, 634 (7th Cir. 2006). In fact, this Court "has never adopted it as a legal requirement" or explained its scope. Id.

B. The court of appeals are deeply divided.

1. The Fifth and Third Circuit have narrowed Section 703(a)'s prohibition on discrimination to only a few employment practices.

The Fifth Circuit interprets Title VII's substantive prohibition on discrimination to reach only "ultimate employment decisions." McCoy v. City of Shreveport, 492 F.3d 551, 559-60 (5th Cir. 2007). This restrictive construction dates back decades. See Dollis v. Rubin, 77 F.3d 777 (5th Cir. 1995). And the Fifth Circuit's decisions have consistently limited what counts as an "ultimate" decision to only :hiring, granting leave, discharging, promoting, or compensating." McCoy, 492 F.3d at 559 (quoting Green v. Adm'rs of Tulane Educ. Fund, 284 F.3d 642, 657 (5th Cir. 2002)). Although this Court's decision in Burlington Northern required the circuit to abandon

this narrow construction for Section 704 cases, the circuit has held that this construction "remains controlling for Title VII discrimination claims" under Section 703. McCoy, 492 F.3d at 560.

In light of its limitation of Title VII's antidiscrimination provisions to "ultimate decisions, the Fifth Circuit has held that subjecting only a minority individual to drug tests or assigning additional work responsibilities only this employee or applicant would not violate Section 703(a). See, e.g., Johnson v. Manpower Profl Servs., Inc., 442 Fed. Appx. 977, 983 (5th Cir. 2011), Ellis v. Compass Grp. USA, Inc., 426 Fed. Appx. 292, 296 (5th Cir. 2011).

The Third Circuit nominally asks whether a particular discriminatory act is "serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment." Storey v. Burns Int'l Sec. Servs., 390 F.3d 760, 764 (3d Cir. 2004).. In practice, this test produces the same results as the Fifth Circuit's "ultimate employment decisions" standard.

In Stewart v. Union County Board of Education, 655 Fed. Appx. 151 (3d Cir. 2016), the Third Circuit actually used the Ellerth list (which closely parallels the Fifth Circuit's list of "ultimate employment decisions") to decide whether the plaintiff had challenged an employment decision covered by Section 703(a). Steward alleged, among other things, that a supervisor moved all white security guards inside the building during the winter season and the black African or other Minority staff were assigned to work outdoors in the colder weather climates"; he also

alleged that his supervisor refused to "rotat[e]" the assignments. Appellant's informal Brief at 10, Stewart v. Union Cty. Bd. of Educ., 655 Fed. Appx. 151 (3d Cir. 2016) (No. 15-3970), 2016 WL 1104687. Nonetheless, the Third Circuit affirmed the district court's grant of summary judgment on the ground that Stewart had not "suffered an actionable adverse action." Stewart, 655 Fed. Appx at 155.

In another recent case that bears a striking resemblance to petitioner's, the Third Circuit again reached the same conclusion. In Harris v. Attorney General United States, 687 Fed. Appx. 167 (3d Cir. 2017), a black or minority employee brought suit alleging that he had been required to work outdoors despite "dangerously high" temperatures while " white staff were allowed to discontinue heir work activities outside." The Third Circuit "did not doubt the plaintiff's account of what happened to Black or other minority employee or applicant received seriousness of the plaintiff suffered. Nevertheless, it held that he had "failed to make out a prima facie case of prohibited race or color discrimination" because the employer had not acted with respect to the plaintiff's compensation, terms, conditions, or privileges of employment." (quoting Storey, 390 F.3d at 764).

2. Seven other circuits - the Second, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh - reject the restrictive approach taken by the Third and Fifth Circuits.

The Second Circuit "ha[s] no bright-line rule to determine whether a challenged employment action is sufficiently significant to serve as the basis for a claim of discrimination." Davis v. N.Y.C. Dep't of Educ., 804 F.3d 231, 235 (2d Cir. 2015). Therefore, in a Tile VII case, discrimination is actionable if it involves "as less distinguished title, a material loss of benefits,

significantly diminished material responsibilities," or other practices relevant to a "particular situation. " Chung v. City Univ. of N.Y., 605 Fed. Appx. 20,22 (2d Cir. 2015).

Thus, the Second Circuit has held, contrary to the Third and Fifth Circuits, that discriminatory allocation of work assignment is recognizable under Section 703(a). In Feingold v. New York, 366 F.3d 138 (2d Cir. 2004), for example, the Second Circuit held that the plaintiff had established a prima facie case of disparate treatment through evidence that white state ALJs had been assigned heavier caseloads than their minority colleagues. Id. At 152-53. Even "performance of normal job duties can amount to an adverse employment action if they are divvied between co-workers in a discriminatory fashion." Lopez v. Flight Ser. &Sys., Inc., 881 F. Supp. 2D 431 , 441 (W.D.N.Y.) 2012). Thus, unevenly allocating baggage unloading duties between Puerto Rican and white employees could constitute a prohibited employment practice. Id. At 442.

The Sixth Circuit has "rejected the rule that only 'ultimate employment decisions' such as hirings, firing, promotions, and de motions" can give rise to a "discrimination claim" under Section 703(a)(1). Michael v. Caterpilla Fin.. Servs. Corp., 496 F . 3d 584 594 (6th Cir. 2004).

The Seventh Circuit has likewise squarely refused to interpret Section 703(a) " so narrowly as to give an employer a license to discriminate'" Lewis v. City of Chicago, 496 F.3 645, 654 (7th Cir. 2007) (quoting Farrell v. Butler Univer. , 421 F.3d 609, 614 (7th Cir.

2005)). A narrow definition that excludes all but a few employment decisions from the section's ambit would "create a loophole for discriminatory action by employers." Id. Accordingly, Section 703(a) forbids discriminatorily subjecting a worker to "conditions" that are humiliating, degrading, unsafe, [or] unhealthful.." Herrnreiter v. Chi. Hous. Auth., 315 F.3d 742, 744 (7 th Cir. 2002).

This case is an excellent vehicle for resolving the question presented.

1. The question presented was pressed and passed upon below. Beginning with his timely EEOC charge, petitioner has repeatedly asserted that he was subjected to differentiated (and harsher) working conditions based on race in violation of Title VII. (quoting EEOC charge); and (quoting plaintiff's complaint).

The Fifth Circuit upheld the district court's grant of summary judgment solely because the " working conditions" without comparing Chhim who applied and hired by the City of Houston Convention Center to fill as Custodial Leader on behalf of 27 candidates that this is showing that Chhim had a strong background not only experience and related college training but also he had satisfied performance yearly reviewing with which Chhim was hired as supervisor position in 1995.

The Fifth Circuit 's decision is wrong

The Fifth Circuit is wrong that only " ultimate employment decisions" can give rise to disparate treatment claims under Section 703(a). That position flouts Section 703(a)'s plain text. It is inconsistent

with federal employment law more generally. And it contradicts this Court's decisions and the EEOC's consistent interpretation of Section 703(a).

A. The Fifth Circuit's decision is contrary to the text of Section 703(a).

1. The phrase "ultimate employment decisions" appears nowhere in the text of Section 703(a). Rather, that phrase is the Fifth Circuit's judicial gloss on the phrase "adverse employment actions," Which is itself a "judicial gloss" on the statutory text, Minor v. Centocor, Inc., 457 F.3d 632, 634 (7th Cir. 2006). But a judicial gloss, let alone a gloss-on-a-gloss, "must not be confused with the statute itself." Id. And that is even more true when the gloss-on-a-gloss ignores the key words in the statute.

The phrase that does appear in the statute prohibits discrimination with respect to the "terms, conditions, or privileges of employment." 42 U.S.C. §2000e-2(a). In interpreting a statute, court must "start with the specific statutory language in dispute." Murphy v. Smith, 138 S. Ct. 2067, 2074 (2018) (quoting Perrin v. United States 444 U.S. 37, 42 (1979)).

It is obvious that the phrase "terms, conditions, or privileges of employment" reaches employment practices beyond "hiring granting leave, discharging, promoting, or compensating,"Pet. App.4a. As long ago as Lochner v. New York, 198 U.S. 45 (1905), Members of this Court described the physical environment in which employees perform their jobs as one of the "conditions" of employment "Id. At 70

(Harlan, J., dissenting) (quoting a description "[t]he labor of the bakers" as being "performed under conditions injurious to the health of those engaged in it because "it requires a great deal of physical exertion in an overheated workshop"). And shortly before Title VII was enacted, this Court referred to the cold working conditions that led to an walkout from a machine shop. NLRB v. Wash. Aluminum Co., 370 U.S.9, 14-15 (1962).

Other language in Section 703(a)(1) confirms that "terms" and "conditions" carry their ordinary meaning here. Section 703(a)(1) makes it unlawful for an employer to undertake certain acts" because of such individual's race, color, religion, sex, or national origin." The section begins by singling out decisions to "fail or refuse to hire or to "discharge" an individual . 42 U.S.C § 2000e-2(a)(1). But the text then continues that it is unlawful "otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment." Id.,(emphasis added). The use of the word "otherwise" signals, "[o]n textual analysis alone," that the provision is designed "to afford broad rather than narrow protection to the employee." NLRB v. Scrivener, 405 U.S. 117, 122 (1972). It signifies a "catchall phrase." Helsinn Healthcare S.A. v. Teva Pharma. USA, Inc., 139 S. Ct 628, 633 (2019); see also Otherwise, Black's Law's Law Dictionary (10th ed. 2014)

2. Other language in Section 703(a)(1) confirm that "terms" and " conditions" carry their ordinary meaning here. Section 703(a)(1) makes it unlawful for an employer to undertake certain acts"because of such individual's race, color, religion, sex or national origin." The section begins by singling out decisions to "fail or refuse to hire" or to discharge " an individual . 42 U.S.C.. §2000e-2(a)(1). But

the textthen continues that it is unlawful "otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment." Id. (emphasis added).

B. The Fifth Circuit's construction of Section 703(a)(1) is inconsistent with other provision of federal employment law.

1. The Fifth Circuit's restriction of Section 703(a)(1) to hiring, granting leave, discharging, promoting, or compensating cannot be square with the overall structure of Section 703(a). The Statute clearly covers segregation: Section 703(a)(2) makes it unlawful for an employer to "limit, segregate, or classify" employees in any way that would "deprive or tend to deprive them of "employment opportunity ." 42 U.S.C. §2000e-2(a)(2).

The statute's express condemnation of segregation confirms that segregated working conditions fall within the ambit of Section 703(a)(1). As the EEOC explains in its Compliance Manual on which this Court frequently relies-because "§ 703(a) (1) is broader than §703(a)(2)," an employer practice "which violates § 703(a)(2) can also violate § 703(a)(1)." EEOC Compliance Manual § 618.1(b), 2006 WL 4672738.

Many early EEOC proceedings involved segregated job assignments or segregated working conditions. And in those cases, the EEOC repeatedly found that such segregation involved "discriminat[ion]," a word used in Section 703(a)(1) but not in Section 703(a)(2). See, e.g., EEOC Decision No. 71-453, 3 Fair Empl. Prac. Cas. 384 (1970), at *2

(concluding that assigning workers to different "gangs" based on race involved both unlawful segregation and unlawful "discriminat[ion]"); EEOC Decision No.71-32, 2 Fair Empl. Prac. Cas. 866 (1970), at *2 (finding that an employer's action of holding racially separate Chriistmas parties "discriminates against its Negro employees on the basis of race with respect [to] a condition or privilege of employment because of their race").

Thus, to fully realize Section 703's command to desegregate the workforce, Section 703(a)(1) must reach beyond "ultimate" employment decisions.

2. Congress reaffirmed the expansive scope of Section 703(a)(1) when it amended 42 U.S.C. § 1981. In Patterson v. McLean Credit Union, 491 U.S. 164 (1989), this Court interpreted the then-existing version of Section 1981, which covered the right to "enforce contracts." It held that "conduct by the employer after the contract has been established"- specifically, the "imposition of discriminatory working conditions"- was not covered by that version of Section 1981. Id. At 177.

Congress "respond[ed]" to this Court's decision by "expanding the scope" of Section 1981 (and several) other civil rights statutes). Pub.L. No. 102-166, § 3(4). It added a subsection to Section 1981 prohibiting racial discrimination that impairs the "enjoyment of all benefits, privileges, terms, and conditions " in any contractual relationship. 42 U.S.C. § 1981(b). Congress's choice to mirror Title VII's language reflected its understanding that Title VII already reached working conditions. See also Patterson, 491 U.S. At 18 (contrasting the pre-amendment version of Section 1981 with "the more expensive reach of Title VII of the Civil Rights Act of 1964").

3. When Congress has wanted to address only a narrow subset of employment practices, it has used language quite different from what it used in Section 703(a)(1). For example, the Immigration Reform and Control Act contains a provision governing " unfair immigration-related employment practice." 8 U.S.C. § 1324b(a)(1). But that provision, in sharp contradistinction to Section 703(a)(1), applies solely when a covered party "discriminate[s] . . . with respect to the hiring or recruitment or referral for a fee. . .or the discharging" of an individual. Id. The difference between the language of the two statutes confirms that in Section 703(a)(1), Congress went beyond protecting employees against discrimination with respect only to ultimate employment decisions.

The centerpiece of Section 703(a) is its prohibition on "discrimination.." As then - Judge Kavanaugh explained, when an individual is subjected to an employment practice "because of" his race, it does not matter whether he suffered other tangible consequences as well. Ortiz-Diaz v. U.S . Dep't of Hous. & Urban Dev., 867 F.3d 70, 81 (D.C. Cir. 2017). The employer's action "plainly constitutes discrimination with respect to compensation , terms, conditions, or privileges employment in violation of Title VII. Id. (Kavanaugh, J., concurring) (quoting 42 U.S.C §2000e-2(a)).

CONCLUSION

For the foregoing reasons, the petitioner for a writ of certiorari should be granted.

Respectfully submitted

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