No. 18-___

IN THE

Supreme Court of the United States

DAVID D. PETERSON,

Petitioner,

v.

LINEAR CONTROLS, INC.,

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 status. 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 David D. Peterson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1a-10a) is reported at 757 Fed. Appx. 370. The district court's memorandum ruling granting defendant's motion for summary judgment (Pet. App. 11a-47a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 2019 (Pet. App. 1a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 703(a) of Title VII of 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 refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in

> any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

INTRODUCTION

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, prohibits a range of employment practices. 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).

In this case, respondent required a group of its black employees to work outdoors in the Louisiana summer while assigning their white counterparts to work indoors with air conditioning. The Fifth Circuit held that this assignment did not violate Section 703(a) because the differential treatment of black and white employees did not affect their terms or conditions of employment. *See* Pet. App. 5a. This decision further entrenches a longstanding conflict among the circuits about the scope of Section 703(a)(1). And the Fifth Circuit's consistent limitation of that provision to what it has termed "ultimate employment decisions"—"hiring, granting leave, discharging, promoting, or compensating"—Pet. App. 4a, is flatly inconsistent with the plain text of Section 703(a).

STATEMENT OF THE CASE

1. Respondent Linear Controls, Inc., is a Louisiana-based corporation that provides electrical maintenance and mechanical services. Petitioner

David D. Peterson, an electrician, began working there in 2008. Pet. App. 16a. Petitioner is African-American.

In July 2015, petitioner was assigned to work on an offshore oil platform in the Gulf of Mexico. Pet. App. 2a, 16a. Petitioner worked on a team of five white and five black Linear Controls employees. The team was expected to live and work on the platform for the duration of the assignment. *See id.* 5a. As with any "typical offshore site," the team's tasks included some work outdoors, where team members would be "affected by outside temperatures." *Id.* 19a. But other portions of the team's work were done inside in air-conditioned facilities. *Id.* 34a.[1]

The assignment that gave rise to this lawsuit lasted from July 15 to July 26. Pet. App. 23a. For the entirety of that period, the five black team members "had to work outside without access to water," while "white team members worked inside with air conditioning." *Id.* 4a. And "[d]espite alleged requests by the black employees to their white supervisors, there was no rotation from outside to inside among white and black crew members." *Id.* 23a.

When black employees attempted to take indoor water breaks, white supervisors "curse[d] and yell[ed]" and ordered them back to work. Pet. App. 23a. During the assignment, one supervisor said of petitioner, "[f***] that [n*****]." *Id.* 5a.

2. Shortly after the assignment ended, petitioner resigned from Linear Controls. He then filed a timely

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[1] Because this case was decided on respondent's motion for summary judgment, this Court "must assume the facts to be as alleged by petitioner." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 76 (1998).

charge with the Equal Employment Opportunity Commission (EEOC). Pet. App. 2a. Among other things, that charge asserted that the differential work assignments on the offshore oil platform were racially discriminatory. *See id.* 22a (quoting petitioner's EEOC charge). The EEOC issued petitioner a right to sue letter. *Id.* 18a.

3. Petitioner then filed suit in the U.S. District Court for the Western District of Louisiana. As is relevant here, the complaint alleged that respondent had violated Title VII because black crew members were "required by Linear Controls' white supervisors to work every day outside, in the heat while white crew members worked exclusively inside, in air-conditioned facilities." Pet. App. 23a. The complaint further alleged that white supervisors denied the black employees' requests to rotate the crews so that all workers would have some chance to work inside. *Id.*[2]

The district court (a magistrate judge acting with the parties' consent) granted respondent's motion for summary judgment. Pet. App. 11a.

The court held that petitioner's race discrimination claim failed "as a matter of law" because he had not alleged "any" employment practice that violated Title VII. Pet. App. 38a-39a. The district court noted that binding authority from the Fifth Circuit took a "narrow view" of what constitutes prohibited discrimination under Section 703(a). Pet. App. 40a (citing *Breaux v. City of Garland*, 205 F.3d 150, 157 (5th Cir. 2000)). Under that view, Section 703(a)'s prohibition on "discriminat[ion]" reaches only

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[2] Petitioner also raised other Title VII and state law claims not at issue here.

"ultimate employment decisions such as hiring, granting leave, discharging, promoting, or compensating." Pet. App. 39a (quoting *Green v. Adm'rs of Tulane Educ. Fund*, 284 F.3d 642, 657 (5th Cir. 2002)). Because petitioner's claim implicated none of those categories, he could not proceed. *Id.* 38a-39a. The court also noted this outcome was consistent with a recent Third Circuit decision rejecting a claim by black workers who had been required to work outside in dangerous heat while white staff were allowed to stop. *Id.* 39a (citing *Harris v. Attorney Gen. United States*, 687 Fed. Appx. 167 (3d Cir. 2017)).[3]

4. On appeal, the Fifth Circuit affirmed.

The court recognized that petitioner's claim was "disturbing." Pet. App. 9a. But even taking as true that petitioner "and his black team members had to work outside without access to water, while his white team members worked inside with air conditioning," the court concluded that petitioner had failed to allege a prima facie case of disparate treatment. Pet. App. 4a. Although Section 703(a) prohibits discrimination with respect to "terms, conditions, or privileges of employment," 42 U.S.C. § 2000e-2(a)(1), the court of

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[3] The district court also found that petitioner had "failed to identify a similarly situated Caucasian comparator." Pet. App. 38a. But the Fifth Circuit assumed the contrary on appeal. *Id.* 4a. And it had good reason to do so. The district court refused to consider two affidavits from other Linear Controls employees who had each stated that the black crew worked outside and the white crew worked inside. *See id.* 36a-38a. Nor did the district court address petitioner's testimony at his deposition that he had worked outside, that "they wouldn't give me no rotation," and that the other black workers had been "with me the whole time." *See* Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment, Exh. F. at 26, ECF Doc. No. 33-6.

appeals held that the "working conditions" to which petitioner had been subjected did not violate the statute, Pet. App. 4a.

The basis for the court of appeals' holding was longstanding circuit precedent that "strictly construes" Section 703(a)'s prohibition on disparate treatment to reach "only 'ultimate employment decisions,' such as 'hiring, granting leave, discharging, promoting, or compensating'" employees. Pet. App. 4a (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 white workers, Title VII had nothing to say.

REASONS FOR GRANTING THE WRIT

I. 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. Pet. App. 4a. The court assumed that respondent assigned

petitioner and his black colleagues to physically separate and more arduous tasks. *Id.* It was nevertheless bound by circuit precedent to hold that this difference in what the court itself described as "working conditions," *id.*, somehow did not affect petitioner's "conditions" of employment.

Not surprisingly, other courts of appeals have rejected the proposition that acts short of "ultimate" employment decisions are immune from liability under Title VII. In the words of a leading treatise, "[t]he circuits are split" on which discriminatory employment practices Section 703(a) forbids. 1 Merrick T. Rossein, Employment Discrimination Law and Litigation § 2:4.20 (Dec. 2018).

A. The split stems from a gap in this Court's 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 "despite his qualifications he was rejected" when he applied for a job. *Id.* at 802.[4]

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[4] The Court explained that the plaintiff 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.*, *Craft 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.*

Lacking definitive guidance from this Court about what "terms" or "conditions" of employment Section 703(a) reaches, some courts have grasped for clues in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006). But neither decision provides guidance on the question presented here.

Ellerth "did not discuss the scope of the general antidiscrimination provision" in Section 703(a). *Burlington Northern*, 548 U.S. at 65. Rather, it concerned when an employer would face vicarious liability for a hostile work environment created by a supervisor's explicit, but unfulfilled, threat regarding "a subordinate's terms or conditions of employment." *Ellerth*, 524 U.S. at 754. This Court held that under those circumstances, employers who exercised reasonable care to prevent and promptly correct sexual harassment would have an affirmative defense so long as they had taken no "tangible employment action" against the subordinate. *Id.* at 765. Because taking

such an action would deny an otherwise-blameless employer any defense, the Court limited the actions to those involving "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 761.

Despite this Court's warning that *Ellerth* did not concern the overall scope of Section 703(a)(1), lower courts have frequently pointed to *Ellerth*'s list of "tangible" and "significant change[s] in employment status" to limit whether something is an "employment practice" for purposes of a Section 703(a) disparate treatment claim. *See infra* pp. 12, 17-18.

Burlington Northern involved a different provision of Title VII: Section 704's prohibition on retaliation, which contains no reference to "terms" or "conditions" of employment. 42 U.S.C. § 2000e-3(a). The courts of appeals had "come to different conclusions" about whether the antiretaliation provision was confined to "activity that affect[ed]" those "terms and conditions" and "how harmful" the "adverse actions" had to be. *Burlington Northern*, 548 U.S. at 57. The Court held that retaliation was not limited to employer acts within the workplace but that the acts, wherever they occurred, needed to be "materially adverse." *Id.*

Although the case did not involve Section 703, this Court pointed out that, in addition to the conflict on which it had granted review, there was also a conflict among the circuits about the standard for a "substantive discrimination offense" under Section 703. *Burlington Northern*, 548 U.S. at 60. It noted that some circuits required only that the challenged action

have some "adverse effect on the 'terms, conditions, or benefits,' of employment." *Id.* (citation omitted). By contrast, this Court described the Fifth Circuit's "'ultimate employment decisio[n]' standard" as "a more restrictive approach." *Id.* More than a dozen years have now passed. Not only have the lower courts failed to coalesce around a clear position, but their divergences have further cemented.

B. The courts of appeals are deeply divided.

1. The Fifth and Third Circuits 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 provision to "ultimate" decisions, the Fifth Circuit has held that subjecting only a black individual to drug tests or assigning additional work

responsibilities only to a black employee would not violate Section 703(a). *See, e.g.*, *Johnson v. Manpower Prof'l 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). Stewart alleged, among other things, that a supervisor "moved all white security guards inside the building during the winter season and the black African American security staff were assigned 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 employee brought suit alleging that he had been required to continue working outdoors despite "dangerously high" temperatures while "white staff were allowed to discontinue their work activities outside." *Id.* at 168-69. The Third Circuit "d[id] not doubt" the plaintiff's account of what happened. *Id.* at 169. Nor did it purport to "minimize the seriousness of [the] injury" the plaintiff suffered. *Id.* 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." *Id.* (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 Title VII case, discrimination is actionable if it involves "a 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 assignments is cognizable 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 Servs. & 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 demotions" can give rise to a "discrimination claim" under Section 703(a)(1). *Michael v. Caterpillar 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.3d 645, 654 (7th Cir. 2007) (quoting *Farrell v. Butler Univ.*, 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 actions 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 (7th Cir. 2002).

Under this standard, in a case that parallels petitioner's, the Seventh Circuit sustained a jury

verdict in favor of two black plaintiffs whose job assignments were changed so they were "outdoors nearly all the time"—one of them consigned to work "in a cold, wet, muddy trench." *Tart v. Ill. Power Co.*, 366 F.3d 461, 475 (7th Cir. 2004). Plaintiffs were "reassigned because of their race," *id.* at 478, to "significantly harsher working conditions," *id.* at 473. This violated Title VII. *Id.* at 472.

The Eighth Circuit takes the same approach as the majority of its sister circuits. For example, in *Wedow v. City of Kansas City*, 442 F.3d 661 (8th Cir. 2006), it affirmed a finding of liability under Title VII for an employer's discriminatory refusal to provide female firefighters with "adequate protective clothing and private, sanitary shower and restroom facilities." *Id.* at 671-72.[5]

The Ninth Circuit defines the employment practices prohibited by Section 703(a) as extending beyond "'terms' and 'conditions' in the narrow [contractual] sense." *Chuang v. Univ. of Cal. Davis, Bd. of Trs.*, 225 F.3d 1115, 1125 (9th Cir. 2000) (quoting *Oncale v. Sundowner Offshore Servs. Inc.*, 523 U.S. 75, 78 (1998)). Thus, as the court explained in *Dimitrov v. Seattle Times Co.*, 2000 WL 1228995 (9th Cir. 2000), it had previously "specifically rejected" the Fifth Circuit's rule "that only ultimate employment actions constitute adverse employment actions." *Id.* at *2. Instead, the Ninth Circuit has

[5] The Eighth Circuit did once suggest that it would require an "ultimate employment decision" to establish a prima facie case under Section 703(a). *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997). But since this Court's decision in *Burlington Northern*, the circuit has never again used the "ultimate employment decision" language in 703(a)(1) cases.

"embraced the EEOC test," which, among other things, covers "changes in work schedules." *Id.* (quoting *Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir. 2000)); *see infra* pp. 27-28, 31 (describing the EEOC's interpretation).

Applying its construction of forbidden employment practices, the Ninth Circuit held that Section 703(a) prohibited intentionally assigning the only female employee disproportionate amounts of "dangerous and strenuous" work and excluding her from areas of the worksite where she could take breaks or talk with her supervisor. *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1090-92 (9th Cir. 2008). In another case, plaintiffs established a prima facie case of disparate treatment in violation of Section 703(a) by pointing to evidence that black pipefitters "were separated from all other pipefitters" and assigned to a different workplace than their white counterparts. *DeWeese v. Cascade Gen. Shipyard*, 2011 WL 3298421, at *10-11 (D. Or. 2011). As the court explained, the defendant's contention that "segregation, without more, does not constitute an adverse employment action" is "reminiscent of a 'separate but equal' model of racial equality that federal courts have long rejected." *Id.* (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

The Tenth Circuit interprets Section 703(a) "liberally"; in deciding whether the challenged practice falls within the scope of the statute, it uses a "'case-by-case approach,' examining the unique factors relevant to the situation at hand." *Sanchez v. Denver Pub. Schs.*, 164 F.3d 527, 532 (10th Cir. 1998) (quoting *Jeffries v. Kansas*, 147 F.3d 1220, 1232 (10th Cir. 1998)). Using this standard, it held that, given the

differences in the nature of work assignments at two detention facilities, female guards could challenge a policy preventing them from transferring to the facility where the work was less arduous and stressful. *Piercy v. Maketa*, 480 F.3d 1192, 1205 (10th Cir. 2007).

Finally, the Eleventh Circuit refuses to adopt a "bright-line test for what kind of effect on the plaintiff's 'terms, conditions, or privileges' of employment the alleged discrimination must have to be actionable; nor would such a rigid test be proper." *Davis v. Town of Lake Park*, 245 F.3d 1232, 1238 (11th Cir. 2001). In that circuit, job reassignments with "a loss of prestige and responsibility" are actionable. *Hinson v. Clinch Cty., Georgia Bd. of Educ.*, 231 F.3d 821, 830 (11th Cir. 2000).

Applying *Davis*, a district court within the circuit concluded that the plaintiffs had established a prima facie case of discrimination by pointing to evidence that the defendant had deliberately given difficult assignments to black technicians more often than to white technicians. This "work-assignment claim" was cognizable under Section 703(a)(1). *Hunter v. Army Fleet Support*, 530 F. Supp. 2d 1291, 1295 (M.D. Ala. 2007). Even if the difficult assignment was part of the job description, disproportionately assigning "dirtier, more strenuous, and more tedious" tasks to black workers than to white workers would be unlawful, *id.* at 1293.

3. The three remaining regional circuits also have repeatedly confronted the question of which employment practices fall within Section 703(a)'s antidiscrimination provision. They oscillate between embracing the restrictive *Ellerth* list and taking the approach of the majority circuits. The ongoing

inability of the First, Fourth, and D.C. Circuits to choose a side in the well-developed split—or to adopt any consistent position at all—underscores the need for this Court's guidance.

The First Circuit (like the Third) has often articulated a test for disparate treatment claims that borrows from this Court's vicarious liability decision in *Ellerth*. *See, e.g.*, *Morales-Vallellanes v. Potter*, 605 F.3d 27, 35 (1st Cir. 2010) (quoting *Ellerth*, 524 U.S. at 761). Relying on *Ellerth*, the First Circuit has held that discriminatory assignment of holiday work shifts cannot constitute an unlawful employment practice. *Cham v. Station Operators, Inc.*, 685 F.3d 87, 94-95 (1st Cir. 2012).

But the First Circuit sometimes departs from the *Ellerth* list to adopt the more capacious view of the majority circuits. For example, in *Caraballo-Caraballo v. Correctional Administration*, 892 F.3d 53 (1st Cir. 2018), the First Circuit "squarely rejected" the proposition that a discriminatory transfer or change in job responsibilities must result in a diminution in salary or benefits to fall within Section 703(a)(1)'s prohibition. *Id.* at 61.

So too in the Fourth Circuit. That circuit has repeatedly required employees to plead conduct enumerated in *Ellerth*'s list to establish a prima facie case of disparate treatment. *See, e.g.*, *Jensen-Graf v. Chesapeake Emp'rs' Ins. Co.*, 616 Fed. Appx. 596, 597-98 (4th Cir. 2015); *Webster v. Rumsfeld*, 156 Fed. Appx. 571, 578 (4th Cir. 2005). Applying this standard, the court held that an employee could not challenge being placed on an employee improvement plan because of her sex. *Jensen-Graf*, 616 Fed. Appx. at 598.

On the other hand, the Fourth Circuit has rejected the Fifth Circuit's "ultimate employment decisions" test. In *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371 (4th Cir. 2004), the court held that "[c]onduct short of ultimate employment decisions can constitute adverse employment action." *Id.* at 375-76 (citation omitted).

Finally, the D.C. Circuit's approach is particularly chaotic. On the one hand, the circuit has numerous cases where it has limited Title VII's reach in disparate treatment claims to the *Ellerth* list. *See, e.g.*, *Douglas v. Donovan*, 559 F.3d 549, 552 (D.C. Cir. 2009); *Taylor v. Small*, 350 F.3d 1286, 1293 (D.C. Cir. 2007). Thus, racially motivated reassignments unaccompanied by diminished pay, benefits, or responsibilities are not prohibited. *Sykes v. Napolitano*, 710 F. Supp. 2d 133, 142 (D.D.C. 2010).

On the other hand, the D.C. Circuit does not always restrict itself to the *Ellerth* list. For example, it has held that discriminatorily assigning an Orthodox Jewish employee to the night shift would establish a prima face case of discrimination because it would constitute a change in the "terms, conditions, or privileges of employment." *Freedman v. MCI Telecomms. Corp.*, 255 F.3d 840, 844 (D.C. Cir. 2001). Decisions like this led then-Judge Kavanaugh to acknowledge that decisions from the D.C. Circuit conflict with decisions from other circuits that interpret Section 703(a) "more narrowly." *Baloch v. Kempthorne*, 550 F.3d 1191, 1196 n.1 (D.C. Cir. 2008) (opinion for the court).

"[U]ncertainty" over the D.C. Circuit's standard has persisted. *Ortiz-Diaz v. U.S. Dep't of Hous. & Urban Dev.*, 867 F.3d 70, 81 (D.C. Cir. 2017)

(Kavanaugh, J., concurring). And despite then-Judge Kavanaugh's urging, *id.*, the D.C. Circuit has not taken the issue en banc.

In short, every regional circuit has weighed in. There is clear disagreement over which employment practices give rise to a disparate treatment claim.

II. The question presented involves an important and recurring issue that only this Court can resolve.

1. The answer to the question of which "employment practice[s]" can be challenged under Section 703(a) is important to countless employers and employees. As the number of cases in the split shows, this question is litigated frequently.

And the volume of reported decisions does not tell the full story: The Fifth Circuit's restrictive and longstanding "ultimate employment decisions" test deters some cases from being filed at all. Even if there is strong evidence of disparate treatment, attorneys are unlikely to file suit unless they can plausibly allege either an "ultimate employment decision" or some other legal claim beyond disparate treatment (such as a separate retaliation claim under Section 704). Unless this Court grants review, the next time an employee within the Fifth Circuit seeks a lawyer to challenge on-the-job racial segregation or discriminatory job assignments, he may be turned away at the door.

2. Even the frequency with which this question arises in Title VII cases understates its importance. The question presented is critical to the construction of a number of other major antidiscrimination statutes as well.

Nearly identical prohibitions to Section 703(a) appear in other major federal fair employment statutes like the Americans with Disabilities Act (ADA), 42 U.S.C. § 12112(a); the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(a); and the Genetic Information Nondiscrimination Act (GINA), 42 U.S.C. § 2000ff-1(a). And 42 U.S.C. § 1981(b), which addresses racial discrimination in contracting and covers smaller employers, also contains language that parallels Section 703(a).

Similar statutory provisions in comparable statutory schemes are presumptively read *in pari materia*. *See, e.g.*, *Pasquantino v. United States*, 544 U.S. 349, 355 n.2 (2005); *McFarland v. Scott*, 512 U.S. 849, 858 (1994); *Sullivan v. Everhart*, 494 U.S. 83, 92 (1990).

So it is entirely predictable that the circuits' conflicting interpretations of Section 703(a) have spilled over into these other statutes. The Fifth Circuit applies its "ultimate employment decisions" restriction to claims under the ADA and the ADEA. *See, e.g.*, *Stringer v. N. Bolivar Consol. Sch. Dist.*, 727 Fed. Appx. 793, 799 (5th Cir. 2018) (ADA); *Ogden v. Brennan*, 657 Fed. Appx. 232, 235 (5th Cir. 2016) (ADEA). By contrast, circuits in the majority do not apply an "ultimate employment decisions" test to those statutes. Instead, they apply their own circuit rules to determine whether the plaintiff has met his burden of pointing to a challengeable employment practice. *See, e.g.*, *Fox v. Costco Wholesale Corp.*, 918 F.3d 65, 71 (2d Cir. 2019) (ADA); *Madlock v. WEC Energy Grp., Inc.*, 885 F.3d 465, 470 (7th Cir. 2018) (Section 1981); *EEOC v. C.R. Eng., Inc.*, 644 F.3d 1028, 1040 (10th Cir. 2011) (ADA).

3. Only this Court can resolve the entrenched and well-recognized conflict on the question presented. The circuits understand that after *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), they cannot apply an "ultimate employment decisions" test in Section 704 retaliation cases. *Id.* at 67. But *Burlington Northern* did not directly resolve whether a court can continue to apply that test to claims under Section 703(a).

A year after *Burlington Northern*, the Government urged this Court to give courts of appeals time to "clarify" their jurisprudence in Section 703(a) cases "in the wake of *Burlington Northern*." Brief in Opposition at 13, *Momah v. Earp*, 554 U.S. 902 (2008) (No. 07-991). But that clarification has not come. While many of the courts have now adopted a clear position on the meaning of "terms" and "conditions," their positions clearly conflict. Just as this Court granted review to resolve a similar conflict in *Burlington Northern*, it should do so here.

III. 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. Pet. App. 22a (quoting EEOC charge); *id.* 23a (quoting plaintiff's complaint).

The Fifth Circuit upheld the district court's grant of summary judgment solely because the "working conditions" petitioner had alleged—namely, that black electricians had been forced to work outside without

water breaks while their white teammates worked indoors with air conditioning—"are not adverse employment actions because they do not concern ultimate employment decisions." Pet. App. 4a.

2. The question presented is also outcome-determinative. Had petitioner brought suit in a circuit other than the Fifth (or the Third), his allegation that respondent gave different and more arduous work assignments to black employees would have established that element of his prima facie case of disparate treatment. *See, e.g.*, *Feingold v. New York*, 366 F.3d 138, 152-53 (2d Cir. 2004) (a showing that white workers were assigned heavier workloads than their minority colleagues established a prima facie case); *Tart v. Ill. Power Co.*, 366 F.3d 461, 473, 478 (7th Cir. 2004) (sustaining a jury verdict for black plaintiffs who had shown that they were "reassigned because of their race" to "significantly harsher working conditions"); *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1090-91 (9th Cir. 2008) (permitting a claim to go forward regarding disparate treatment with respect to work assignments and exclusion from part of the worksite); *Freedman v. MCI Telecomms. Corp.*, 255 F.3d 840, 844 (D.C. Cir. 2001) (finding a prima facie case of discrimination when a worker was assigned to the less desirable night shift because of his religion).[6]

IV. 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

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[6] On remand, the Fifth Circuit can resolve any remaining issues it did not reach.

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," Pet. App. 4a—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, courts must "start with the specific statutory language in dispute." *Murphy v. Smith*, 138 S. Ct. 784, 787 (2018). Since Title VII provides no special definition of that phrase, the words should be "interpreted as taking their ordinary, contemporary, common meaning" at the time Section 703 was enacted, *Wisc. Cent. Ltd. v. United States*, 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 of "[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 employee walkout from a machine shop. *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 14-15 (1962).

Dictionary definitions contemporaneous with the enactment of Title VII confirm that the statutory language covers a wide spectrum of employment practices. Webster's *New International Dictionary* (2d ed. 1954) defined "conditions" as "attendant circumstances." *Condition*, Webster's New International Dictionary (2d ed. 1954); *see also Condition*, Black's Law Dictionary (4th ed. 1968) (including under the common law definitions of condition: "mode or state of being; state or situation").

Section 703(a) thus extends beyond a sharply limited list of ultimate employment decisions. In particular, having to work outside in the heat is an "attendant circumstance" or "state" of one's job that qualifies as a "term" or "condition" of employment. The Fifth Circuit itself inadvertently admitted as much when it referred to petitioner's having to "work outside without access to water" as involving "working conditions." Pet. App. 4a.

2. 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 Dictionary (10th ed. 2014) ("*otherwise* tends to be quite broad in scope").[7]

3. Lest there be any doubt, the Fifth Circuit's "ultimate employment decisions" standard also runs afoul of the surplusage canon. This Court has warned lower courts to avoid an interpretation that fails to give effect to all the words in a statute. *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 562 (1990); *see also Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174-76 (2012).

In the past quarter-century, the Fifth Circuit has identified only five "ultimate employment decisions" it

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[7] *Scrivener* was construing the phrase "otherwise discriminate" in the context of the National Labor Relations Act; as this Court has explained, it often draws analogies between that Act and "Title VII contexts," *Hishon v. King & Spalding*, 467 U.S. 69, 76 n.8 (1984).

thinks fall within Section 703(a): "hiring, granting leave, discharging, promoting, or compensating." Pet. App. 4a (quoting *McCoy v. City of Shreveport*, 492 F.3d 551, 559 (5th Cir. 2007)). But a "refus[al] to hire," a "discharge," and an employee's "compensation" are already enumerated "employment practice[s]" with respect to which an employer may not discriminate. 42 U.S.C. § 2000e-2(a)(1). And a promotion can often be framed as "the opportunity to enter into a new contract with the employer." *Patterson v. McLean Credit Union*, 491 U.S. 164, 185 (1989). So under the Fifth Circuit's interpretation, the words "hiring," "discharge," and "compensation" are surplusage. Even worse, the phrase "terms, conditions, or privileges of employment" is reduced to those already enumerated acts plus "granting leave." That cannot be right. Congress would not have used so many general words to speak only to one discrete practice. To the contrary: Congress knows how to speak specifically to granting leave when it wishes to. *See* Family and Medical Leave Act, 29 U.S.C. §§ 2601 *et seq.*

B. The Fifth Circuit's construction of Section 703(a)(1) is inconsistent with other provisions 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 squared 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 opportunities." 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.[8]

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 Christmas parties "discriminates against its Negro employees on the basis of race with respect [to] a condition or privilege of employment, because of their race").

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[8] The EEOC's Compliance Manual "reflect[s] 'a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *AT&T Corp. v. Hulteen*, 556 U.S. 701, 723 n.5 (2009) (quoting *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008), and *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998)). *See also Mount Lemmon Fire Dist. v. Guido*, 139 S. Ct. 22, 27 (2018) (relying on the Manual); *Green v. Brennan*, 136 S. Ct. 1769, 1784 (2016) (same).

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 180 (contrasting the pre-amendment version of Section 1981 with "the more expansive 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.

C. The Fifth Circuit's "ultimate employment decisions" test is contrary to both this Court's and the EEOC's interpretations of Section 703(a).

Both this Court's decisions and EEOC interpretations confirm that when Section 703(a)(1) uses the words "terms" or "conditions" of employment, it does so to ensure that no racially discriminatory employer action in the workplace escapes Title VII's reach.

1. This Court's foundational decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), explained that Title VII is designed to "eliminate those discriminatory practices and devices which have fostered *racially stratified job environments*." *Id.* at 800 (emphasis added). There is no way to reconcile the Fifth Circuit's "ultimate employment decisions" restriction with this conception of Title VII. Under the Fifth Circuit's rule, Section 703(a)(1) has nothing to say when an employer deliberately segregates the workplace or otherwise subjects workers of one race to less desirable working conditions as long as employees are not fired, denied promotion, or paid less. Given that segregation and racially differentiated work assignments are the very essence of racial stratification, the "ultimate employment decisions" test cannot be right.

This Court itself has interpreted "terms, conditions, or privileges" under Title VII broadly. In *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), the Court rejected the view that Section 703 is limited to "economic" or "tangible" discrimination. *Id.* at 64. To the contrary, it "strike[s] at the entire spectrum of disparate treatment." *Id.* And in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), the Court reaffirmed that the phrase "terms" and "conditions" goes beyond "the narrow contractual sense." *Id.* at 78; *see also Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 62 (2006) (noting that Section 703 reaches "actions that affect employment or alter the *conditions of the workplace*") (emphasis added). Indeed, if "terms" and "conditions" were as narrow as the Fifth Circuit thinks they are, then this Court never could have held, as it did in *Meritor* and *Oncale*, that Section 703(a)(1) reaches racial and sexual harassment.[9]

2. The EEOC has consistently taken the position that the phrase "terms, conditions, or privileges of employment" reaches employer practices involving work assignments. The EEOC's Compliance Manual declares that "[t]he phrase 'terms, conditions, and privileges' has come to include a wide range of activities or practices which occur in the work place." EEOC Compliance Manual § 613.1(a), 2006 WL 4672701. In particular, the phrase covers "job assignments and duties." *Id.*; *see also* EEOC

[9] And it is no answer to suggest that such disparate treatment can be attacked by using this Court's hostile environment caselaw. That jurisprudence is aimed at a different problem altogether.

Compliance Manual § 2-II, 2009 WL 2966754 (stating that "work assignments" are covered).

In line with this longstanding interpretation, the EEOC has declared that "a prima facie case of discrimination would be established if [an] employer had a policy of assigning Blacks to one section of the plant and Whites to another, or women to one production line and men to another." EEOC Compliance Manual § 618.3(a), 2006 WL 4672740.

The Fifth Circuit's "ultimate employment decisions" test cannot be squared with this principle. The Fifth Circuit derived its requirement from the framework developed in *McDonnell Douglas* for analyzing disparate treatment claims involving only circumstantial evidence of a discriminatory purpose. *See McCoy v. City of Shreveport*, 492 F.3d 551, 556 (5th Cir. 2007). But in *Stone v. Louisiana Department of Revenue*, 590 Fed. Appx. 332 (5th Cir. 2014), the Fifth Circuit confirmed that it sees "ultimate employment decisions" as synonymous with Section 703(a)(1)'s reference to "terms, conditions, or privileges of employment." *Id.* at 339. And the statutory phrase applies to *all* claims under Section 703(a)(1), including ones where there is direct evidence of discriminatory purpose. It follows inescapably that, under the Fifth Circuit's view, even a facial policy of workplace racial segregation would lie outside Section 703(a)(1) because there has been no "ultimate employment decision."

Earlier this week, the United States filed a Brief in Opposition that agrees with petitioner's arguments here. *See* Brief in Opposition at 12-16, *Forgus v. Shanahan* (No. 18-942). The Government then declared that, "[g]iven the significant and widespread

misreading of Title VII" in cases that impose a restriction on what counts as a term or condition, "this Court's review would likely be appropriate in a properly presented case." *Id.* at 16. Petitioner's is that case.

* * *

The centerpiece of Section 703(a) is its prohibition on "discriminat[ion]." 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 of employment' in violation of Title VII." *Id.* (Kavanaugh, J., concurring) (quoting 42 U.S.C § 2000e-2(a)).

This simple principle, grounded in the text of Section 703(a), requires that petitioner have the opportunity to prove that respondent intentionally assigned him to harsher working conditions because of his race.

CONCLUSION

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

Respectfully submitted,

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May 7, 2019

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-30790

United States
Court of Appeals
FILED
February 6, 2019
Lyle W. Cayce
Clerk

DAVID D. PETERSON,
Plaintiff - Appellant

v.

LINEAR CONTROLS, INCORPORATED,
Defendant – Appellee

Appeal from the United States District Court
for the Western District of Louisiana
USDC. No. 6:16-CV-725

Before STEWART, Chief Judge, and SOUTHWICK and ENGELHARDT, Circuit Judges.

PER CURIAM:[*]

David Peterson sued his former employer, Linear Controls, alleging a hostile work environment and discrimination based on race under Title VII. The magistrate judge granted summary judgment to

[*] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Linear Controls on each of Peterson's claims. We AFFIRM.

I.

Peterson worked at Linear Controls for six years, primarily as an offshore electrician. During his last job assignment with the company, Peterson worked at Fieldwood Energy's East Breaks 165 platform. His assignment lasted six weeks, from July 16, 2015 to August 22, 2015 (including a week-long break). In September 2015, Peterson resigned from Linear Controls via letter, explaining that he intended to continue his education as an electrician.

A month later, Peterson filed an EEOC charge against Linear Controls, alleging discrimination and retaliation on the basis of race (black) and religion (Muslim). Peterson reported that he was subjected to "Muslim jokes and comments because of [his] religious beliefs (not eating pork)." He also reported "different terms and conditions of employment" in two instances. First, he was one of four employees to arrive late to a safety meeting, but only he—the sole black employee—was written up. Second, he was on a team of five white employees and five black employees, and the black employees had to work outside and were not permitted water breaks, while the white employees worked inside with air conditioning and were given water breaks. Peterson also alleged that his managers would "judge [his] appearance and overlook [his] work." The EEOC issued a right to sue letter on request, and Peterson filed suit against Linear Controls.

After Peterson and Linear Controls submitted sworn statements from various Linear Controls

employees to support their positions, Linear Controls moved for summary judgment. A magistrate judge, ruling by the parties' consent, granted summary judgment to Linear Controls on all claims. Peterson appeals the dismissal of two claims: hostile work environment and discrimination based on race.

II.

We review a grant of summary judgment de novo. *Rayborn v. Bossier Par. Sch. Bd.,* 881 F.3d 409, 414 (5th Cir. 2018). Summary judgment is proper when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When deciding if there is a genuine issue of material fact, "courts must view the facts and draw reasonable inferences in the light most favorable to the nonmoving party." *Rayborn*, 881 F.3d at 414 (quotation omitted).

III.

Peterson appeals the dismissal of his Title VII racial discrimination claim. The magistrate judge analyzed this claim as one relying on circumstantial evidence of discrimination and subject to *McDonnell Douglas*'s burden-shifting framework. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). *McDonnell Douglas* requires a plaintiff to demonstrate that "(1) he is a member of a protected class, (2) he was qualified for the position at issue, (3) he was the subject of an adverse employment action, and (4) he was treated less favorably because of his membership in that protected class than were other similarly situated employees who were not members of the protected class, under nearly identical

circumstances." *Paske v. Fitzgerald*, 785 F.3d 977, 985 (5th Cir. 2015) (quotation omitted). The magistrate judge held that Peterson did not allege an adverse employment action and did not adequately identify a similarly situated comparator. Peterson contends that the magistrate judge improperly excluded witness declarations that identified (1) similarly situated comparators and (2) direct evidence of discrimination sufficient to escape the *McDonnell Douglas* framework and defeat summary judgment.

Peterson's arguments fail to revive his claim. Assuming the declarations identify similarly situated comparators, Peterson still cannot satisfy Title VII's adverse employment action requirement. *Paske*, 785 F.3d at 985.

Our court strictly construes adverse employment actions to include only "ultimate employment decisions," such as "hiring, granting leave, discharging, promoting, or compensating." *McCoy v. City of Shreveport*, 492 F.3d 551, 559, 560 (5th Cir. 2007). Peterson alleged that he and his black team members had to work outside without access to water, while his white team members worked inside with air conditioning. Taking this as true, the magistrate judge did not err in holding that these working conditions are not adverse employment actions because they do not concern ultimate employment decisions. *Id.*; *see also Aryain v. Wal-Mart Stores Tex. LP*, 534 F.3d 473, 485–86 (5th Cir. 2008).

Peterson also contends that the district court ignored direct evidence of discrimination sufficient to

defeat summary judgment. Peterson's complaint alleged that his supervisor denied him leave from work to visit a sick family member and later, when discussing Peterson's request with another employee, said "[f***] that [n*****]."

Racial slurs may "constitute[] direct evidence that racial animus was a motivating factor" behind an adverse employment action. *Brown v. E. Miss. Elec. Power Ass'n*, 989 F.2d 858, 861 (5th Cir. 1993). Such language must be (1) "proximate in time" to the action, (2) "made by an individual with authority" over the action, and (3) "related to the" action. *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 655 (5th Cir. 1996), *abrogated on other grounds by Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 134 (2000). At first glance, Peterson's allegations appear to meet this test. His complaint states that his supervisor denied him leave, an adverse employment action, and then in the context of that denial called Peterson the n-word to another employee. But Peterson's deposition testimony belies the allegations in his complaint. He acknowledges he was allowed to "go in"—leave the offshore site—to visit his sick fiancée. A supervisor warned Peterson he might not be allowed to return to the same job if he left, but Peterson admits that he was allowed to return. Another Linear Controls employee's declaration confirms that Peterson was permitted to leave on this occasion and others. As the magistrate judge determined, there is no evidence that Peterson was denied leave. Because Peterson was not subjected to an adverse employment action, we affirm the dismissal of his Title VII racial discrimination claim. Peterson's reliance on *Reeves* does not save his claim,

because he cannot make out a prima facie case of discrimination without an adverse employment action. *Reeves,* 530 U.S. at 142–43.

IV.

Peterson also appeals the dismissal of his hostile work environment claim. A prima facie case of hostile work environment requires a plaintiff show that: (1) he "belongs to a protected group;" (2) he was "subject to unwelcome [ ] harassment;" (3) the harassment was based on a protected characteristic; and (4) the harassment "affected a term, condition, or privilege of [his] employment." *Watts v. Kroger Co.,* 170 F.3d 505, 509 (5th Cir. 1999) (quotation omitted).[1]

The magistrate judge granted Linear Controls' motion for summary judgment on Peterson's hostile work environment claim, finding the alleged harassment did not affect a term, condition, or privilege of Peterson's employment. Peterson alleged that, for ten days in July 2015, the black members of his team worked outside in the heat while the white members of his team worked inside in the air conditioning. He also alleged that black employees were routinely denied water breaks, but in his deposition admitted there was only one instance in which he was denied a water break. The magistrate judge held that Peterson's allegations did not create a hostile work environment because (1) Peterson's job description required working in an outdoor

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[1] A fifth element exists when a coworker, rather than a supervisor, creates the hostile work environment. Peterson's allegations concern a supervisor, so we do not consider this element. *See Lauderdale v. Tex. Dep't of Criminal Justice, Inst. Div.,* 512 F.3d 157, 162–63 (5th Cir. 2007).

environment; (2) he worked at Linear Controls for seven years, but his allegations only concerned a ten-day period; and (3) the assignment did not cause him physical injury or harm.

Whether harassing conduct is sufficiently severe or pervasive to affect a term, condition, or privilege of employment depends on the totality of the circumstances, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance" or workplace competence. *Harvill v. Westward Commc'ns, LLC,* 433 F.3d 428, 434 (5th Cir. 2005) (quoting *Harris v. Forklift,* 510 U.S. 17, 23 (1993)).

Peterson did not allege sufficiently severe or pervasive conduct. He worked for Linear Controls for six years, but his allegations regarding harsher job assignments concern only one ten-day period. More is generally required to show pervasive harassment. *See, e.g., Watkins v. Recreation and Park Comm'n for the City of Baton Rouge*, 594 F. App'x 838, 841 (5th Cir. 2014) (rejecting claim premised on three instances of racially charged language and symbols over eight-year employment); *Lauderdale,* 512 F.3d at 164 (reviving claim when a supervisor called his employee "ten to fifteen times a night for almost four months").

Additionally, he does not allege that his job performance or career outlook were affected. Peterson's job description required him to work outside, and the work he completed was not physically threatening or humiliating. Peterson does

not allege that working outside interfered with his job performance or competence. In fact, his responsibilities demonstrably progressed over his time at Linear Controls. He moved up the ranks from helper to electrician and was offered a higher paying position in maintenance, which he turned down. The totality of the circumstances do not present a hostile work environment. *See, e.g., Jackson v. Honeywell Int'l, Inc.,* 601 F. App'x 280, 287–88 (5th Cir. 2015) (rejecting claim because plaintiff testified that racial slurs did not unreasonably interfere with his work performance or job satisfaction).

Peterson's coworker's statement that a supervisor used the n-word to describe Peterson does not change our analysis of this claim. The one-time use of that despicable word does not comport with our court's conception of a hostile work environment. *See, e.g., Howard v. United Parcel Serv., Inc.*, 447 F. App'x 626, 632 (5th Cir. 2011) (rejecting claim grounded in one "racially inappropriate" term directed toward plaintiff and allegations that other employees overheard racial slurs). This is particularly true here, where Peterson did not hear the slur. *See Johnson v. TCB Constr. Co. Inc.,* 334 F. App'x 666, 671 (5th Cir. 2009) (rejecting claim when supervisor frequently used n-word outside plaintiff's presence but there was no evidence it affected plaintiff's job).

Peterson also argues that the ten-day period was a particularly "egregious incident" creating a hostile work environment. He admits that he did not present this argument to the trial court. Generally, an argument "not raised in the district court cannot be asserted for the first time on appeal." *Horton v. Bank One, N.A.,* 387 F.3d 426, 435 (5th Cir. 2004)

(quotations omitted). There is an exception, however, when the issues presented to the district court would have permitted the district court to "rule on the essential argument" advanced on appeal. *Lifemark Hosps., Inc. v. Liljeberg Enters., Inc.*, 304 F.3d 410, 427 n.29 (5th Cir. 2002). But even if Peterson activated this exception by presenting a standard hostile work environment claim to the district court, his "egregious incident" argument cannot survive on the merits.

Egregious, isolated incidents "can alter the terms and conditions of employment." *Harvill*, 433 F.3d at 435. An example of an egregious race-based incident arose when a company's supervisors brought in a white woman in a gorilla suit who made sexually and racially offensive comments about black employees on Juneteenth. *Henry v. Corpcar Servs. Hous., Ltd.,* 625 F. App'x 607, 608–09 (5th Cir. 2015). She also touched them inappropriately and without consent. *Id.* This single, egregious incident created a hostile work environment considering the social context of the gorilla costume and Juneteenth; the incident's physically humiliating nature; and the demonstrable impact on black employees' job performance and outlook. *Id.* at 613.

The conduct Peterson alleged does not meet this standard. Peterson's claim that black employees were given unfavorable working conditions is disturbing given the racial makeup of Linear Controls' workforce and the allegation that a supervisor referred to Peterson as the n-word. But social context is not the only factor we consider. *See id.* Peterson was directed to perform tasks that fell within his job description. *See Hobbs v. City of Chicago*, 573 F.3d

454, 464 (7th Cir. 2009) ("No reasonable jury could conclude that being assigned duties that were part of one's job description . . . amount[s] to a hostile work environment."). He does not claim he was physically humiliated, *see Paul v. Northrop Grumman Ship Sys.,* 309 F. App'x 825, 829 (5th Cir. 2009) (listing the physical harassment alleged in "egregious" cases of harassment), or that his job performance was affected, *see Henry*, 625 F. App'x at 613 (describing how plaintiff "suffered from severe anxiety, depression, anger, and nervousness" before resigning). Under the totality of the circumstances here, Peterson did not allege an egregious incident creating a hostile work environment.

V.

For the foregoing reasons, we AFFIRM the dismissal of Peterson's claims.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

Peterson	Civil Action No. 16-00725
versus	Magistrate Judge Carol B. Whitehurst
Linear Controls Inc.	By Consent of the Parties

MEMORANDUM RULING

Before the Court is a Motion For Summary Judgment filed by defendant, Linear Controls Inc. ("Linear Controls"), [Rec. Doc. 29]. Plaintiff, David D. Peterson, filed a Memorandum In Opposition [Rec. Doc. 33] and Linear Controls filed a Reply thereto [Rec. Doc. 39]. For the reasons that follow, the Court will grant the Motion.

I. Background

Plaintiff is a former employee of Linear Controls who worked offshore as an electrician on a construction crew and also periodically performed maintenance work on offshore rigs. Plaintiff was employed with Linear Controls for approximately seven (7) years before he submitted a resignation letter on September 23, 2015.

Plaintiff filed an EEOC Charge against Linear Controls on October 21, 2015 alleging that for an approximately six (6) week period in 2015, July 15–August 22, 2015, while working for Linear Controls on the Fieldwood Energy, LLC ("Fieldwood") East

Breaks 165 platform, he was discriminated against on the basis of his race—African-American, and that he was subjected to discrimination based on his religion—Muslin [sic]. Plaintiff also claimed "retaliation" in his EEOC charge because he was late for a safety meeting along with two white employees, but he was the only one written-up for the violation.[1] *R. 29-3, Exh. B*. Plaintiff asserted claims under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e) ("Title VII"). After conducting an investigation the EEOC ruled in Linear Controls' favor and found that the evidence did not establish a violation of Title VII on either the race or the religious discrimination claims.

On May 25, 2016, Plaintiff filed a Complaint in this action asserting race and religious discrimination claims under Title VII. Plaintiff also asserted a claim of racial discrimination under Louisiana's Employment Discrimination Law and a state law claim for intentional infliction of emotional distress.

On May 25, 2017, Linear Controls filed the instant Motion for Summary Judgment seeking dismissal on the merits of all of the Plaintiff's asserted federal and state law claims. Plaintiff filed an Opposition to Linear Control's Motion for Summary Judgment on June 29, 2017. *R. 33*.

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[1] The EEOC investigated the safety meeting incident as one for disparate treatment rather than retaliation based on Plaintiff's racial discrimination charge. *R. 29-3, Exh. G.*

II. Summary Judgment Standard

Under Rule 56(a) of the Federal Rules of Civil Procedure, summary judgment is mandated when the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Am. Home Assurance Co. v. United Space Alliance, LLC*, 378 F.3d 482, 486 (5th Cir. 2004). A fact is material if proof of its existence or nonexistence might affect the outcome of the lawsuit under the applicable law in the case. *Minter v. Great American Insurance Co. of New York*, 423 F.3d 460, 465 (5th Cir. 2005). A genuine issue of material fact exists if a reasonable jury could render a verdict for the nonmoving party. *Thorson v. Epps*, 701 F.3d 444, 445 (5th Cir. 2012).

The party seeking summary judgment has the initial responsibility of informing the court of the basis for its motion, and identifying those parts of the record that it believes demonstrate the absence of genuine issue of material fact. *Washburn v. Harvey*, 504 F.3d 505, 508 (5th Cir. 2007). If the moving party carries its initial burden, the burden shifts to the nonmoving party to demonstrate the existence of a genuine issue of a material fact. *Id.* In such a case, the non-movant may not rest upon the allegations in his pleadings, but rather must go beyond the pleadings and designate specific facts demonstrating that there is a genuine issue for trial. *Celotex v. Catrett*, 477 U.S. 317, 325 (1986). All facts and justifiable inferences are construed in the light most favorable to the nonmovant. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986).

If the dispositive issue is one on which the nonmoving party will bear the burden of proof at trial, the moving party may satisfy its burden by pointing out that there is insufficient proof concerning an essential element of the nonmoving party's claim. *Norwegian Bulk Transport A/S v. International Marine Terminals Partnership*, 520 F.3d 409, 412 (5th Cir. 2008). The motion should be granted if the non-moving party cannot produce sufficient competent evidence to support an essential element of its claim. *Condrey v. Suntrust Bank of Ga.*, 431 F.3d 191, 197 (5th Cir. 2005). However, metaphysical doubt as to the material facts, conclusory allegations, unsubstantiated assertions and those supported by only a scintilla of evidence are insufficient. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994).

In an employment discrimination case, the focus is on whether a genuine issue exists as to whether the defendant intentionally discriminated against the plaintiff. *Grimes v. Texas Department of Mental Health and Mental Retardation*, 102 F.3d 137, 139 (5th Cir. 1996) (and cases cited therein). As in any case, unsubstantiated assertions and conclusory allegations are not competent summary judgment evidence. *Hervey v. Mississippi Dept. of Educ.*, 404 Fed.Appx. 865, 869 (5th Cir. 2010) (citing *Ramsey v. Henderson*, 286 F.3d 264, 269 (5th Cir. 2002)) ("conclusory allegations, speculation, and unsubstantiated assertions are inadequate to satisfy the nonmovant's burden on a motion for summary judgment"). In response to a motion for summary judgment, it is therefore incumbent upon the non-moving party to present evidence—not just

conjecture and speculation—that the defendant retaliated and discriminated against plaintiff on the basis of his race. *Grimes*, 102 F.3d at 140.

III. Undisputed Facts

Linear Controls publishes and distributes company policies addressing discrimination and harassment in the workplace. Linear Controls's Equal Employment Opportunity ("EEO") Policy stated in pertinent part:

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

R 29-2, Undisputed Fact No. 2, citing R. 29, Exh. R, Declaration of Clemons; Exh. S, Employee Handbook.

Linear Controls also prominently displays at its facilities EEO posters published by the U.S. Department of Labor. These posters provide that discrimination, harassment and retaliation are prohibited. The posters also provide contact information for the U.S. Department of Labor, Equal

Employment Opportunity Commission ("EEOC"). In addition, Linear Controls has a written grievance or complaint policy. Linear Controls' management also maintains an open door policy under which employee complaints or concerns can be raised. Employees may raise complaints or concerns with supervisors or with Human Resources. *R. 29-2, Undisputed Fact No. 3, citing Exh. R, Declaration of Clemons; Exh. S, Employee Handbook*.

Plaintiff acknowledged receipt of copies of the above-referenced policies as shown by the signed Receipt and Acknowledgment forms dated October 28, 2008 and March 28, 2012, copies of which are marked as Exhibit T, in globo. *R. 29-2, Undisputed Fact No. 4, also citing Plaintiff's Depo., Exh. D, pp. 175-179.*

Linear Controls originally hired Plaintiff on October 28, 2008 as a Helper earning $9.00/hr. Plaintiff's employment was separated in March of 2009 due to lack of work. *R. 29-2, Undisputed Fact No. 5 citing Exh. R, Declaration of Clemons*.

During the time period relevant to this litigation, Plaintiff worked offshore for Linear Controls as an Electrician on a construction crew. *R. 29-2, Undisputed Fact No. 8 citing Exh. R, Declaration of Clemons*.

On July 13, 2015, while offshore in the Grand Isle area on a job for Linear Controls' customer, Fieldwood Energy, LLC ("Fieldwood"), Plaintiff was late for a safety meeting. *R. 29-2, Undisputed Fact No. 9 citing Exh. O,7/13/15 Employee Disciplinary Report*.

Plaintiff admits he was late for the meeting. *R. 29-2, Undisputed Fact No. 10 citing Exh. D, Plaintiff's Depo., pp. 152-159, 233-235, 246.*

The next day, July 14, 2015, Plaintiff was sent in from the Grand Isle job. *R. 29-2, Undisputed Fact No. 11 citing Exh. P, 07/14/2015 Employee Disciplinary Report*.

Plaintiff became confrontational with Linear Controls' Maintenance Supervisor, Michael Book, when Plaintiff learned that he was being sent in from the job. *R. 29-2, Undisputed Fact No. 14 citing Exh. Q, Depo. of Davis, pp. 21-25*; *Exh. P, 07/14/2015 Employee Disciplinary Report*. Michael Book and Plaintiff were the only Linear Controls' employees on the job. *Id. citing Exh. Q, pp. 21-25*.

After being sent in from the Grand Isle job, Plaintiff was put back to work immediately by Linear Controls on another location. *R. 29-2, Undisputed Fact No. 15 citing Exh. R, Declaration of Clemons*.

Plaintiff admits he was late for a safety meeting in August 2015 on the East Breaks 165 project. *R. 29-2, Undisputed Fact No. 17 citing Exh. E, 8/13/2015 (p. 12/100) notes submitted by Plaintiff to EEOC*.

No disciplinary action was incurred by any employee, including Plaintiff, in August 2015 on the East Breaks 165 project as Linear Controls did not receive any reports from Fieldwood that either Duhon, Hammett or Plaintiff were late for any safety meeting in August 2015. *R. 29-2, Undisputed Fact No. 18 citing Declaration of Clemons*.

On September 15, 2015, Plaintiff called Tim Davis, Linear Controls' Construction Project

Manager, asking to have his employment terminated by Linear Controls. Davis declined since the company was not conducting layoffs at the time and had a project coming up and needed Plaintiff to work. *R. 29-2, Undisputed Fact No. 21 citing Depo. of Davis, pp. 19-20; Plaintiff's Depo., pp. 160-169*.

On September 23, 2015, Plaintiff submitted a letter to Linear Controls stating: "I will like to resign from Linear Control's, due to I am continuing my education as an electrician to further my career." *R. 29, Exh. C, Plaintiff's 09/3/2015 letter*.

Plaintiff's resignation letter makes no reference to discrimination or harassment based upon race or religion or to any other alleged unlawful discriminatory acts or conduct. *R. 29-2, Undisputed Fact No. 25 citing Exh. C, Plaintiff's 09/3/2015 letter.*

After his resignation, Plaintiff did continue his education, receiving additional training and/or education through the International Brotherhood of Electrical Workers ("IB EW") and otherwise. *R. 29-2, Undisputed Fact No. 26 citing Plaintiff's Deposition, pp. 10, 41-43, 174-175*.

Plaintiff filed his Charge of Discrimination on October 28, 2015, and the EEOC issued a Notice of Right to Sue at Plaintiff's request , due to the passage of time, on February 22, 2016. *R. 29-2, Undisputed Fact No. 27 citing Exh. B*, *EEOC Charge, Exh. F, EEOC Notice of Right to Sue*.

Plaintiff worked for Linear Controls on Fieldwood's East Breaks 165 platform from July 16, 2015 to July 26, 2015 and from August 2, 2015 to August 22, 2015. From July 27, 2015 to August 1,

2015, Plaintiff was off. *R. 29-2, Undisputed Fact No. 28 citing Declaration of Clemons*.

Duhon denies making any comments to Plaintiff about being a Muslin [sic]. *R. 29-2, Undisputed Fact No. 31 citing Exh. I, Depo of Duhon, pp 21-22.*

The job description for an Electrician on a Linear Controls' construction crew, as was Plaintiff, called for working outdoors including exposure to "a typical offshore site" and the "ability to work in a work area where work temperatures may be affected by outside temperatures." *R. 29-2, Undisputed Fact No. 37 citing Plaintiff's Depo., pp. 179-182; Exh. L, Job Description, Bates Nos. L00720-L000721*.

Working in an outdoor environment was part of Plaintiff's job description and regular job duties. *R. 29-2, Undisputed Fact No. 38 citing Plaintiff's Depo., pp. 179-182; Exh. L, Job Description, Bates Nos. L00720-L000721*; *Declaration of Clemons*.

Although he was an Electrician and a member of Linear Control's construction crew, Plaintiff was given assignments on maintenance projects from time to time if the work was within his capabilities. *R. 29-2, Undisputed Fact No. 40 citing Exh. N, Declaration of Macdonald*.

Plaintiff was offered a maintenance position within his capabilities and for which he was qualified, pursuant to an inquiry from Plaintiff. *R. 29-2, Undisputed Fact No. 41 citing Exh. N, Declaration of Macdonald; Davis' Depo., pp. 36-38*.

Plaintiff declined the offer as he would potentially make less money working in maintenance even though the job paid $1.00 more per hour.

Generally, Electricians on a construction crew work longer shifts (more than 14 days) and more hours per day than workers on a maintenance job. Also, in a full-time maintenance position, Plaintiff would generally not have the opportunity to work as an Electrician, when not working on a maintenance job, as Electricians are assigned to work on specific projects. *R. 29-2, Undisputed Fact No. 42 citing Declaration of Macdonald; Davis' Depo., pp. 36-38*.

Calvin J. Broussard, Jr., an African-American man, accepted the maintenance position that Plaintiff declined. *R. 29-2, Undisputed Fact No. 43 citing Declaration of Macdonald; Davis' Depo., pp. 36-38*.

Plaintiff does not contend that his job performance trailed off while working for Linear Controls. Plaintiff testified that his overall performance improved throughout the course of his employment. *R. 29-2, Undisputed Fact No. 45 citing Plaintiff's Depo., p. 147*.

A year and three months after he resigned from Linear Controls, while working for his second, subsequent employer, and after this lawsuit was filed, Plaintiff saw his family doctor for anxiety on one (1) occasion, December 27, 2016. As Plaintiff testified, no mention was made of Linear Controls to the doctor. *R. 29-2, Undisputed Fact No. 46 citing Plaintiff's Depo., pp. 212, 217-225.*

Though offered prescription medication at that time, Plaintiff testified that he did not feel that he needed it and did not fill the prescription, nor does he intend to do so. *R. 29-2, Undisputed Fact No. 47 citing Plaintiff's Depo. pp. 224-225.*

IV. Law And Analysis

A. Exhaustion of Administrative Remedies

A Title VII plaintiff must file a timely charge with the EEOC before he can commence a civil action under Title VII in federal court. 42 U.S.C. § 2000e-5(e)(1), (f)(1)4; *Nat'l RR Passenger Corp. v. Morgan*, 536 U.S. 101, 109 (2002); *Dao v. Auchan Hypermarket*, 96 F. 3d 787, 789 (5th Cir. 1996). Although filing an EEOC charge is not a jurisdictional prerequisite, it "is a precondition to filing suit in district court." *Dao*, 96 F.3d at 789. It is equally well settled that a civil action may not be commenced until after the charging party has received a "right-to-sue" letter from the EEOC. 42 U.S.C. § 2000e–5(f)(1); *Nielsen v. City of Moss Point, Miss.*, 621 F.2d 117, 120 (5th Cir. 1980).

The scope of the charging party's subsequent right to institute a civil suit is fixed such that the EEOC charge may be enlarged only by such investigation as reasonably proceeds therefrom. *National Association of Government Employees v. City Public Service Board of San Antonio, TX*, 40 F.3d 698, 711-712 (5th Cir. 1994). Thus, the suit which is subsequently filed may encompass only "the discrimination stated in the charge itself or developed in the course of a reasonable [EEOC] investigation of that charge." *Id.* at 712. Stated differently, the scope of a Title VII action "is limited to the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." *Young v. City of Houston, TX.*, 906 F.2d 177, 179 (5th Cir. 1990).

On October 28, 2015, Plaintiff filed a Charge of Discrimination with the EEOC ("the Charge"). *R. 29, Exh. B*. Plaintiff defined the time period applicable to his charge as "07-13-2015" to "07-14-2015." The Charge stated:

> I began my employment with Linear Controls on October 28, 2008 most recently as an Electrician. I was subjected to Muslim jokes and comments because of my religious beliefs (not eating pork). On July 13, 2015, I was subjected to different terms and conditions of employment, in that, myself and three other guys were late for a safety meeting but I was the only person written up and the next day I received another write-up for no reason. There were five White and five Black guys. The Black guys had to work in the heat but the White guys did not, we were not allowed to take water breaks but the White guys were. The Managers would also judge my appearance and overlook my work. The company employs more than 500 employees.
>
> No reason was given for the action taken against me.
>
> I believe I have been discriminated against because of my religion, _____[blank in the original]; race, Black; and retaliated against in violation of Title VII of Title VII (sic) of the Civil Rights Act of 1964, as amended, in that Chad Duhon and Brandon Hammett, both White males, were late for a safety meeting but received no write ups.

Thus, in his EEOC charge Plaintiff stated claims for: (1) discrimination based on race and religion; (2) harassment based on religion; (3) retaliation; and (4) disparate treatment based on race.

Plaintiff's allegations in his Complaint included claims of (1) discrimination based on race and religion; (2) harassment based on religion and race[2]; (3) disparate treatment based on race; (4) constructive discharge; and (5) retaliation. Plaintiff's Complaint filed on May 25, 2016, alleged:

1. From July 15 to July 26, 2015, Plaintiff was working offshore as an electrician on a crew on the Fieldwood Energy, LLC East Breaks 165 platform ("East Breaks 165") and that, during that time, black crew members were required by Linear Controls' white supervisors to work every day outside, in the heat while white crew members worked exclusively inside, in air-conditioned facilities;
2. During that time, if any black crew member, including Plaintiff, took a water break inside, the white supervisors would curse and yell and order him back to work; and
3. Despite alleged requests by the black employees to their white supervisors, there was no rotation from outside to inside among white and black crew members. *R.1, ¶ VIII.*

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[2] In his Opposition Memorandum, Plaintiff contends that the outdoor work he was required to perform and the outdoor water breaks constituted harassment and hostile work environment based on his race.

The Complaint also alleged that white employees, Chad Duhon, Plaintiff's direct supervisor, and Brandon Hammet, Plaintiff's co-employee, were late for safety meetings but not admonished. In his EEOC charge, Plaintiff alleged that he was "retaliated against" because Duhon and Hammett were not written up. The Complaint further alleged that Plaintiff was harassed by his white supervisors without reason and that Duhon and Hammet made jokes and derogatory comments about Plaintiff's religion. In addition, the Complaint alleged that Plaintiff's request to leave an offshore project due to a family emergency illness was "denied" by his white supervisor(s). The Complaint also alleged that Plaintiff was "laid off . . . and never called to return back to work." Finally, the Complaint alleged Plaintiff was "forced to and did voluntarily resign."

1. Claims Not In The Charge Nor Alleged In The Complaint

Plaintiff contended in his deposition that he wanted a transfer or promotion from his position as an Electrician on a construction crew to a foreman's position or a job on a maintenance crew, but was denied a promotion. *R. 29, Exh. D, Plaintiff's Depo, pp. 86-89*. Plaintiff claimed that a Caucasian employee was given a job on the maintenance crew and he was not. *Id.* at pp. 93, 190. Plaintiff's claim is disputed by the record. Plaintiff was offered a maintenance position which he declined because he would potentially make less money working in maintenance as Electricians on a construction crew work longer shifts (more than 14 days) and more hours per day than workers on a maintenance job. *R. 29-2, Undisputed Fact Nos. 41 and 42*. Moreover, the

maintenance position that Plaintiff declined was ultimately accepted by Calvin J. Broussard, Jr., an African-American man. *Id.*, Undisputed Fact No. 43. Even assuming that Plaintiff had a viable claim, which he does not, because Plaintiff did not assert any such failure to promote claim in his EEOC charge, he is precluded from including it in this action.

2. Claims In The Charge Not Alleged In The Complaint

Plaintiff's EEOC charge alleged that unidentified "Managers" judged Plaintiff's appearance and overlooked his work. However, there is no such allegation in the Complaint; therefore, there is no such claim presently before the Court. Any claim premised on Plaintiff's appearance allegedly being judged and his work allegedly being overlooked must be dismissed. *See Cassimere v. Fastorq, LLC*, 2017 WL 812468, at *12 (W. D. La. 2017) (Dismissing on summary judgment claims not included in plaintiff's EEOC charge or Title VII complaint.)

3. Allegations In The Complaint Not Stated In The Charge

a. Denial of Leave

Plaintiff alleged in his Complaint that he was denied the opportunity to go home for a family illness emergency while working on the subject platform. While Plaintiff did not include this claim in the Charge and the EEOC did not investigate this claim, he did mention it in the handwritten notes in the EEOC Questionnaire. *R. 29-3, p. 99*. Because this claim is not in the Charge and was not developed in

the ensuing EEOC investigation, it may not be pursued in this action.

Regardless, Plaintiff's claim is without merit. In a June 27, 2015 handwritten note and in his deposition, Plaintiff conceded he was allowed to leave the platform with the understanding that he might not be able to return to the same project. *R. 29-3, Exh. E, p. 104; Exh. D, pp. 119-125, 132-133*. In fact, Plaintiff returned to the same project. Also, Tim Davis, Linear Controls' Construction Project Manager, testified that Plaintiff had requested personal leave on numerous occasions—his requests were never denied and he was allowed to return to the project, rig or worksite. Thus, this claim lacks merit.

b. Safety Meeting Write-ups

In his EEOC charge Plaintiff claimed that his direct supervisor, Chad Duhon, and Brandon Hammett, his co-employee, both Caucasian, were late for safety meetings but not admonished. Plaintiff contended that he was "retaliated against" because Duhon and Hammett were not written up. In his Charge, Plaintiff specifically stated that on July 13, 2015, while he was working on the Grand Isle platform, he, Duhon and Hammett were late, but he was the only one written up. R. 29-3, p. 7. In the notes in the EEOC Questionnaire, Plaintiff further stated that he received another write-up the next day, July 14, for the July 13, 2015 incident which was a "final warning." *Id.*, *p. 99, No. 5, A & B*.

Plaintiff admits that he overslept and was late for the July 13, 2015 meeting. Contrary to his claim, Plaintiff's own deposition testimony establishes that

Duhon and Hammett did not work on the Grand Isle platform on July 13, 2015. *R. 29-3, Exh. D, p. 235*. Also, the testimony of Davis, the Project Manager, provided that Plaintiff was sent in from the Grand Isle job because Linear Controls' customer did not want to use Plaintiff on the job any longer. *Id.*, *Exh. Q, pp. 20-35.* Thus, Linear Controls has established a legitimate, nondiscriminatory reason for the July 13, 2015 and July 14, 2015 write-ups.

In his Complaint and EEOC Questionnaire notes, Plaintiff claimed that he was late for a safety meeting in August, 2015 while on the East Breaks 165 platform and was chastised "unprofessionally" by his Caucasian supervisors. The Declaration of Dawn Clemons, Linear Controls' Chief Financial Officer, states that "[a]fter being sent in on July 14, 2015 from the Grand Isle job, Plaintiff was put back to work immediately [on the East Breaks 165 platform]." *R. 29-4, p. 32*. Clemons further states that Linear Controls received no reports that Plaintiff, Duhon or Hammett were late for any safety meeting in August 2015 and no disciplinary action was incurred by any employee, including Plaintiff. *Id.*

But assuming *arguendo* that a disciplinary write-up was issued, in order to establish a prima facie case of discrimination as well as for retaliation under Title VII, a plaintiff must demonstrate an adverse employment action. A disciplinary write-up does not constitute an adverse employment action. *Cassimere*, 2017 WL 812468, at *9 (citing *King v. Louisiana*, 294 Fed. Appx. 77, 85 (5th Cir. 2008) (Allegations of unpleasant work meetings and verbal reprimands do not constitute actionable adverse employment actions.)). Plaintiff has supplied no competent

summary judgment evidence which constitutes an adverse employment action with regard to the write-up claims. The Court will grant Defendant's motion to dismiss this claim.

c. Constructive Discharge

The allegations in the Complaint that Plaintiff was "laid off . . . and never called back to return to work " and "forced to and did voluntarily resign" are not in included in his Charge and therefore must be dismissed. As previously stated, it is well-established that the failure to assert a claim in an EEOC charge precludes an employee from including that claim in a later civil action. As stated in *Calmes v. JP Morgan Chase Bank*, 943 F. Supp. 2d 666, 681-682 (E. D. La. 2013), "If a plaintiff fails to state a particular claim in his EEOC charge or if that charge is not developed in the ensuing EEOC investigation, the plaintiff is precluded from bringing that claim in his civil suit." In *Calmes*, the plaintiff submitted a letter of resignation stating that he was resigning to look for other employment. *Id.* at 682. The plaintiff then filed an EEOC charge and later filed a Title VII complaint alleging harassment, retaliatory discharge and constructive discharge. *Id.* The charge, however, did not allege retaliatory or constructive discharge. *Id.* The court dismissed the retaliatory and constructive discharge claims on summary judgment, stating in pertinent part:

> [T]he Court notes that despite the fact that Plaintiff's charge was filed with the EEOC on June 15, 2010, a mere three days after his resignation took effect, Plaintiff failed to inform the EEOC that he had resigned/felt

> that he had to resign as a result of Defendant's conduct. The charge itself contains allegations of harassment by Mr. Ritchel and details the subsequent behavior by Defendant; however, it fails to assert that such behavior caused Plaintiff to terminate his employment. As such, Plaintiff is precluded from bringing a claim for constructive discharge in the instant action . . . .
>
> [A]t no point in the EEOC charge does Plaintiff state that the alleged harassment has resulted in any definitive termination of his employment. Rather, Plaintiff explains that he has been suspended with pay and that Defendant is attempting to force him to take disability leave, not terminate him. Plaintiff does not contend [in the EEOC charge] that he has left and/or has been forced to leave. Accordingly, Plaintiff is also precluded from bringing a claim of retaliatory discharge . . . .

Id. at 682. *See also*, *Harris*, 178 F. Supp. 2d at 690 (W. D. La. 2001) (Employee's Title VII claims including the denial of various promotions and opportunities, hostile work environment, and retaliation were not properly before the Court as employee's charge referred only to her employer's failure to promote her for specific positions); *Stone v. Louisiana Dept. of Revenue*, 590 Fed. Appx. 332, 338 (5th Cir. 2014) (dismissing constructive discharge and other claims since plaintiff's EEOC charge did not allege facts reasonably encompassing such claims).

An EEOC charge must state facts sufficient to trigger an EEOC investigation and put the employer on notice of the existence and nature of the claim. *Stone* at 338. Here, Plaintiff's Charge does not mention Plaintiff's separation of employment at all. The Charge was signed by Plaintiff on October 21, 2015 and filed on October 27, 2015, approximately a month after Plaintiff submitted his letter of resignation on September 23, 2015. While Plaintiff's resignation letter states that he was resigning to seek additional education to further his career[3], the Charge makes no reference to being laid off or forced to resign. Likewise, Plaintiff's resignation letter states nothing about harassment or discrimination.

Plaintiff's Charge did not specifically contain, or reasonably encompass, any claim regarding his separation from employment and was never amended or supplemented to include one. Thus, the EEOC did not inquire into Plaintiff's separation of employment at any time prior to closing the case. *R. 29, Exhs. G, H.* The EEOC closed its investigation and issued a "Notice of Right to Sue (Issued on Request)" on February 22, 2016. "[I]f an EEOC investigation has actually been conducted, most courts hold that the scope of the complaint is limited to the actual scope of the investigation." *National Association of Government Employees v. City Public Service Board of San Antonio, Tx*, 40 F.3d 698, 712 (5th Cir. 1994) (citing 2 Larson, Employment Discrimination § 49.11(c)(1) at 9B–16). Accordingly, Plaintiff's claims of constructive, retaliatory or other allegedly

[3] Plaintiff testified he did in fact seek additional education.

unlawful discharge must be dismissed for failure to include them in the EEOC Charge.

B. Discrimination Claims

Title VII prohibits employers from discriminating against employees on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e–2(a). "The Title VII inquiry is whether the defendant intentionally discriminated against the plaintiff." *Alvarado v. Texas Rangers*, 492 F.3d 605, 611 (5th Cir. 2007). A plaintiff can prove Title VII discrimination through direct or circumstantial evidence. *Turner v. Baylor Richardson Medical Center*, 476 F.3d 337, 345 (5th Cir. 2007); *Alvarado* at 611. Direct evidence of an employer's discriminatory intent is rare; therefore, Title VII plaintiffs must ordinarily prove their claims through circumstantial evidence. *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 993 (5th Cir. 1996) (en banc).

Where there is no direct evidence of discrimination, Title VII claims are analyzed using the framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Paske v. Fitzgerald*, 785 F.3d 977, 984 (5th Cir. 2015). A Title VII plaintiff bears the initial burden to prove a prima facie case of discrimination by a preponderance of the evidence. *Shackelford v. Deloitte & Touche, LLP*, 190 F.3d 398, 404 (5th Cir. 1999) citing *McDonnell Douglas*, 411 U.S. at 801-803.

Here, Plaintiff contends he suffered racial and religious discrimination during his employment on Fieldwood's East Breaks 165 platform sometime between July 15 and August 22, 2015, when he terminated his employment. Plaintiff asserts a claim

of disparate treatment based on his race and claims of harassment creating a hostile work environment based on his religion and his race. The Court will consider Plaintiff's claims as follows.

1. Disparate Treatment

To establish a prima facie case of disparate treatment racial discrimination, the plaintiff must provide evidence that: "(1) he is a member of a protected class, (2) he was qualified for the position at issue, (3) he was the subject of an adverse employment action, and (4) he was treated less favorably because of his membership in that protected class than were other similarly situated employees who were not members of the protected class, under nearly identical circumstances." *Paske*, 785 F.3d at 985 (quoting *Lee v. Kan. City S. Ry. Co.*, 574 F.3d 253, 259 (5th Cir. 2009)).

The Fifth Circuit defines "similarly situated" narrowly. *Silva v. Chertoff*, 512 F. Supp. 2d 792, 803 n. 33 (W. D. Tex. 2007) (citing *Wheeler v. BL Dev. Corp.*, 415 F.3d 399, 405 (5 Cir. 2005)). Similarly situated individuals must be "nearly identical" and must fall outside the plaintiff's protective class. *Wheeler* at 405. To show that an employee outside the protected class was "similarly situated" but treated more favorably, a plaintiff must show that the alleged misconduct of both employees was "nearly identical." *Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212, 221 (5th Cir. 2001).

"The employment actions being compared will be deemed to have been taken under nearly identical circumstances when the employees being compared held the same job or responsibilities, shared the same

supervisor or had their employment status determined by the same person, and have essentially comparable violation histories." *Turner v. Kansas City Southern Ry. Co.*, 675 F.3d 887, 893 (5th Cir. 2012).

The prima facie case, once established, raises a presumption of discrimination, which the defendant must rebut by articulating a legitimate, nondiscriminatory reason for its actions. *Shackelford*, 190 F.3d at 404. If the defendant satisfies this burden, the presumption of discrimination raised by the prima facie case disappears, and the plaintiff is left with the ultimate burden of proving discrimination. *Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 897 (5th Cir. 2002). The plaintiff may satisfy this burden by producing "substantial evidence" which proves that the proffered reasons are pretextual. *Id.*; *Shackelford*, 190 F.3d at 404. The plaintiff must put forward evidence rebutting each of the nondiscriminatory reasons the employer articulates. *Wallace v. Methodist Hospital System*, 271 F.3d 212, 220 (5th Cir. 2001). "Evidence that the proffered reason is unworthy of credence must be enough to support a reasonable inference that the proffered reason is false; a mere shadow of doubt is insufficient." *Auguster vs. Vermilion Parish School Board*, 249 F.3d 400, 403 (5th Cir 2001). The Fifth Circuit has "consistently held that an employee's 'subjective belief of discrimination' alone is not sufficient to warrant judicial relief." *Auguster*, 249 F.3d at 403 (citing *Bauer v. Albemarle Corp.*, 169 F.3d 962, 967 (5th Cir. 1999)).

Plaintiff alleges in his Complaint that "from July 15, 2015 to July 26, 2015 [he] was a member of

Defendant's work crew" on the East Breaks 165 platform. *R. 1, ¶ VIII*. While Plaintiff acknowledged that his job description called for exposure to "a typical offshore site" and the "ability to work in a work area where temperatures may be affected by outside temperatures," *R. 29, Exh. D, Plaintiff's Depo., pp. 179-182; R. 29-2, Undisputed Facts 37, 38*, he maintains that the African-American crew members were required to work every day outside while the Caucasian crew members worked exclusively inside in air-conditioned facilities. Plaintiff further contends that if an African-American employee took a water break inside, the white supervisors would curse and yell and order the employee back to work. *Id*. In particular, Plaintiff testified in his deposition that, after sitting inside the safety man, Jimmy Cox's, office drinking water for a couple of minutes, his Caucasian supervisor, Robert Walker, fussed at him and told him to get the "f" back to work. *R. 29, Exh. D, Plaintiff's Depo., pp. 75-83,100*. Plaintiff got up and went back to work. *Id.*

In his Declaration, Broc Arnaud, Linear Control's employee since July 1, 2014, who personally worked with Plaintiff, stated that Caucasian employees, including Arnaud himself, worked both outside and inside on the subject platform; and that Caucasian and African-American employees worked together outside on the platform. *R. 29-2, Exh. K, Declar. Of Arnaud, ¶ 3*. In particular, Arnaud testified that he personally observed African-American employees of Linear Controls, namely Daniel Harris, Archie Mouton, Aaron Boudreaux and Chris Lavergne, working inside on the East Breaks 165 platform. *Id.* Arnaud also stated that he personally observed

Plaintiff working inside for a period of time. *Id.* Moreover, Arnaud stated that he, Matthew Latiolais and Brandon Hammett, worked outside. *Id.* Robert Walker, one of Plaintiff's direct supervisors, testified that he himself had worked outside pulling cable and that African-American employees worked inside on the subject platform. *R. 29-3, Exh. J, Walker Depo., pp. 22-23.*

Arnaud also stated that all employees on the East Breaks 165 platform were allowed to take water breaks when needed and they were allowed to get water and Gatorade from refrigerators or coolers at any time. He further stated that Linear Controls' managers would regularly and routinely hand out water to their employees who were working outside throughout the shift. *R. 29-2, Declar. Of Arnaud, ¶5.* Also, Walker, Plaintiff's supervisor testified that neither he nor Duhon "got onto workers for stopping to get a drink of water." *R. 29-3, Walker Depo., p. 23.* Rather, he stated, they would actually bring the workers water. *Id.*

Plaintiff has identified no similarly situated Caucasian employee who performed the same work he performed and was allowed to work exclusively indoors. Nor has Plaintiff identified a similarly situated Caucasian co-worker performing his same work who was allowed to take a water break like the one Plaintiff was allegedly denied. Rather, Plaintiff's Complaint and his deposition offer nothing more than general claims that Caucasian workers were treated better than him.

In his opposition memorandum, Plaintiff submits the Declaration of Archie J. Mouton, an Electrician

on the East Breaks 165 platform who states he worked "in July 2015" with Plaintiff on a crew of four African Americans, including Plaintiff and himself. *R. 33-1, ¶ 1, 2*. As to Plaintiff's allegations of racial disparity in the outdoor versus indoor working environment, Mouton states, "[b]oth crews had the same job, however, my crew was assigned to work outside in the heat. The white crew worked inside in the air conditioning." *Id.*, *¶ 3*. Plaintiff also submits the Declaration of Jimmy Cox, the Safety Representative for United Fire Safety who "was contracted to work at . . . East Breaks 165 platform." *R. 33-2*. Cox states that "all black workers that were employed by Linear had to work outside and all the white employees worked inside where there was air conditioning. Plaintiff's supervisor, Chad Duhon, stayed inside and would yell at any of the black employees who came inside to get water or took breaks." *Id. at ¶ 4*.

Defendant objects to the statements of Mouton and Cox. Federal Rule of Civil Procedure 56(c)(4) requires that a declaration used to support or oppose a motion "must be [1] made on personal knowledge, [2] set out facts that would be admissible in evidence, and [3] show that the [] declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). Defendant objects to Mouton's declaration for failure to attest to personal knowledge as to any Caucasian co-workers who "had the same job" and who "worked inside in the air conditioning." *R. 35-3*. Defendant contends that Mouton does not provide the actual time period which he worked on the platform, instead simply states that he was on the project "six weeks" "in July 2015," and therefore has not laid the proper

foundation to establish his personal knowledge. Defendant also objects to Cox's statements on the basis of personal knowledge in that Cox merely makes a reference to "July 2015" and does not specify the dates he was actually on the platform or whether he was there for the entirety of Plaintiff's employment. Nor does Cox testify as to the basis of his personal knowledge of how he knows which employees were Linear Controls' employees, the race of any particular employees and the job titles and positions of any of the employees.[4]

In addition to its objections for failure to lay a proper foundation/lack of personal knowledge as required by FRE Rule 602, Defendant also objects to both Declarations on the basis of relevance under FRE 401, inadmissible hearsay offered to prove the truth of the matters asserted, pursuant to FRE Rule 801, and argumentative, speculative and conclusory statements which are not based on personal knowledge, inadmissible under FRE Rule 701.

While a declaration need not specifically state that it is based on personal knowledge, it must include enough factual support for a court to determine that its averments were based upon the personal knowledge of the declarant. Fed. R. Civ. P. 56(c)(4); *Gahagan v. United States Citizenship and Immigration Services*, 2016 WL 7187943, at *2 (E. D. La., 2016) (citing *Thomas v. Atmos Energy Corp.*, 223

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[4] The Court notes that throughout the Declaration, Cox's "statements" are referenced in the third person—"Declarant states" or "Declarant says"— rather than the first person. Such a reference questions whether the Declaration is actually Cox's own statement.

Fed. Appx. 369, 374 (5th Cir. 2007)). When considering a motion for summary judgment, a court disregards any portion of a declaration that fails to comply with Rule 56(c)(4). *Akin v. Q–L Investments, Inc.*, 959 F.2d 521, 531 (5th Cir. 1992).

The Court finds that Mouton and Cox's declarations as to Plaintiff's claims at issue fail to comply with the requirements of Rule 56(c)(4). The declarants have not laid the proper foundation to demonstrate their presence on the platform during the relevant period of time or that they had personal information in order to establish that the alleged disparity between the crew members was based on a comparison of similarly situated employees. "The similarly situated prong requires a Title VII claimant to identify at least one coworker outside of his protected class who was treated more favorably under nearly identical circumstances. This coworker, known as a comparator, must hold the same job or hold the same job responsibilities as the Title VII claimant; must share the same supervisor or have his employment status determined by the same person as the Title VII claimant; and must have a history of violations or infringements similar to that of the Title VII claimant." *Alkhawaldeh v. Dow Chemical Company*, 851 F.3d 422, 426–27 (5th Cir. 2017). Thus, as Plaintiff has failed to identify a similarly situated Caucasian comparator, he cannot establish a prima facie case.

Even if Plaintiff had identified a similarly situated Caucasian comparator who was assigned to work exclusively inside the platform facility and/or allowed to take a water break inside, Plaintiff's claims still fail as a matter of law because he has not

alleged or testified to any adverse employment action. "Adverse employment actions include only ultimate employment decisions such as hiring, granting leave, discharging, promoting, or compensating." *Green v. Adm'rs of Tulane Educ. Fund*, 284 F.3d 642, 657 (5th Cir. 2002).

Defendant directs the Court to *Harris v. Attorney General U.S.A.*, 2017 WL 1493692 (3rd Cir. 2017), a case with facts similar to the instant one. In *Harris* the Third Circuit stated:

> [Plaintiff] has described the. . . discriminatory action as forcing him "to work under unhealthful environmental (excessive heat) conditions," or directing him "to perform mowing activities on a day where the temperature and heat index were dangerously high". . . The District Court concluded that this single action did not amount to an adverse employment action, because it did not alter [plaintiff's] "compensation, terms, conditions, or privileges of employment,". . . and it did not reduce his opportunities for promotion or professional growth . . . Rather, [plaintiff] was assigned to complete one of his regular job duties. *Id.* at *2.

Defendant argues that just as the court held in *Harris*, working outside in the heat between July 15, 2015 and July 26, 2015, was part of Plaintiff's job description and his regular job duties, such action does not meet the definition of "adverse employment action", *i.e.*, a significant change in employment status, such as hiring, firing, failing to promote,

reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. *See also*, *Breaux v. City of Garland*, 205 F.3d 150, 157 (5th Cir. 2000) (noting that the U.S. Fifth Circuit takes a narrow view of what constitutes an adverse employment action.)

Similarly, Plaintiff's allegations that he was not allowed to go inside and take his water break do not constitute an adverse employment action. Actions such as assigning an employee more difficult work, giving employees unequal break times, and giving allegedly biased annual evaluations are not "adverse actions" within the meaning of Title VII. *Aryain v. Wal-Mart Stores Tex. LP*, 534 F.3d 473, 486 (5th Cir. 2008) (break requests); *Shackelford v. Deloitte & Touche, LLP*, 190 F.3d 398, 407 (5th Cir. 1999) (unfair employee evaluations); *Benningfield v. City of Houston*, 157 F.3d 369, 376-77 (5th Cir. 1998) (heavier work load). Neither the alleged assignment of outdoor work nor the denial of an inside water break is an adverse employment action within the meaning of Title VII. Defendant's Motion in this regard will be granted.

*2. Harassment Claim*s

Plaintiff asserts a purported hostile work environment claim premised on allegations of religious harassment. Plaintiff alleges he was subject to Muslim jokes and comments made by his supervisor, Duhon, and co-employee, Hammett, while working on Fieldwood's East Breaks 165 platform sometime between July 15 and August 22, 2015. In his Opposition, Plaintiff appears to raise a harassment and hostile work environment claim

based on the allegations that he was not allowed to work inside and was denied a water break. While Plaintiff's EEOC Charge indicates these allegations as to racial discrimination were based on disparate treatment, the Court will also consider whether these claims constitute racial harassment and hostile work environment under Title VII.

To state a prima facie case of hostile work environment based on harassment, an employee must show that: (1) he belongs to a protected group; (2) he was subjected to unwelcome harassment; (3) the harassment complained of was based on a protected characteristic; (4) the harassment complained of affected a term, condition or privilege of his employment; and (5) the employer knew or should have known of the harassment and failed to take prompt remedial action. *Watts v. Kroger Co.*, 170 F.3d 505, 509-510 (5th Cir. 1999); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (Element five need not be established if the alleged harassment is committed by employee's supervisor.).

For harassment to affect a "term, condition or privilege of employment," it must be so "severe or pervasive" as to alter the terms or conditions of employment and create an abusive working environment. *Watts*, 170 F.3d at 509. To determine whether behavior qualifies as severe or pervasive harassment, Federal Courts look to subjective and objective components. *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1276 (11th Cir. 2002). Thus, to be actionable, the behavior alleged must result in a work environment that the plaintiff subjectively perceives as abusive and that a reasonable person would deem abusive. *Harris v. Forklift Sys. Inc.*, 510

U.S. 17, 21–22 (1993). The following factors weigh on whether a work environment is objectively abusive or hostile: (I) the frequency of the discriminatory conduct; (ii) its severity; (iii) whether it is physically threatening or humiliating, or a mere offensive utterance; and (iv) whether it unreasonably interferes with an employee's work performance. *Faragher*, 524 U.S. at 787-788; *Ramsey v. Henderson*, 286 F.3d 264, 268 (5th Cir. 2002).

It is well settled that the mere utterance of an "epithet which engenders offensive feelings in an employee" does not sufficiently alter the terms or conditions of employment in a way that violates Title VII. *Faragher*, 524 U.S. at 787. Thus, simple teasing, rudeness, offhand remarks, and isolated incidents of derogatory overtures are insufficient to establish a hostile working environment. *Id.* at 787-788; *Baker v. Starwood Hotel and Resort*, 1999 WL 397405, at *3 (E.D. La. 1999).[5]

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[5] Defendant cites several unpublished opinions from the Eleventh Circuit including *Alansari v. Tropic Star Seafood Inc.*, 388 Fed. Appx. 902, 905 (11th Cir. 2010), a case involving a claim of religiously hostile work environment brought by a Muslim. The circuit court affirmed summary judgment, noting that behavior "including solicitations to go to church because 'Jesus would save' [him], other comments about his Muslim religion, and the playing of Christian music on the radio ... may have been unwanted and even derogatory . . . but it did not rise to a threatening or humiliating level." Defendant also cites *Byrd v. Postmaster Gen.*, 582 Fed. Appx.787 (11th Cir. 2014); *Richardson v. Dougherty County, Ga.*, 185 F. App'x 785, 791 (11th Cir. 2006).

a. Religion

Regarding Plaintiff's EEOC charge for harassment based on his Muslin [sic] religion, Plaintiff stated in his deposition that while working for Linear Controls on the East Breaks 165 platform, Duhon and Hammett would say to him "loo, loo, loo, boom" or "do, do, do, boom," which Plaintiff testified sounded to him like "Muslims blowing up stuff." *R. 29, Exh. D, Plaintiff Depo. pp. 106–112*. In his deposition, Plaintiff interpreted this phrase as a reference to "terrorists." Plaintiff did not identify any derogatory comments containing the words "religion," "Muslim" or "pork." *Id.* Plaintiff did not allege or testify to any physical harm or threats of harm, just "jokes and comments." *Id.*[6]

As to Plaintiff's deposition testimony that the statements, "loo, loo, loo, boom" or "do, do, do, boom," were religious harassment, Defendant contends that these comments were insufficient to establish a prima facie case of religious discrimination. *See Lara v. Raytheon Technical Service,* 476 Fed. Appx. 218 (11th Cir. 2012) (Christian employee failed to establish prima facie case of hostile work environment based on religious harassment since, among other reasons, many of the instances of harassing behavior, which took place over a month and a half, were not even related to religion). The Court agrees. The alleged remarks attributed to

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[6] In the Complaint, Plaintiff alleges that he was constantly and continuously cursed and yelled at by his supervisors and co-employees, but sets forth no specific facts or evidence establishing that the cursing and yelling had anything to do with his religion, or race for that matter.

Duhon and Hammett have nothing to do with religion, thereby eliminating a required element of Plaintiff's prima facie case—harassment based on a protected characteristic. Moreover, Duhon testified in his deposition that he did not know Plaintiff was a Muslim, *R. 29, Exh. D, Plaintiff's Depo, pp. 197-98*, and Plaintiff has produced no evidence showing that Hammett knew Plaintiff was a Muslin [sic].

b. Race

As to Plaintiff's contentions of "yelling and cursing" as the basis for racial harassment. Plaintiff sets forth no specific facts or evidence that the cursing and yelling had anything to do with race. Indeed, in his deposition Plaintiff denied being the target of any racial slurs. *Id. at pp. 197–198*. Plaintiff's own conclusory allegations and unsubstantiated assertions, without even a scintilla of evidence, are insufficient to establish this claim for hostile work environment.

In his Opposition Memorandum, Plaintiff also contends that requiring him to work outside in the heat and being denied water breaks inside constitute a hostile work environment based on race.[7] *R. 33, p. 9*. Considering the factors which weigh on whether a work environment is objectively abusive or hostile: (i) the frequency of the discriminatory conduct; (ii) its severity; (iii) whether it is physically threatening or humiliating, or a mere offensive utterance; and

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[7] While the Court finds that Plaintiff failed to raise an harassment/hostile work environment claim based on his outdoor work and water breaks in his EEOC Charge, the Court will consider the claim for purposes of this motion for summary judgment.

(iv) whether it unreasonably interferes with an employee's work performance, *Faragher*, 524 U.S. at 787-788, the Court finds that Plaintiff's hostile work environment claims in this regard lack merit.

As provided in the foregoing analysis as to disparate treatment, Plaintiff has admitted that working in an outdoor environment was part of his job description and regular job duties and that his work performance improved while employed with Linear Controls. The record provides that he worked on the East Breaks 165 platform from July 16, 2015 to July 26, 2015, then was off for six days before returning. *R. 33-7, Plaintiff's Stmt. Of Disp. Facts, responding to ¶¶ 28, 38, 45 of Def. Stmt. Of Undisp. Facts.* According to the Complaint, it was during the period from July 16th to July 26th that Plaintiff alleges he was not allowed to work inside or take a water break inside. *R. 1, ¶ 8*. Plaintiff does not set forth facts showing that this occurred at other times or on other jobs, nor does he set forth facts showing that he suffered physical harm or injury as a result. Plaintiff's claims of hostile work environment are belied by his complaint that he resigned because he was not returned to work soon enough. The Court will grant Defendant's Motion as to hostile work environment on the basis of race.

C. State Law Claims

1. The Louisiana Employment Discrimination Claims

The Louisiana Employment Discrimination Law, La. R.S. 23:301 (LEDL) prohibits an employer from discriminating against an individual based on his race, color, religion, sex, age, or national origin. The

scope of the LEDL is the same as Title VII, and therefore, claims under the LEDL are analyzed under the Title VII framework and jurisprudential precedent. *DeCorte v. Jordan*, 497 F.3d 433, 437 (5th Cir. 2007). Because the outcome of the alleged discrimination claims under Louisiana law are the same as the outcome under Title VII, for the reasons discussed above, the LEDL claims must also be dismissed.

2. Intentional Infliction of Emotional Distress

For the claim of intentional infliction of emotional distress the plaintiff must prove 1) that the conduct of the defendant was extreme and outrageous; 2) that the emotional distress of the plaintiff was severe; and 3) that the defendant desired to inflict severe emotional distress or knew that severe emotional distress would be certain or substantially certain to result from his conduct. *White v. Monsanto Co.*, 585 So.2d 1205, 1209 (La. 1991). The conduct must be ". . . so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. Liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. Persons must necessarily be expected to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind." *Id.* at 1209.

Based on the record before the Court, Plaintiff cannot establish that he was subjected to the type of deliberate and repeated harassment required to give rise to a claim for intentional infliction of emotional

distress. Further, he has not provided any evidence that he suffered any emotional distress, much less that the emotional distress he may have suffered was severe. In fact, Plaintiff describes himself as a "healthy, young man," who does not feel mentally unstable, who has never seen a psychiatrist or a psychologist, and who does not feel like he needs mental health counseling. *R. 29-3, Exh. D, pp. 204-208.* While he was working for Linear Controls, Plaintiff testified that his overall performance improved throughout the course of time. *Id. at p. 147.* It was not until one year and three months after he resigned from Linear Controls, while working for his second, subsequent employer and after Plaintiff filed this lawsuit, that he saw his family doctor for anxiety on one occasion, December 27, 2016. *Id. at pp. 212, 217-225.* He made no mention of Linear Controls to the doctor. *Id.* Though the doctor offered prescription medication at that time, Plaintiff testified that he did not feel that he needed it and did not fill the prescription, nor does he plan to do so. *Id. at pp. 224-225.*

Plaintiff has failed to provide any evidence that he suffered severe emotional distress as a result of Defendant's alleged actions. Accordingly, Defendant's motion for summary judgment related to Plaintiff's state law claim for emotional distress will be granted.

THUS DONE AND SIGNED this 5th day of September, 2017, at Lafayette, Louisiana.

Carol B. Whitehurst
Carol B. Whitehurst
United States Magistrate Judge