No. 22-263

In The

Supreme Court of the United States

YVES WANTOU,

Petitioner,

v.

WAL-MART STORES, TEXAS, L.L.C.,

Respondent.

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

SUPPLEMENTAL BRIEF FOR PETITIONER

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TABLE OF AUTHORITIES

Petitioner respectfully files this Supplemental Brief pursuant to Rule 15(8), to call the attention of the Court to new cases and intervening matter, including, *inter alia*, in *Muldrow v. City of St. Louis et al.*, case which is pending before this Court (Case # 22-193). On 01/09/2023, the Court invited the Solicitor General to file a brief in *Muldrow* to express the views of the United States. Petitioner respectfully asks the Court to hold this Petition pending *Muldrow*; and in the event of grant of certiorari in *Muldrow*, the Court should grant certiorari in this case also and hear both cases as companion cases; or alternatively, after the Court decides *Muldrow* on the merits, it should vacate and remand the Fifth Circuit's ("FCCA") decision in the instant case as to Hostile Work Environment ("H.W.E.") and denial of Cat's Paw Theory Instructions (C.P.T.I.'s). Should the Court deny certiorari in *Muldrow*, the Court should grant this petition for certiorari and permit review of the case on the merits.

On 09/16/2022, Petitioner filed Petition for Certiorari as to the FCCA's judgment. In order to comply with the deadline (09/16/2022) for filing Petition, Petitioner had to substantively complete and submit the attendant brief to the publisher multiple weeks in advance of deadline. Since said submission of Petitioner's brief, Plaintiff became aware of numerous critical cases and filings in this Court, critical decisions in different Circuits and different District Courts within different Circuits that occurred either after said submission or shortly before same such that they reasonably could not have been known to Petitioner at the

time of submission. Said cases, filings and decisions include:

- Petition for Certiorari in *Muldrow v. City of St. Louis et al.*, S.Ct. Case # 22-193, docketed on 08/31/2022.
- Amicus Brief by Constitutional Accountability Center in *Muldrow*, filed 09/30/2022.[1]
- Amicus Brief by National Employment Lawyers Association in *Muldrow*, filed 09/30/2022.[2]
- *MacIntyre v. Carroll College*, Ninth Circuit, Case # 21-35642, decided on 09/08/2022.[3]
- *Chapman v. Oakland Living Center, et al.*, Fourth Circuit, Case # 20-2361, decided on 08/30/2022.[4]
- *Lockhart v. Energy Transfer Partners*, WD Pa, Case # 21-35642, decided on 09/29/2022.[5]

ARGUMENT

I. *Muldrow* Case

Muldrow, just as the instant case, at its core "boils down" to the fundamental question of whether the discrimination undergone by the plaintiff constituted

[1] Sup.App.1-11 (excerpts).

[2] Sup.App.12-16 (excerpts).

[3] Sup.App.17-18 (excerpts).

[4] Sup.App.19-23 (excerpts).

[5] Sup.App.24 (excerpts).

discrimination because of a protected characteristic, **"with respect to his compensation, terms, conditions, or privileges of employment**."[6] In *Muldrow*, two entities (Constitutional Accountability Center ("CAC") and National Employment Lawyers Association ("NELA")) with unique and indisputable experience and expertise as to employment discrimination law and, for that matter, constitutional and civil rights law, filed *amicus curiae* briefs[7] in which they abundantly showed that the pivotal question in a Title VII case is whether the employer discriminated against the plaintiff "'with respect to his compensation, terms, conditions, or privileges of employment' because of a protected characteristic"[8] ***under the plain language and originally intended meaning of the terms of the statute***.[9] If the answer to this question is, **on the disjunctive**, affirmative, then Title VII was violated irrespective of the many atextual requirements/gloss added by the various Circuits to the plain language of Title VII, many of which atextual requirements/gloss undercut "'the paramount concern of Congress in enacting Title VII[, which] was the elimination of discrimination in employment,' and ensuring that 'similarly situated employees are not . . . treated differently solely because they differ with respect to

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[6] *See* 42 U.S.C. § 2000e-2(a)(1).

[7] *See* Sup.App.1-11 (excerpts); Sup.App.12-16 (excerpts).

[8] Sup.App.3 (quoting 42 U.S.C. § 2000e-2(a)(1)); *see also* Sup.App.14 (quoting same).

[9] Sup.App.3-7; Sup.App.14-16.

[protected characteristic].'"[10] "Congress intended the prohibition on discrimination in the 'terms, conditions or privileges' of employment '**to strike at the entire spectrum of disparate treatment**,' not merely 'economic or tangible discrimination.'"[11]

As CAC showed in *Muldrow*, this Court "has explained that 'Title VII tolerates no . . . discrimination [on the basis of a protected characteristic], **subtle or otherwise**,'[12] including with respect to any 'benefits that comprise the 'incidents of employment' . . . or that form 'an aspect of the relationship between the employer and the employees.'"[13]"[14] Indeed, as noted by CAC, this Court has stated that "[I]t is abundantly clear that Title VII tolerates no racial discrimination, **subtle or otherwise**."[15] Yet, in Wantou's case, FCCA erroneously limited its inquiry to the verbal harassment explicitly regarding Wantou's protected characteristics and was erroneously oblivious of all other types of harassment, notably harassment a jury could find to be subtly linked to Wantou's protected characteristics. As CAC showed in *Muldrow*, the real test as

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[10] Sup.App.9 (quoting *T.W.A. v. Hardison*, 432 U.S. 63, 71-85 (1977); citing *EEOC v. Shell*, 466 U.S. 54,77 (1984)).

[11] Sup.App.14-15.

[12] Sup.App.6 (Emphasis added) (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973)).

[13] Sup.App.6-7 (quoting *Hishon v. King & Spaulding*, 467 U.S. 69, 75 (1984)).

[14] Sup.App.6-7.

[15] Sup.App.10 (Emphasis added) (quoting *McDonnell*, *supra*).

to Title VII violation is "whether [the plaintiff] would have been treated the same regardless of [protected characteristic]"[16] "Once this fact is established, 'the analysis is complete.'"[17] This test is easily passed in Wantou's case both with explicit verbal harassment as to Wantou's race/national origin, and harassment a jury would find subtly linked to Wantou's race.

Under the statute's plain language, and as the statute was originally plainly intended, a plaintiff alleging Title VII discrimination must simply show that an employer discriminated against him "with respect to his compensation, terms, conditions, or privileges of employment" because of a protected characteristic.[18] "At the time of Title VII's passage, the ordinary meaning of 'discriminate' was to 'make a difference in treatment or favor (of one as compared with others).'"[19] "In 1964, much like today, 'terms' meant '[p]ropositions, limitations, or provisions, stated or offered, as in contracts, for the acceptance of another and determining the nature and scope of the agreement.'"[20] "[T]he word 'conditions' referred to '[a]ttendant circumstances [or an] existing state of affairs,' and a 'condition' meant

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[16] Sup.App.8-9 (quoting *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1743 (2020)).

[17] Sup.App.9 (quoting *Chambers v. D.C.*, 35 F.4th 870, 872 (D.C. Cir. 2022)).

[18] Sup.App.3 (quoting U.S.C. § 2000e-2(a)(1)); *see also* Sup.App.8 (quoting *Bostock*, *supra*).

[19] Sup.App.4-5 (quoting *Webster's New International Dictionary* 745 (2d ed. 1959)) ("*Webster's II*").

[20] Sup.App.6 (quoting *Webster's II*, at 2604).

'[s]omething established or agreed upon as a requisite to the doing or taking effect of something else.'"[21] "[A] 'privilege' meant '[a] right or immunity granted as a peculiar benefit, advantage, or favor,'[22] or 'such right or immunity attaching specif[ically] to a position or an office.'[23]"

Based on the above definitions, at the time the statute was passed, of the terms used therein, it is undeniable that Wal-Mart violated Title VII by continuously perpetrating (**besides verbal harassment explicitly connected to Wantou's protected characteristics**) verbal harassment subtly connected to Wantou's race and nonverbal harassment a jury would find to be directly or subtly connected to Wantou's race. First, among the "terms and conditions" of Wantou's employment, was to be built-in Title VII's own mandate that " 'Title VII tolerates no . . . discrimination [on the basis of a protected characteristic], **subtle or otherwise**,'[24] including with respect to any 'benefits that comprise the 'incidents of employment' . . . or that form 'an aspect of the relationship between the employer and the employees.' "[25]"[26] Wal-Mart violated Wantou's

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[21] Sup.App.6 (quoting *Webster's II*, at 556).

[22] Sup.App.6 (quoting *Webster's II*, at 1969).

[23] Sup.App.6 (quoting *Webster's Third New International Dictionary* 1805 (Philip Babcock Gove ed. 1961)).

[24] Sup.App.6-7 (Emphasis added; brackets in original) (quoting *McDonnell*, *supra*).

[25] Sup.App.6-7 (quoting *Hishon v. King & Spaulding*, 467 U.S. 69, 75 (1984)).

[26] Sup.App.6-7 (Emphasis added).

terms/conditions of employment by actively promoting discrimination against Wantou because of Wantou's protected characteristics. Evidence indisputably shows Wantou complained, **as far back as May/June 2015** (***and not in late October 2015 as FCCA surmised***[27]) to Wal-Mart, through Wal-Mart's managers, about being subject to illegal harassment; but Wal-Mart stood idly by and allowed said harassment to continue unabated and to actually flourish.[28] Because of Wal-Mart's inaction, Wantou filed a formal illegal harassment complaint on 10/01/2015;[29] but Wal-Mart simply used delaying tactics/excuses to avoid taking any action, including avoiding investigating Wantou's allegations of H.W.E., thus violating its duty to effect prompt remedial action; and because of Wal-Mart's continued delay and avoidance, Wantou filed yet another complaint in November 2015, complaining of Wal-Mart's refusal to investigate and halt Wantou's H.W.E.[30] When Wal-Mart finally started conducting what was a sham investigation (half a year after Wantou's initial complaint of H.W.E.), not only was it "too little too late,"[31] but Wal-Mart's only purpose in conducting said investigation was to defend the perpetrators of illegal

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[27] Pet.App.31 n.1.

[28] Pet.App.81-83.

[29] Pet.App.83-84; ROA.6374-75.

[30] ROA.6376-77.

[31] *Christian v. Umpqua Bank*, 984 F.3d 801, 813 (9th Cir. 2020).

harassment in their actions rather than put an end to said illegal harassment.[32]

Crucially, instead of distancing the racist perpetrators from employment actions concerning Wantou and otherwise limiting their impact on Wantou's terms/conditions/privileges of employment, **Wal-Mat did exactly the opposite**. Coachings certainly alter terms/conditions/privileges of employment, including the prospects of advancement within an organization, the employee's worth in the organization, the psychological well-being of the employee; and coachings make the employee's job and job "security" with the employer more tenuous. Thus a coaching issued to an employee on account of the employee's protected characteristics unduly affects employment terms/conditions/privileges.

Wantou stated that the practice of issuing Wantou bogus coachings based on false allegations made by the racist employees Wantou had repeatedly complained about began with the arrival of Leeves as Pharmacy Manager.[33] As EEOC found, even before Leeves' arrival as Pharmacy Manager, another African pharmacist, Charles Uduma, "who had previously worked with Leeves told Wantou that Leeves, who was white, was a racist . . . According to Wantou, [this] turned out to be true."[34] Wantou also repeatedly complained that

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[32] ROA.6082-83, ROA.7208.

[33] ROA.6026.

[34] Pet.App.118; ROA.6026.

Leeves had made herself "the spokesperson and the advocate of" racist Caucasian pharmacy staff.[35]

Wal-Mart itself and Leeves (as Pharmacy Manager) illegally directly used the racist perpetrators complained about by Wantou to adversely affect Wantou's employment terms/conditions/privileges; and Wal-Mart gave *carte blanche* to Leeves and the other racist perpetrators to affect Wantou's employment terms/conditions/privileges at their heart's content. Thus, on 03/16/2022, Wal-Mart sought feedback on Wantou's work exclusively from the five racist Caucasian individuals Wantou had repeatedly complained about (in a pharmacy of **over thirty employees**,[36] therefore with more than twenty-five other employees from which Wal-Mart could have obtained feedback!), and on the basis of said alleged feedback, Wal-Mart issued Wantou an alleged coaching on 03/16/2016.[37] Also, Samples (who habitually called Wantou utterly racist epithets) repeatedly sought to harass Wantou by intentionally (with the complicity of equally racist Pharmacy Manager Leeves) hindering, obstructing and sabotaging Wantou in the completion of Wantou's professional tasks as a pharmacist; and thus on 04/25/2016, in one such incident in which racially biased Samples sought to intentionally hinder, obstruct and sabotage Wantou in the completion of Wantou's professional tasks as a pharmacist (thus directly

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[35] ROA.13183.

[36] ROA.6092.

[37] ROA.6091-92, ROA.13395-98.

affecting Wantou's terms/conditions/privileges of employment), Wantou sought to correct the situation in the interest of waiting customers by addressing it with Samples, but Leeves yelled at Wantou **in front of customers and the rest of the staff**, as loudly as she could: "Stop badgering her [**expletive**], stop badgering her with that [**expletive**], stop badgering her [**expletive**], leave her alone [**expletive**]. Stop right now [**expletive**]. Stop right now [**expletive**]."[38] Wantou felt "highly humiliated and made to be inferior," particularly in light of the fact that Wantou never saw Leeves treat Caucasian pharmacist Shawn Shannon in that manner.[39] Wantou complained about Leeves' and Samples' behavior but Wal-Mart took no action whatsoever against Leeves and Samples, but Leeves herself issued Wantou a coaching, but claimed she was not the issuer of the coaching even though the coaching bore her name as the issuer.[40] In an attempt to cover their tracks as to Leeves' and Wal-Mart's violation of Title VII, and to protect Leeves, Leeves and Wal-Mart also issued a coaching to Caucasian Pharmacist Shawn Shannon to serve as a ***smokescreen*** by Leeves and Wal-Mart for their illegally discriminatory and retaliatory purposes, but this attempt by Leeves and Wal-Mart to cover their tracks fails because unlike Wantou, Shannon was not subject to a ***pattern*** of bogus coachings based on false allegations, and therefore his employment terms/conditions

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[38] Pet.App.118, Pet.App.100.

[39] Pet.App.118, Pet.App.100.

[40] ROA.18227-28.

were nowhere near as affected as Wantou's.[41] Leeves continued, with Wal-Mart's acquiescence, to issue Wantou bogus coachings which she supported with false allegations made by herself and the racist Caucasian staff members Wantou repeatedly complained about. Wal-Mart eventually terminated Wantou in November 2016, allegedly for "Misconduct with **coachings**," clearly proving that the bogus coachings emanating from racist Caucasian staff had in fact adversely affected Wantou's ***terms and conditions of employment***, to the point of being a cause for Wantou's termination.

II. IMPACT ON CAT'S PAW THEORY ("C.P.T.")

As shown above, "the paramount concern of Congress in enacting Title VII was the elimination of discrimination in employment";[42] but without C.P.T., that concern substantially becomes a mockery, as employers simply abscond from Title VII by hiding behind a purported discrimination-naïve or retaliation-naïve decision-maker as to adverse employer decisions rooted in discrimination/retaliation. C.P.T. allows Title accountability, regardless of any façade put up by employer. Title VII, by its plain language/originally intended purpose, favors C.P.T., as whenever an employee's employment terms/conditions are adversely affected on account of protected characteristics, C.P.T. allows the plaintiff to get "to the bottom of

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[41] ROA.6045.

[42] Sup.App.9 (quoting *T.W.A.*, *supra*, at 85).

things" regardless of employer's staged innocence. Hence, Title VII's plain language supports reversing FCCA's decision as to C.P.T.I.'s denial in a case in which they were unquestionably warranted. To hold otherwise would simply be to allow Wal-Mart to hide behind its purported decision-makers as to its adverse actions in order to escape liability, which would undercut the very purpose of Title VII.

III. *MacIntyre* Case

MacIntyre[43] is a case that reinforces the fact that there is a circuit split as to the first question presented by Petitioner ("Q.P.P."),[44] and the important need for this Court to address Petitioner's first Q.P.P.

The *MacIntyre* court held that where district court has used erroneous standards at summary judgment, it is inappropriate for circuit court to affirm judgment on alternative ground unless the alternative ground issues are purely legal: "Here, the remaining issues are not purely legal and require us to determine whether the evidence creates a genuine issue of material fact. The district court is thus better suited to consider these issues in the first instance."[45] In Wantou's case, the district court declined, in adjudicating Wantou's H.W.E. claim, to resolve the question as to whether Walmart's alleged response was prompt/remedial, but properly held that "[w]hat constitutes prompt

[43] Sup.App.17-18 (excerpts).

[44] *See* Pet.i-ii.

[45] Sup.App.18.

remedial action is a **fact-specific inquiry** and not every response by an employer will be sufficient to absolve the employer of liability."[46] The issue as to whether Wal-Mart's purported response was sufficient to absolve Wal-Mart of liability was not a purely legal question but a fact-specific inquiry. Yet, FCCA, while admitting that the district court had adjudicated Wantou's H.W.E. claim under erroneous standards, affirmed judgment based on this fact-specific alternative ground. This runs diametrically counter to the Ninth Circuit position in *MacIntyre*.

IV. *Chapman* Case[47]

Chapman reinforces the circuit spit as to Wantou's second Q.P.P. In Wantou's case, FCCA held that "it is not evident that a triable dispute exists relative to whether Wal-Mart remained aware [after Walmart's alleged initial response] that Wantou suffered continued harassment and 'failed to take prompt remedial action.' "[48] In *Chapman*, the Fourth Circuit makes clear that employer's response, however serious, must be reasonably calculated to end the harassment. The employee has no duty to make employer aware of H.W.E. again if employer's response is ineffective. In *Chapman*, after a supervisor's six-year old child (therefore not even an employee) called the plaintiff (Chapman) the n-word, the supervisor vehemently spanked the

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[46] Pet.App.35.

[47] Sup.App.19-23 (excerpts).

[48] Pet.App.16.

child, then dragged the child to Chapman in order for the child to apologize to Chapman, and then left the crying and distressed boy alone with Chapman.[49] The Fourth Circuit found that the supervisor's response was not reasonably calculated "to prevent further harassment the harassment, [as a reasonable factfinder] could conclude that leaving a distressed six-year old child, who has just been making racist comments, alone in the workplace with the victim and target of those comments certainly is not 'reasonably calculated' to stop the harassment or to repair the working environment."[50] The Fourth Circuit further held that "we have found a jury issue where an employer's response to reports of workplace harassment was far more robust."[51] Unlike in *Chapman*, Wal-Mart did not even provide any contemporaneous evidence whatsoever of any reprimand of any type of the perpetrators of H.W.E.; yet, FCCA implied Wal-Mart's response was remedial; and imposed an atextual requirement to make Wal-Mart aware of further H.W.E.

V. *Lockhart* Case[52]

While this recently decided case, *Lockhart*, was decided in a district court (WD Pa) rather than circuit court, it was decided using Third Circuit's standards. *Lockhard* is relevant to the case at bar because it

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[49] Sup.App.21.

[50] Sup.App.21-22.

[51] Sup.App.22.

[52] Sup.App.24 (excerpts).

reinforces the fact that there is a Circuit split regarding the standards for H.W.E., and that said standards are very disparate across the different Circuits. The *Lockhart* court recognized that "some harassment may be severe enough to contaminate an environment even if not pervasive" and further recognized that the Court cannot disregard a plaintiff's testimony ("Plaintiff is prepared to testify that Smith taunted and mocked him almost daily. Probing and ridiculing about his practice of Judaism became a frequent topic. Smith used the tenets of Christianity to make plaintiff feel guilty about divorcing his wife"), including depositions, in adjudicating summary judgment, which is contrary to what FCCA did in Wantou's case in which FCCA discarded Wantou's deposition statements (and only by doing so could FCCA reach its erroneous conclusion that there was no further harassment after Walmart's purported response).[53]

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[53] Sup.App.24-25, Pet.App.12-13, 16.

CONCLUSION

The Court should grant the relief requested in the introductory paragraph.

Respectfully submitted,

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APPENDIX TABLE OF CONTENTS

No. 22-193

IN THE
Supreme Court of the United States

JATONYA CLAYBORN MULDROW,

Petitioner,

v.

CITY OF ST. LOUIS, STATE OF MISSOURI, *et al.*,

Respondents.

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

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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September 30, 2022

* * *

INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC also works to ensure that courts remain faithful to the text and history of key federal statutes like Title VII of the Civil Rights Act. CAC therefore has a strong interest in ensuring that Title VII is understood, in accordance with its text, history, and Congress's plan in passing it, to prohibit an employer from discriminating against any individual with respect to her compensation, terms, conditions, or privileges of employment because of that individual's race, color, religion, sex, or national origin, regardless of whether that disparate treatment produces materially adverse effects. It therefore has an interest in this case.

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[1] Counsel for all parties received notice at least 10 days prior to the due date of amicus's intention to file this brief; the parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Title VII of the Civil Rights Act of 1964 prohibits an employer from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Notwithstanding this plain text, the court below held that Respondent City of St. Louis did not violate Title VII when it transferred Petitioner Jatonya Clayborn Muldrow to a different job and denied her a requested transfer, allegedly because of her sex. *See* Pet. App. 15a. According to the court below, Muldrow needed to establish that either her reassignment from the Intelligence Division to a position in the Fifth District or her denied request to transfer to an administrative aide position constituted an "adverse employment action," that is, "a tangible change in working conditions that produces a material employment disadvantage." *Id.* at 9a. This decision should not stand because Title VII's antidiscrimination provision contains no such requirement.

Under the statute's plain language, a plaintiff alleging discrimination under Title VII must show that an employer discriminated against her "with respect to [her] compensation, terms, conditions, or privileges of employment" because of a protected characteristic. 42 U.S.C. § 2000e-2(a)(1). An employee who shows that she was transferred to a new job or had a transfer request denied because of her sex easily satisfies this standard. *See Chambers v. District of Columbia*, 35

F.4th 870, 872 (D.C. Cir. 2022) ("[A]n employer that transfers an employee or denies an employee's transfer request because of the employee's . . . sex . . . violates Title VII by discriminating against the employee with respect to the terms, conditions, or privileges of employment."); *Ortiz-Diaz v. U.S. Dep't of Hous. & Urban Dev., Office of Inspector Gen.*, 867 F.3d 70, 81 (D.C. Cir. 2017) (Kavanaugh, J., concurring) ("All discriminatory transfers . . . are actionable under Title VII. As I see it, transferring an employee because of the employee's race . . . plainly constitutes discrimination with respect to 'compensation, terms, conditions, or privileges

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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.'" *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1738 (2020) (quoting 42 U.S.C. § 2000e-2(a)(1)). To discern that meaning, the Court must look "to the time of the statute's adoption, here 1964, and begin by examining the key statutory terms." *Id.* at 1738-39.

Under the original public meaning of its text, Title VII plainly prohibits transferring an employee from one position to another, or rejecting an employee's transfer request, because of sex or another protected characteristic. At the time of Title VII's passage, the ordinary meaning of "discriminate" was to "make a difference in treatment or favor (of one as compared with others)," *Webster's New International Dictionary* 745

(2d ed. 1959) [hereinafter *Webster's Second*], or to "make a difference in treatment or favor on a class or categorical basis in disregard of individual merit," *Webster's Third New International Dictionary* 648 (Philip Babcock Gove ed., 1961) [hereinafter *Webster's Third*]; *see* 110 Cong. Rec. 7213 (Apr. 8, 1964) (Interpretative Memorandum of Title VII of H.R. 7152 Submitted Jointly by Sens. Clark & Case, Floor Managers) ("To discriminate is to make a distinction, to make a difference in treatment or favor. . . ."); *id.* at 7218 (Apr. 8, 1964) (Sen. Clark Response to Dirksen Memorandum) ("To discriminate is to make distinctions or differences in the treatment of employees. . . ."); *id.* at 8177 (Apr. 16, 1964) (Sen. Tower reading Title VII Summary Prepared by National Association of Manufacturers) ("Presumably, 'discriminate' would have its commonly accepted meaning which . . . is 'to make a distinction' or . . . 'to make a difference in treatment or favor . . . as to discriminate in favor of one's friends; to discriminate against a special class.'"); *id.* at 12617 (June 3, 1964) (statement of Sen. Muskie) ("Discrimination in this bill means just what it means anywhere: a distinction in treatment given to different individuals because of their [protected status]."). Thus, Title VII "make[s] it unlawful for an employer to make any distinction or any difference in treatment of employees because of [a protected characteristic]." *Id.* at 8177; *see also Chambers*, 35 F.4th at 874 ("'No one doubts that the term 'discriminate against' refers to distinctions or differences in treatment that injure protected individuals.'" (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 59 (2006))).

Specifically, the statute prohibits "mak[ing] a difference in treatment or favor," *Webster's Second*, *supra*, at 745, "with respect to [an individual's] compensation, terms, conditions, or privileges of employment," 42 U.S.C. § 2000e-2(a)(1), on the basis of a protected characteristic. In 1964, much like today, "terms" meant "[p]ropositions, limitations, or provisions, stated or offered, as in contracts, for the acceptance of another and determining the nature and scope of the agreement." *Webster's Second*, *supra*, at 2604. Similarly, the word "conditions" referred to "[a]ttendant circumstances [or an] existing state of affairs," and a "condition" meant "[s]omething established or agreed upon as a requisite to the doing or taking effect of something else." *Id.* at 556. And a "privilege" meant "[a] right or immunity granted as a peculiar benefit, advantage, or favor," *id.* at 1969, or "such right or immunity attaching specif[ically] to a position or an office," *Webster's Third*, *supra*, at 1805.

Under the original public meaning of those words, Title VII prohibits an employer from transferring an employee from one position to another because of sex, even if the employee's compensation and other

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Inc., 510 U.S. 17, 21 (1993))). This Court has explained that "Title VII tolerates no . . . discrimination [on the basis of a protected characteristic], subtle or otherwise," *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973), including with respect to any "benefits that comprise the 'incidents of employment' . . . or that form

'an aspect of the relationship between the employer and employees,'" *Hishon v. King & Spaulding*, 467 U.S. 69, 75 (1984) (quoting S. Rep. No. 88-867, at 11, and *Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971)). Given that, decisions regarding employee transfers that are made on the basis of sex necessarily affect the terms, conditions, or privileges of employment and accordingly violate Title VII.

II. The Court Below Imposed Requirements with No Basis in the Statutory Text.

Despite Title VII's straightforward language, which plainly bars discriminatory job transfer decisions, the court below imposed additional requirements with no basis in Section 703(a)(1)'s text. Relying on circuit precedent, the court below stated that in order to make a prima facie showing of discrimination, a Title VII plaintiff needs to show that she experienced a "tangible change in working conditions that produces a material employment disadvantage," Pet. App. 9a (quoting *Clegg v. Ark. Dep't of Corr.*, 496 F.3d 922, 926 (8th Cir. 2007)), and that "[a] transfer that does not involve a demotion in form or substance" cannot constitute the required "materially adverse employment action" for liability, *id.* (quoting *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997)). It concluded that Muldrow failed to make that showing regarding her forced transfer, reasoning that her transfer "did not result in a diminution to her title, salary, or benefits" and noting that she offered "no evidence that she suffered a significant change in working conditions or

responsibilities and, at most, expresses a mere preference for one position over the other." *Id.* at 11a (emphasis added). It also concluded that Muldrow's showing as to her denied transfer request fell short because she did not "demonstrate how the sought-after transfer would have resulted in a material, beneficial change to her employment." *Id.* at 13a.

The court below was wrong to impose these requirements that do not exist anywhere in the text of the statute. Individuals "are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration." *Bostock*, 140 S. Ct. at 1749. Section 703(a)(1) of Title VII nowhere indicates that a plaintiff must show that she suffered an "adverse employment action" or any "material employment disadvantage"—let alone a "materially significant disadvantage" or that her transfer was a "demotion in form or substance." Pet. App. 9a; *see Chambers*, 35 F.4th at 875 (holding that "any additional requirement, such as . . . 'objectively tangible harm,' is a judicial gloss that lacks any textual support"). Rather, as explained above, a Title VII plaintiff must simply show that she was treated differently because of her sex (or another protected characteristic) with respect to the compensation, terms, conditions, or privileges of her employment. *See Bostock*, 140 S. Ct. at 1743 (explaining that an "employer violated Title VII because . . . it could not 'pass the simple test' asking whether an individual female employee would have been treated the same regardless of her sex" (quoting *City of Los Angeles, Dep't of Water & Power v.*

Manhart, 435 U.S. 702, 711 (1978))). Once this fact is established, "the analysis is complete." *Chambers*, 35 F.4th at 874-75. Petitioner made this showing. *See* Pet. App. 2a-4a, 6a (indicating that

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adversity requirement for a claim of discrimination under Section 703(a)(1).

III. Requiring a Plaintiff Alleging Disparate Treatment to Show a Materially Significant Disadvantage Is Contrary to Congress's Plan in Passing Title VII and the Statute's History.

In addition to ignoring the statute's text, the approach of the court below compels outcomes that are flatly contrary to Congress's plan in passing Title VII. As this Court has stated time and again, and as the statutory text makes clear, "the paramount concern of Congress in enacting Title VII was the elimination of discrimination in employment," *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 85 (1977), and ensuring that "similarly situated employees are not . . . treated differently solely because they differ with respect to race, color, religion, sex, or national origin," *id.* at 71; *see Shell Oil Co.*, 466 U.S. at 77 ("The dominant purpose of [Title VII], of course, is to root out discrimination in employment."); *Kremer*, 456 U.S. at 468 ("Congress enacted Title VII to assure equality of employment opportunities without distinction with respect to race, color, religion, sex, or national origin.");

McDonnell Douglas, 411 U.S. at 801 ("[I]t is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise.").

Despite this broad mandate, "employment discrimination decisions by the federal courts," like the one below, "have created a body of law that patently contradicts Title VII's aim of equal employment opportunity" by adding atextual requirements. Esperanza N. Sanchez, Note, *Analytical Nightmare: The Materially Adverse Action Requirement in Disparate Treatment Cases*, 67 Cath. U. L. Rev. 575, 579 (2018). "In seeking to determine which employment actions are actionable, the lower federal courts have aggressively narrowed the scope of the 'terms, conditions, or privileges of employment' provision." *Id.* at 584. In fact, multiple circuits have held that a "purely lateral transfer" of an employee from one position to the same position elsewhere because of a protected characteristic is not actionable under federal employment discrimination laws because the employee cannot show that she suffered an adverse employment action, even though that requirement appears nowhere in Section 703(a)(1). *See, e.g.*, *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996) ("Obviously a purely lateral transfer, that is, a transfer that does not involve a demotion in form or substance, cannot rise to the level of a materially adverse employment action."); *Burger v. Cent. Apartment Mgmt., Inc.*, 168 F.3d 875, 879 (5th Cir. 1999) (same); *Ledergerber*, 122 F.3d at 1144 (same); *Trujillo v. New Mexico Dep't of Corr.*, 182 F.3d 933 (table), 1999 WL 194151 at *3 (10th Cir. Apr. 8, 1999)

(same); *see also* Pet. 10 (explaining that the circuits have adopted divergent approaches to determining what conduct is actionable under Section 703(a)(1) and that "[o]nly the D.C. and Sixth Circuits have applied the statutory text as written").

A recent Fifth Circuit decision illustrates just how far some courts, like the court below, have strayed from the statutory text and from Congress's plan for Title VII. In *Peterson v. Linear Controls, Inc.*, the court held that a plaintiff alleging that he and the other Black employees at his workplace "had to work outside and were not permitted water breaks, while the white employees worked inside with air conditioning and were given water breaks" failed to state a claim of racial discrimination under Title VII because "these working conditions are not adverse employment actions because they do not concern ultimate

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No. 22-193

In The
Supreme Court of the United States

JATONYA CLAYBORN MULDROW,

Petitioner,

v.

CITY OF ST. LOUIS, STATE OF MISSOURI et al.,

Respondents.

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

BRIEF OF *AMICUS CURIAE*, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, IN SUPPORT OF PETITIONER

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* * *

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Founded in 1985, the National Employment Lawyers Association (NELA) is the largest bar association in the country focused on empowering workers' rights attorneys. NELA and its sixty-nine circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to protecting the rights of workers in employment, wage and hour, labor, and civil rights disputes. NELA attorneys litigate daily in every circuit, giving NELA a unique perspective on how principles announced by courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting

[1] Pursuant to S. Ct. R. 37.6, *Amicus Curiae* submits that no counsel for any party participated in any way in the authoring of this Brief. In addition, no other person or entity, other than *Amicus Curiae*, has made any monetary contribution to the preparation and/or submission of this Brief. Counsel of record for all parties received timely notice of *Amicus's* intent to file this Brief, and counsel for all parties consented in writing to the filing of this Brief pursuant to S. Ct. R. 37.2.

litigation affecting the rights of individuals in the workplace.

SUMMARY OF ARGUMENT OF *AMICUS CURIAE*

Petitioner has asked the Court to resolve whether Title VII's prohibition of discrimination in "terms, conditions, or privileges of employment," 42 U.S.C.

* * *

Section 703(a)(1) of Title VII bars "discriminat[ion]" based on protected characteristics "with respect to [an individual's] compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1). Discrimination simply means differential treatment, or, as this Court has explained, "[a]s used in Title VII, the term 'discriminate against' refers to 'distinctions or differences in treatment that injure protected individuals.'" *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1740 (2020) (quoting *Burlington Northern*, 548 U.S. at 59); *see also Babb v. Wilkie*, 140 S. Ct. 1168, 1173 (2020) (discrimination carries its "'normal definition,'" which is "'differential treatment'" (quoting *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005))). In *Bostock*, the Court held that the touchstone inquiry under Title VII is not whether an employee suffered economic harm, but whether she was treated "worse" than men in the same job. *Bostock*, 140 S. Ct. at 1740.

Congress intended the prohibition on discrimination in the "terms, conditions, or privileges" of employment

"to strike at the entire spectrum of disparate treatment," not merely "economic or tangible discrimination." *Meritor Savs. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (internal quotation marks and citation omitted). *See also Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (noting that Title VII's prohibition on discrimination extends beyond " 'terms' and 'conditions' in the narrow contractual sense" (quoting 42 U.S.C. § 2000e-2(a)(1))); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976)

* * *

rather than merely as a personal preference, was sufficient to state a claim, and in fact "falls within Title VII's heartland." 867 F.3d at 74, 75. In his concurrence, then-Judge Kavanaugh noted that the uncertainty involved in drawing the line between actionable and non-actionable transfers militated in favor of establishing the clear principle that "[a]ll discriminatory transfers (and discriminatory denials of requested transfers) are actionable under Title VII." *Id.* at 81 (Kavanaugh, J., concurring).

This line-drawing uncertainty leads courts to focus on egregious facts or "extraordinary circumstances," as the district court described them in *Ortiz-Diaz*, 75 F. Supp. 3d at 565, that might support finding that an unwanted transfer constitutes actionable discrimination. But as in other areas of the law, egregious facts do not "mark the boundary of what is actionable." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993) (noting that the appalling conduct alleged in *Vinson* and other

egregious harassment cases did not set the standard for what is actionable, and that a worker's emotional and psychological stability need not be destroyed to state a claim).

So too here. Adherence to the straightforward language of the statute prohibiting discrimination because of sex in the terms, conditions, or privileges of employment will best serve the statutory purpose of eradicating employment discrimination. Plaintiffs in transfer cases, like all discrimination plaintiffs, will still have the burden of proving that the challenged employment action was taken because of their

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BENNETT K. MACINTYRE, *Plaintiff-Appellant*, v. CARROLL COLLEGE, *Defendant-Appellee.*	No. 21-35642 D.C. No. 6:19-cv-00042-SHE OPINION

Appeal from the United States District Court
for the District of Montana
Sam E. Haddon, District Judge, Presiding

Submitted August 11, 2022*
Seattle, Washington

Filed September 8, 2022

Before: Morgan Christen, Kenneth K. Lee, and Danielle J. Forrest, Circuit Judges.

Opinion by Judge Lee

* * *

II. We remand the case to the district court to consider Carroll's alternative bases for summary judgment.

Carroll argues that we should affirm the grant of summary judgment on three other grounds: (1) an

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* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

inadequate pleading of protected activity; (2) a lack of a causal link between any alleged protected activity and the nonrenewal of MacIntyre's employment contract; (3) a failure to adduce evidence that Carroll's legitimate, nondiscriminatory reason for the nonrenewal was pretextual.

While we may affirm summary judgment "on any ground supported by the record," *U.S. ex rel. Ali v. Daniel, Mann, Johnson & Mendenhall*, 355 F.3d 1140, 1144 (9th Cir. 2004), "[w]hether, as a prudential matter, we should do so depends on the adequacy of the record and whether the issues are purely legal, putting us in essentially as advantageous a posture to decide the case as would be the district court." *Golden Nugget, Inc. v. Am. Stock Exch., Inc.*, 828 F.2d 586, 590 (9th Cir. 1987).

Here, the remaining issues are not purely legal and require us to determine whether the evidence creates a genuine issue of material fact. The district court is thus better suited to consider these issues in the first instance.

We reverse the district court's grant of summary judgment to Carroll College and remand for the district court to consider Carroll College's alternative grounds for summary judgment.

REVERSED; REMANDED.

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-2361

TONYA R. CHAPMAN,

Plaintiff – Appellant,

v.

OAKLAND LIVING CENTER, INC.; ARLENE SMITH; MICHAEL SMITH; STEVE SMITH,

Defendants – Appellees.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Amicus Supporting Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Asheville. Martin K. Reidinger, Chief District Judge. (1:18-cv-00345-MR-WCM)

Argued: December 9, 2021 Decided: August 30, 2022

Before KING and WYNN, Circuit Judges, and KEENAN, Senior Circuit Judge.

Vacated and remanded by published opinion. Judge King wrote the opinion, in which Judge Wynn and Senior Judge Keenan joined.

ARGUED: Kimberly Veklerov, Gregory Eng, UNIVERSITY OF VIRGINIA SCHOOL OF LAW, Charlottesville, Virginia, for Appellant. Jonathan Woodward Yarbrough, CONSTANGY, BROOKS, SMITH & PROPHETE, LLP, Asheville, North Carolina, for Appellees. Jeremy Daniel Horowitz, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Amicus Curiae. **ON BRIEF:** J. Scott Ballenger, Jennifer Elchisak, Third Year Law Student, Zev Klein, Third Year Law Student, Jehanne McCullough, Third Year Law Student, Carly Wasserman, Third Year Law Student, Appellate Litigation Clinic, UNIVERSITY OF VIRGINIA SCHOOL OF LAW, Charlottesville, Virginia, for Appellant. Jill S. Stricklin, CONSTANGY, BROOKS, SMITH & PROPHETE, LLP, Winston-Salem, North Carolina, for Appellees. Gwendolyn Young Reams, Acting General Counsel, Jennifer S. Goldstein, Associate General Counsel, Sydney A.R. Foster, Assistant General Counsel, Anne W. King, Appellate Litigation Services, Office of General Counsel, U.S.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Amicus Curiae.

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* * *

Regarding OLC's actual knowledge of the subsequent harassment, the district court determined that Steve Smith was immediately alerted and appropriately responded to the first August 2018 n-word incident, and that Chapman's abrupt resignation deprived OLC of an opportunity to learn of and deal with the second August 2018 n-word incident. In thereby relieving OLC of liability, the court relied on our precedent recognizing that "Title VII requires only that the employer take steps reasonably likely to stop the harassment." *See Xerxes Corp.*, 639 F.3d at 674 (internal quotation marks omitted). Under that precedent, "it is possible that an action that proves to be ineffective in stopping the harassment may nevertheless be found reasonably calculated to prevent future harassment and therefore adequate as a matter of law." *Id.* at 670 (alteration and internal quotation marks omitted).

Unlike the district court, we discern a genuine dispute of fact as to whether Steve Smith's response to the first August 2018 n-word incident—spanking his young son, dragging the boy to the assisted living facility's kitchen to apologize to Chapman, and then abruptly leaving the boy crying and recalcitrant with Chapman and Warner, without even offering his own apology—was reasonably calculated to prevent further harassment. That is, "[a] reasonable trier of fact could

conclude that leaving a distressed six-year-old child, who has just been making racist comments, alone in the workplace with the victim and target of those comments certainly is not action 'reasonably calculated' to stop the harassment or to repair the working environment." *See* Br. of Appellant 23. To be sure, we have found a jury issue where an employer's response to reports of workplace harassment was far more robust. *See, e.g., EEOC v. Cent. Wholesalers, Inc.*, 573 F.3d 167, 177 (4th Cir. 2009) (concluding that although the employer "took a number of steps" to curb alleged harassment, including conducting investigations, holding meetings with the victim and her harassers, and having an anti-discrimination policy in place, its "response was not without its apparent shortcomings").

"Of course," as we have explained, "the reasonableness of [OLC's] actions depends, in part, on the seriousness of the underlying conduct." *See Pryor v. United Air Lines, Inc.*, 791 F.3d 488, 498 (4th Cir. 2015). Furthermore, it is significant – though not dispositive of the adequacy of Steve Smith's response – that the response proved ineffective and that the second August 2018 n-word incident quickly followed the first. *Id.* at 499 (recognizing that "the effectiveness of an employer's actions remains a factor in evaluating the reasonableness of the response").

Finally, a jury could also be swayed by this point made by Chapman: that Steve Smith's "response would have been inadequate even if the child had apologized." *See* Br. of Appellant 24. As Chapman has cogently asserted,

[s]urely an employee in Ms. Chapman's position is owed more from her employer than a coerced apology delivered by a six year old child. An apology would have left two questions entirely unaddressed: first, how the

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RYAN WILLIAM LOCKHART, Plaintiff,	)	
v.	)	2:20cv258
ENERGY TRANSFER PARTNERS, LP, Defendant.	)	**Electronic Filing**

OPINION

(Filed Sep. 29, 2022)

* * *

Nevertheless, the Supreme Court's precedent makes clear that "the correct standard is "severe *or* pervasive." Id. (emphasis in original). These are "alternative possibilities." Id. In other words, "some harassment may be severe enough to contaminate an environment even if not pervasive; other, less objectionable, conduct will contaminate the workplace only if it is pervasive." Id. (quoting Jensen, 435 F.3d at 449 n. 3) Thus, isolated incidents or even a single incident of discriminatory treatment can satisfy the "severe or pervasive" requirement where the conduct is sufficient to amount to a change in the terms and conditions of employment. Id.

When considered under the above standards, plaintiff's evidence falls well above the threshold needed to proceed to trial. Plaintiff is prepared to

testify that Smith taunted and mocked him almost daily. Probing and ridiculing about plaintiff about his practice of Judaism became a frequent topic. Smith used the tenants of Christianity to make plaintiff feel guilty about divorcing his wife. He regularly forced plaintiff into discussions about religion and proselytized to plaintiff. He mocked plaintiff in front of others by engaging in a goose step march while proceeding down the hall and past plaintiff's office door. He pulled plaintiff's hair out with pliers in an effort to emphasize the sincerity of his Christian-held beliefs. And he made quite concerning statements about the Jews being the first "terrorists," learning their "lesson" in the Holocaust and having family members who were "Nazis."

Smith also constantly chided, harassed and mocked plaintiff for failing to subscribe to and display what Smith perceived as the desired traits of masculinity. Smith regularly used greetings and sang songs which ridiculed plaintiff for displaying effeminate behavior. He often slapped plaintiff on the buttocks while making homophobic remarks. He would prance up the hall and past plaintiff's office while thrusting his pelvis as if to mock plaintiff for engaging in homosexual behaviors. He made derisive comments about plaintiff's slender build and belittled him for taking dancing lessons. He repeatedly ridiculed plaintiff by calling him a faggot and did so in front of the other office workers.

* * *