No. 22-2021

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Louis Naes,

Plaintiff-Appellant

v.

City of St. Louis, Missouri, et al.,

Defendants-Appellees

On Appeal from a Final Judgment of the
United States District Court for the Eastern District of Missouri
Case No. 4:19-cv-02132-SEP, Hon. Sarah E. Pitlyk

OPENING BRIEF FOR PLAINTIFF-APPELLANT LOUIS NAES

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Summary of Case and Request for Oral Argument

Twenty minutes of argument would aid this Court in addressing the issues. This appeal concerns which discriminatory employment practices are prohibited by Title VII, the Missouri Human Rights Act, and the Equal Protection Clause, issues that arise frequently and continue to vex lower courts.

Appellant Louis Naes maintains that the St. Louis Metropolitan Police Department and two of its high-ranking officers violated the antidiscrimination guarantees of Title VII, the MHRA, and the Equal Protection Clause by transferring him out of an Animal Abuse Investigator position because of his sexual orientation and later denying him a requested transfer back to that role for the same reason. The district court granted summary judgment to all Defendants on Naes's MHRA and equal-protection discrimination claims because it concluded, contrary to *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737, 1739-40 (2020), that discrimination based on sexual orientation is not sex discrimination. It granted summary judgment to the police department on Naes's Title VII claim—premised on the department's discrimination in Naes's "compensation, terms, conditions, or privileges of employment," 42 U.S.C. § 2000e-2(a)(1)—because it concluded that Naes's forced transfer and subsequent transfer denial, even if discriminatory, are not so-called "adverse employment actions." Oral argument would help this Court decide whether the district court erred in arriving at these conclusions.

TABLE OF CONTENTS

Table of Authorities

Cases **Page(s)**

Page(s)

Page(s)

Page(s)

Page(s)

Page(s)

Statutes

Page(s)

Other Authorities

Introduction

Appellant Louis Naes maintains that Defendants-Appellees the St. Louis Metropolitan Police Department, Major Angela Coonce, and Police Chief John Hayden violated the antidiscrimination guarantees of Title VII, the Missouri Human Rights Act, and the Equal Protection Clause when they forced him to transfer jobs because of his sexual orientation and later denied him a requested transfer for the same reason.

According to the district court, a jury could conclude that the police department discriminated against Naes, yet it was nonetheless entitled to summary judgment because its discriminatory conduct did not amount to an "adverse employment action" and was thus not actionable. To be clear: Under the district court's reasoning, if the police department's files contained a memo stating that it transfers women but not men to certain job assignments or that it grants transfer requests to only white employees, Title VII, the MHRA, and the Equal Protection Clause would have nothing to say about it.

Because Title VII, the MHRA, and the Equal Protection Clause "tolerate[] no … discrimination, subtle or otherwise," *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973), the district court's decision cannot be right. This Court should reverse.

Jurisdictional Statement

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1367 and 42 U.S.C. § 2000e-5(f)(1). Summary judgment was entered against Plaintiff-Appellant Louis Naes as to some claims on March 31, 2022 and as to all remaining claims and all parties on April 15, 2022. App. 442; R. Doc. 148, at 1. Naes filed a notice of appeal on May 12, 2022. App. 443; R. Doc. 149, at 1.[1] This Court has jurisdiction under 28 U.S.C. § 1291.

Issue Presented and Apposite Authorities

The issue presented is whether a governmental employer that transfers an employee or denies an employee a transfer because of the employee's sexual orientation violates Title VII, the MHRA, and the Equal Protection clause when the employment decision negatively affects the employee's schedule, workplace, job responsibilities, and prestige but does not reduce the employee's pay or benefits.

The apposite statutory provision is 42 U.S.C. § 2000e-2(a)(1).

The apposite cases include *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020); *Muldrow v. City of St. Louis*, 30 F.4th 680 (8th Cir. 2022); *Bonenberger v. St. Louis Metropolitan Police Department*, 810 F.3d 1103 (8th Cir. 2016); and *Chambers v. District of Columbia*, 35 F.4th 870 (D.C. Cir. 2022) (en banc).

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[1] The joint appendix contains five volumes and is paginated from 1 through 1402. Volumes 3, 4, and 5 have been filed under seal.

Statement of the Case

I. Factual background

This appeal arises from a grant of a motion for summary judgment, and this Court must thus view the evidence and draw all reasonable inferences in favor of the nonmoving party, Plaintiff Louis Naes. *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011).[2]

A. Naes's work and the discriminatory work environment. Naes, a heterosexual male, is a police officer with the St. Louis Metropolitan Police Department. App. 555; R. Doc. 108-1. From October 2012 until April 2018, Naes worked as the Animal Abuse Investigator in the Nuisance Unit. *Id.* at 560. In that detective role, Naes received assignments directly from the chief of police, App. 598; R. Doc. 108-1, and worked with Stray Rescue of St. Louis, a non-profit, to address animal abuse and cruelty in the city as part of a task force. *Id.* at 561; App. 1218; R. Doc. 116-1.[3]

About two weeks before he became the Animal Abuse Investigator, Naes met Randy Grim, Stray Rescue's founder. App. 1257; R. Doc. 116-1. Grim invited Naes and his wife to dinner and told Naes's wife that he wanted to turn Naes into a "toaster oven," which Naes understood as innuendo for when a gay person has sex with a straight person. *Id.* at 1258.

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[2] Like the district court, *see* App. 1364; R. Doc. 137, at 1, we cite to Plaintiff's Response to Defendant's Statement of Uncontroverted Material Facts and Defendant's Response to Plaintiff's Statement of Controverted Material Facts when there is no genuine dispute of material fact.

[3] https://www.strayrescue.org/mission.

Grim told Naes during their working relationship that he did not like straight women and that it would be better if Naes were gay. App. 1258–59; R. Doc. 116-1. He shared that Naes was initially assigned as the Animal Abuse Investigator because Grim thought Naes "was cute." *Id.* at 1257. Grim also asked another detective, Officer Luther Hall, if he was gay and "what he was into," telling Hall that if he were gay, he could be his boyfriend. *Id.* at 1259. These comments made Hall feel uncomfortable. *Id.*

Grim often told Naes that he wanted a gay person on the task force and that he was going to talk to then police Captain Angela Coonce about it. App. 1259; R. Doc. 116-1. As documented by a contemporaneous memo Naes wrote on May 5, 2017, Grim told Naes that Coonce would replace him as soon as she was promoted. App. 708; R. Doc. 108-8. Grim described Coonce as the leader of the police department's "Lesbian Mafia," a group of lesbian police officers Coonce promotes because of their sexual orientation. App. 589; R. Doc. 108-1; App. 1259; R. Doc 116-1. According to Grim, he and Coonce were good friends, and if Naes did not do what Grim said, Coonce would fire him. App. 1259; R. Doc. 116-1; *see also* App. 686; R. Doc. 108-7.

B. The forced transfer. In January 2018, Police Chief Hayden assigned Coonce to the Intelligence Unit. App. 566–67; R. Doc. 108-1. Then, in April 2018, Hayden made Coonce the Commander of a unit, which included the Nuisance section to which Naes was assigned. *Id.* By the end of April, Coonce had replaced Naes with a gay female officer. App. 684, 688; R. Doc. 108-7; App. 1287; R. Doc. 116-1. As Grim had explained to Naes, Coonce had

a reputation for promoting people in the "Lesbian Mafia," "people who were taken care of or moved into better positions or specialized units because [Angela Coonce] took care of it." App. 722, 723, 725–26; R. Doc. 108-10; App. 1310–20; R. Doc. 116-1.

For example, although T.R., who is gay, did not have the requisite experience, she was temporarily assigned to the Intelligence Unit (one of the hardest units to get into, App. 1322–23; R. Doc. 116-1) under Coonce's command. App. 1318–19; R. Doc. 116-1.[4] The unit requires a minimum of three years' experience, but T.R. had only four months' experience as a non-probationary police officer. *Id.* at 1317, 1319. T.R. had shared with Officer Hall that she was a member of the "Lesbian Mafia" in a conversation about her advancement in the police department through specialized assignments. App. 1311–12; R. Doc. 116-1. Ultimately, T.R. was permanently assigned to Intelligence when she still lacked the minimum qualifications. App. 1318–19; R. Doc. 116-1. And T.R. was not transferred out of Intelligence even after she was accused of using excessive force and making a false arrest. *Id.*

Coonce also transferred Officer L.R. to Nuisance to replace Naes, even though L.R. lacked the minimum qualifications. App. 1288–89, 1292; R. Doc. 116-1. A police captain explained the transfer to Naes this way: "You just got whacked by the Lesbian Mafia." App. 1313; R. Doc. 116-1. Naes also

[4] As the district court did, App. 1381; R. Doc. 137, at 18, we use initials to refer to officers whom we identify as gay to avoid outing any individuals.

identified five other gay, female officers who were transferred to units under Coonce's command. App. 1318; R. Doc. 116-1.

To facilitate L.R.'s replacement of Naes, Coonce fabricated reasons to justify Naes's transfer out of Nuisance. App. 1389; R. Doc. 137, at 26. On April 16, 2018 Coonce and Lieutenant Brent Feig claimed to audit the Nuisance office, but the paperwork they maintained documented the audit of the whole unit, made no reference to the unit, only Naes. App. 567; R. Doc. 108-1; App. 1323–24; R. Doc. 116-1; App. 122; R. Doc. 104-6, at 13. During the purported audit, Coonce and Feig noted what they described as "concerning irregularities" including that:

(1) there was a safe containing cash from American Society for the Prevention of Cruelty to Animals (ASPCA) grant funds in the Nuisance office, App. 570–71; R. Doc. 108-1, in accordance with Naes's supervisor's instructions, App. 1228; R. Doc. 116-1.

(2) the safe was purchased by Officer Hall, App. 569; R. Doc. 108-1;

(3) confidential informant files were not properly maintained, App. 570–71; R. Doc. 108-1, which Naes disputes, App. 1386; R. Doc. 137, at 23; App. 1273; R. Doc. 116-1 ;

(4) confidential-informant and grant funds were not properly documented, App. 570–71; R. Doc. 108-1, which Naes disputes, App. 861; R. Doc. 108-22;

(5) there was a wine cooler with an evidence envelope taped to it containing counterfeit wine, which was being stored in the office because

Naes and Hall needed to keep the evidence at a certain temperature to maintain its integrity (and had permission to do so), App. 1386–87; R. Doc. 137, at 23–24; App. 1269; R. Doc. 116-1;[5] and

(6) Naes had purchased dogs as part of an animal-abuse investigation without filling out a property receipt, App. 574; R. Doc. 108-1.

Coonce and Feig cited three additional concerns, which the district court held were indisputably false. App. 1383, 1389, 1390; R. Doc. 137, at 20, 26, 27. No one previously had any concerns with Naes's performance during the six years that he served as Animal Abuse Investigator. App. 1384; R. Doc. 137, at 21.

Coonce requested that Naes be transferred out of Nuisance, and, on April 27, 2018, Chief Hayden approved the request and transferred Naes to a patrol position on April 30. App. 574, 576; R. Doc. 108-1. Then, L.R. was temporarily assigned to Nuisance as the new Animal Abuse Investigator. *Id.* at 579. Coonce claims to have made the decision to transfer Naes on April 24, but L.R. and Chief Hayden were aware of the transfer days earlier. App. 840; R. Doc. 108-19; App. 884; R. Doc. 108-25.

C. The negative consequences of the forced transfer. As a detective in Nuisance, Naes spent 90 percent of his time investigating animal abuse-crimes, App. 562–63; R. Doc. 108-1, and 10 percent of his time assisting Hall

[5] In addition to his work as Animal Abuse Investigator, Naes worked with Hall on liquor-related assignments and on business-license and pawn-shop investigations. App. 563; R. Doc. 108-1.

with liquor-related investigations, business license investigations, pawn shop investigations, and working on a Trash Task Force, *id.* at 563; *see supra* note 5. In contrast, a patrol officer answers service calls, interviews witnesses, creates and files police reports, makes arrests, testifies in court, and patrols areas on foot. App. 581; R. Doc. 108-1. Naes enjoys some of these responsibilities. *Id.* But as the Animal Abuse Investigator, Naes worked weekdays from 7:00 a.m. to 3:30 p.m. and had holidays off. App. 1320; R. Doc. 116-1. He sometimes voluntarily worked weekends in that role to earn overtime. *See* App. 692; R. Doc. 108-7. The transfer changed Naes's schedule: He had to work both weekdays and weekends, alternate between a dayshift and an afternoon shift, and could be required to work holidays. *Id.*

Naes's opportunities for overtime pay were also diminished. App. 590–91; R. Doc. 108-1; App. 842; R. Doc. 108-19. In Nuisance, he worked his own cases for overtime, whereas his overtime opportunities as a patrol officer were only those available to other non-detective officers, such as patrolling a fixed area. App. 591; R. Doc. 108-1. Because of the change in overtime opportunities, Naes's overall pay dropped by about $12,000 per year. App. 153; R. Doc. 104-9, at 11; App. 1249; R. Doc. 116-1. The former position also afforded him an office at the police headquarters, whereas as a patrol officer he had no office. App. 842; R. Doc. 108-19. And unlike when he worked in Nuisance, Naes's work as a patrol officer was not covered by the media. App. 1258; R. Doc. 116-1.

D. Formal discrimination complaint and police department's refusal to transfer. Believing that his transfer was motivated by unlawful discrimination, Naes complained to Hayden on May 2, 2018. App. 1304–05; R. Doc. 116-1. Hayden disagreed that Naes had been discriminated against. *Id.* Naes then filed a Charge of Discrimination with the EEOC and the Missouri Commission on Human Rights. App. 588; R. Doc. 108-1.

When the police department posted the Animal Abuse Investigator position in 2019, looking to hire someone permanently for the role (temporary assignments can last no more than a year), both L.R. and Naes applied. App. 583; R. Doc. 108-1. L.R. did not meet the position's minimum qualifications, App. 1288; R. Doc. 116-1, yet she was interviewed and selected for the position over Naes. App. 583, 587; R. Doc. 108-1.

II. Procedural background

Naes sued Defendants—the City of St. Louis, Major Angela Coonce, and Police Chief John Hayden—in July 2019 alleging discrimination and retaliation claims under Title VII, the Missouri Human Rights Act, and the Equal Protection Clause (through Section 1983). R. Doc. 1; App. 20; R. Doc. 59, at 1. The claims were based both on the City's initial transfer decision and its subsequent refusal to transfer Naes when he applied and interviewed for the Animal Abuse Investigator position.

A. Initial ruling on motion for summary judgment. The district court initially granted in part and denied in part Defendants' motion for summary judgment. App. 1364; R. Doc. 137, at 1.

Although the court held that genuine disputes of material fact exist over whether the City's transfer decisions were motivated by Naes's sexual orientation, App. 1391; R. Doc. 137, at 28, the court granted summary judgment to Defendants on Naes's equal-protection claims because, in its view, this evidence did not demonstrate that Naes "was discriminated against on the basis of his gender," *id.* at 1401–02. For the same reason, the court granted summary judgment to Defendants on Naes's state-law discrimination claims. *Id.* at 1394, 1397–98. The court did not address how these conclusions could be squared with *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), where the Supreme Court held that it is "impossible" to discriminate on the basis of sexual orientation without also discriminating on the basis of sex. *Id.* at 1741.

With respect to Naes's Title VII discrimination claims, the court denied Defendants' motion for summary judgment. On the discriminatory-transfer claim, the court determined that Naes had established a prima facie case because a reasonable jury could conclude that Naes, a heterosexual male, was transferred out of his position so that a lesbian could take his place, App. 1380–91; R. Doc. 137, at 19–28 and the transfer amounted to an "adverse employment action" under this Court's precedent because genuine disputes of material fact exist over whether Naes's job responsibilities decreased, his

work schedule became less favorable, and he lost prestige. *Id.* at 1370–75. Naes had also established that the City's purported legitimate reasons for transferring him were pretextual because "three of the City's nine putative reasons for transferring him are false" and he "raised a genuine dispute over the legitimacy of five more of those reasons." *Id.* at 1392. As to Naes's transfer-denial claim, the district court denied Defendants' motion for summary judgment because the evidence showed that L.R. was hired over Naes despite being "less qualified," *id.* at 1394, and other evidence supported that the disparate treatment was motivated by sex discrimination, *id.* at 1397.[6]

B. Ruling on motion to alter or amend judgment. Defendants moved to alter or amend the judgment after this Court decided *Muldrow v. City of St. Louis*, 30 F.4th 680 (8th Cir. 2022). Relying on this Court's adverse-employment-action precedent, *Muldrow* held that even if the plaintiff police officer's job transfer were motivated by discrimination, the transfer did not violate Title VII because it "did not result in a diminution to her title salary, or benefits" and the plaintiff purportedly offered no evidence that she suffered a "significant change in working conditions or responsibilities." *Id.* at 689. Likewise, under *Muldrow*, a discriminatory denial of a sought-after transfer does not violate Title VII unless the requested transfer "would have resulted in a material, beneficial change to [the plaintiff's] employment." *Id.*

[6] The court held that there was insufficient evidence to support Naes' retaliation claims, which are not pursued here.

at 690. Even though Muldrow offered evidence that the position she sought was more "high profile" and would have given her an "'inside track' as to what was 'going on'" in the police department, this Court held that she had not suffered an "adverse employment action," which it viewed as an element of her Title VII claim. *Id.*

The district court agreed with Defendants that "after *Muldrow*," even though the record included sufficient evidence of Defendants' discriminatory intent, the City's employment decisions did not violate Title VII because Naes's "circumstances" did not amount "to an actionable adverse employment action." App. 436; R. Doc. 147, at 2. The court thus granted Defendants' motion to alter or amend the judgment, disposing of Naes's only remaining claims. *Id.* at 425.

Summary of Argument

Applying the statutory and constitutional text, the police department subjected Naes to actionable discrimination under Title VII, the MHRA, and the Equal Protection Clause.

As the district court held, a jury could conclude that the police department discriminated against Naes because of his sex under Title VII when it transferred him from his Animal Abuse Investigator position to a patrol-officer role because of his sexual orientation. The district court also erred in concluding that to prove an MHRA or equal-protection claim, a plaintiff cannot rely on evidence of discrimination based on sexual

orientation. Under *Bostock*, discrimination based on sexual orientation is sex discrimination. Thus, the same evidence that shows that the police department discriminated against Naes for Title VII purposes demonstrates that Defendants violated the MHRA and the Equal Protection Clause.

Neither the relevant statutes nor the Constitution are limited to "adverse employment actions." Instead, Title VII and the MHRA ban all employment decisions based on sex that relate to any term, condition, or privilege of an individual's employment. Under the Equal Protection Clause as well, governmental employers, like Defendants here, may not make sex-based employment decisions unless the discrimination is justified by an important governmental interest and the means employed are substantially related to that interest. Viewing the facts in the light most favorable to Naes, the police department's discriminatory transfer and denial of Naes's request for a job transfer constituted discrimination with respect to the terms, conditions, or privileges of his employment and thus violated Title VII, the MHRA, and the Equal Protection Clause. And even if Naes must demonstrate that he suffered a narrowly defined "adverse employment action," reversal is required here because the record demonstrates that the transfer and transfer denial caused Naes significant disadvantages.

Argument

Defendants discriminated against Naes because of his sex with respect to the "compensation, terms, conditions, or privileges" of his employment in violation of Title VII, the MHRA, and the Equal Protection Clause.

A. Discrimination based on sexual orientation is sex discrimination under Title VII, the MHRA, and the Equal Protection Clause, and Naes presented sufficient evidence of discrimination under the summary-judgment standard.

1. The district court erred in distinguishing between discrimination based on sexual orientation and discrimination based on sex under the MHRA and the Equal Protection Clause.

Title VII and the MHRA use identical language, making 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 his compensation, terms, conditions, or privileges of employment, because of such individual's … sex." 42 U.S.C. § 2000e-2(a)(1); *see* Mo. Ann. Stat. § 213.055(1)(a). An employer violates these statutes when it discriminates on the basis of sexual orientation because "it is impossible to discriminate against a person for being homosexual [or heterosexual] … without discriminating against that individual based on sex," and Title VII and the MHRA prohibit discrimination based even "*in part* on sex." *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1739–40 (2020) (emphasis added); *see* 42 U.S.C. § 2000e-2(m); Mo. Ann. Stat. § 213.010(2), (6). As *Bostock* explains, when an employer relies on sexual orientation to make employment decisions, the

employer necessarily refers to the individual's sex to determine congruence or incongruence between sex and gender, making sex a motivating factor for the employer's discriminatory actions. 140 S. Ct. at 1741.

The Equal Protection Clause also prohibits governmental employers from using sex to create "artificial constraints on an individual's opportunity" (with limited exceptions not relevant here). *United States v. Virginia*, 518 U.S. 515, 533 (1996). Thus, after *Bostock's* clarification that "it is impossible to discriminate against a person" based on sexual orientation "without discriminating against that individual based on sex," *Bostock*, 140 S. Ct. at 1739-40, a governmental employer that makes employment decisions based on sexual orientation necessarily violates the Equal Protection Clause.

The district court properly applied *Bostock* to Naes's Title VII claim, but ignored *Bostock's* impact on Missouri's identical antidiscrimination law and on the Equal Protection Clause's protections against sex discrimination. App. 1392, 1401; R. Doc. 137, at 29, 38. In making the MHRA error, the district court assumed *Lampley v. Missouri Commission on Human Rights*, 570 S.W.3d 16, 24, 25 (Mo. 2019) (en banc), a pre-*Bostock* Missouri Supreme Court decision, remained good law. App. 1393, 1401–02; R. Doc. 137, at 32, 38–39. In *Lampley*, the Missouri Supreme Court relied on federal decisions interpreting Title VII to hold that the MHRA did not bar discrimination based on sexual orientation. *Lampley*, 570 S.W.3d at 24, 25. The court reasoned that "[f]ederal courts have distinguished between discrimination based on sexual orientation and sex discrimination as evidence by sex

stereotyping" and although, under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1998), an employee may demonstrate sex discrimination "through evidence of sexual stereotyping," "sexual orientation is incidental and irrelevant to sex stereotyping." *Lampley*, 570 S.W.3d at 24, 25.

The Missouri Supreme Court has not had an opportunity to reexamine *Lampley*, which directly contradicts *Bostock's* holding that it is impossible to discriminate against an individual because of his sexual orientation without discriminating against him because of his sex. *Lampley's* decades-long, consistent reliance on federal case law interpreting Title VII and the MHRA and Title VII's identical language, leaves little room for doubt that *Lampley* is no longer good law. As if to underscore *Lampley*'s obsolescence, Defendants themselves never cited *Lampley* nor argued that discrimination based on sexual orientation is not actionable under the MHRA. *See* App. 64; R. Doc. 104, at 12 (arguing only that "there is no evidence that the reason for [Naes's transfer] was Plaintiff's … sexual orientation").

Likewise, Defendants never argued that, post-*Bostock*, discrimination based on sexual orientation is somehow prohibited under Title VII but not under the Equal Protection Clause. App. 66–68; R. Doc. 104, at 14–16. The district court, however, granted summary judgment to Defendants on Naes's Equal Protection Clause claim, holding that, as a matter of law, discrimination based on sex and discrimination based on sexual orientation are distinct under the Equal Protection Clause. The court offered no explanation for how that distinction remains valid after *Bostock*, App. 1401–

02; R. Doc. 137, at 38–39, given its understanding that Naes presented sufficient evidence of discrimination under the summary-judgment standard.

Applying the rule that a plaintiff may prove unlawful employment discrimination under Title VII, the MHRA, and the Equal Protection Clause by demonstrating that he has been discriminated against on the basis of sexual orientation, Naes presented sufficient evidence of discrimination to survive summary judgment. Indeed, the district court held that Naes "has made a sufficient showing for a reasonable trier of fact to infer that he was discriminated based on his sexual orientation." App. 1397; R. Doc. 137, at 34.

a. Naes has established a prima facie case of discrimination. Naes established his prima facie case of sex discrimination under the *McDonnell Douglas* circumstantial-evidence test by showing that (1) he is a member of a protected group, (2) he was qualified for the Animal Abuse Investigator position, (3) he suffered an adverse employment action, and (4) similarly situated employees outside of his protected group were treated more favorably. *Martinez v. W.W. Grainger, Inc.*, 664 F.3d 225, 230 (8th Cir. 2011).[7] The standards for proving discriminatory intent under Title VII, the MHRA, and Section 1983 employment-discrimination claims are the same. *See Tipler v. Douglas Cnty., Neb.*, 482 F.3d 1023, 1027 (8th Cir. 2007) (explaining that "the

[7] That Naes suffered an adverse action is discussed below in Part B (at 20–39).

issue of discriminatory intent is common to analyses under the Equal Protection Clause, § 1983, and Title VII"); *see* Mo. Rev. Stat. § 213.101.3 (2017) (directing courts to use "the burden-shifting analysis of *McDonnell Douglas*" for cases "not involving direct evidence of discrimination").

The burden of establishing a prima facie case is "not onerous." *Tex. Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 253 (1981). Defendants do not dispute that Naes was a member of a protected class (heterosexual male) and was qualified for the Animal Abuse Investigator position. App. 64–65; R. Doc. 104, at 12–13. Naes provided examples of similarly situated gay female officers who were treated more favorably. Indeed, the record shows that gay female officers with *fewer qualifications* than Naes were given employment opportunities that he was denied. App. 1314–19; R. Doc. 116-1; *id.* at 1292. As the district court put it: L.R., a gay woman, "was *less* qualified" and treated more favorably than Naes: "she was given a job for which she was underqualified, while Plaintiff was transferred out of the same job—for which he was fully qualified and which he had been performing successfully for more than five years—on what a reasonable jury could find to be false pretenses." App. 1382–83, 1390–91; R. Doc. 137, at 19–20, 28–29. In sum, the district court concluded that a genuine dispute of material fact remains over whether Coonce treated members of the "Lesbian Mafia" preferentially. App. 1381; R. Doc. 137, at 18 App. 1317, 1318, 1319; R. Doc. 116-1.

b. Defendants purported non-discriminatory reasons for their transfer decisions are pretextual. Because Naes has established a prima facie case,

the burden shifts to Defendants to produce a legitimate, non-discriminatory reason for its actions.

i. Transfer Defendants maintain that they transferred Nases because Coonce and Feig noted what they described as "concerning irregularities" during their April 2018 assessment of the Nuisance unit. But the district court held that "[f]ive of the City's cited reasons are genuinely disputed" and "[t]hree of the City's cited reasons are evidently false." App. 1389; R. Doc. 137, at 26. For example, Coonce and Feig cited Naes's handling of ASCPA grant funds in a safe in the office as a supposed irregularity, warranting Naes's transfer. App. 570–71; R. Doc. 108-1. They included that Officer Hall purchased the safe as a purported legitimate reason for transferring Naes. *Id.* They failed to explain, however, "why Hall's purchase of the safe was improper or how it implicated Plaintiff." App. 1385; R. Doc. 137, at 24. Naes pointed to evidence that he handled the safe in accordance with his supervisor's instructions. App. 1228; R. Doc. 116-1. That three of Defendants' cited reasons for transferring Plaintiff are "false," App. 1383, 1389; R. Doc. 137, at 20, supports an inference that the remaining proffered justifications are pretextual. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000).

A jury could also conclude that Defendants were motivated by discrimination because the timing of Coonce's transfer request indicates that she decided to transfer L.R. to the Animal Abuse Investigator position prior to requesting Naes's transfer from the same position. Although Coonce

maintains that she did not decide to transfer Naes until April 24, the record shows that L.R. and Chief Hayden knew that L.R. would be transferred into Naes's position days earlier. App. 840; R. Doc. 108-19; App. 884; R. Doc. 108-25. That L.R. was not qualified to replace Naes also supports the conclusion that Defendants' purported reasons for reassigning Naes were pretextual. App. 1390; R. Doc. 137, at 27. *See, e.g.*, *Bryson v. Bridgeway Behav. Health, Inc.*, 128 F. Supp. 3d 1145, 1150 (E.D. Mo. 2015); *Bozue v. Mut. of Omaha Ins. Co.*, 536 F. Supp. 3d 438, 451-52 (E.D. Mo. 2021). Although L.R. lacked the minimum qualifications for the Animal Abuse Investigator position, Defendants nevertheless replaced Naes with L.R.

ii. Denial of transfer. Defendants argued below that when L.R. and Naes both applied for the permanent Animal Abuse Investigator position in 2019, L.R. was selected for the role over Naes because she was more qualified. App. 64; R. Doc. 104, at 12. That argument, as the district court recognized, is belied by the record. App. 1397; R. Doc. 137, at 34. L.R. did not meet even "the *minimum qualifications*" for the job. *Id.* In contrast, in 2019, Naes surpassed the minimum qualifications. App. 1288, 1299; R. Doc. 116-1. A reasonable jury could thus find that Defendants' purported justification for hiring L.R. over Naes was pretextual.

B. Transferring an employee (or denying a transfer request) based on sex is actionable discrimination under Title VII, the MHRA, and the Equal Protection Clause.

The district court initially held that the 2017 forced transfer and the 2019 refusal to transfer were so-called "adverse employment actions." App. 1375, 1397; R. Doc. 137, at 12, 34. But after a panel of this Court decided *Muldrow v. City of St. Louis*, 30 F.4th 680 (8th Cir. 2022), the district court reversed itself, holding that even though the record included sufficient evidence of Defendants' discriminatory intent, the City's involuntary transfer and subsequent refusal to hire Naes did not violate Title VII because Naes's "circumstances" did not amount "to an actionable adverse employment action." App. 436; R. Doc. 147.

Admittedly, *Muldrow* involved similar facts to those here. Although Muldrow's title, salary, and benefits remained the same when she was forced into a new position in the police department, her schedule, responsibilities, supervisor, workplace, and other job requirements changed. 30 F.4th at 685–86. Yet, this Court held that her transfer was not an "adverse employment action" because it did not decrease her potential for promotion; although she lost out on certain overtime eligibility, she still had overtime opportunities but chose not to take them; and, in the panel's view, she suffered no "material disadvantage" when she was prohibited from maintaining her preferred schedule. *Id.* at 688–89. Likewise, the panel held that Muldrow had not suffered actionable discrimination when she was

denied a transfer because, in its view, the transfer would not have resulted in a material, beneficial change to Muldrow's employment. *Id.* at 690.

We recognize that a panel of this Court may not overrule *Muldrow*. But we contend that reversal is required even in light of *Muldrow*. That is because no case of this Court—including *Muldrow*—says this Court may ignore the relevant statutory or constitutional text in conducting statutory or constitutional interpretation. Nor did *Muldrow* create a "categorical rule" that forced transfers (or denials of sought-after transfers) never constitute actionable discrimination. *See Threat v. City of Cleveland*, 6 F.4th 672, 679 (6th Cir. 2021) (making the same point as to the Sixth Circuit's precedent on shift changes as adverse employment actions under Title VII). Indeed, *Muldrow* could not have created that rule because earlier panel precedent holds otherwise. *See Turner v. Gonzales*, 421 F.3d 688 (8th Cir. 2005); *Bonenberger v. St. Louis Metro. Police Dep't*, 810 F.3d 1103, 1107 (8th Cir. 2016). Moreover, the plaintiff in *Muldrow* did not raise an equal-protection claim, so the case could not foreclose Naes's path to relief under the Equal Protection Clause.

Thus, in the pages that follow, we first argue that the text is clear: Title VII of the Civil Rights Act of 1964, Missouri's nearly identical anti-discrimination law, and the Equal Protection Clause prohibit Defendants' discriminatory conduct whether it constitutes a narrowly defined "adverse employment action" or not. We then argue that even if only *some* discriminatory employer practices are unlawful, the forced transfer and transfer denial at issue here are actionable. If the panel agrees with the

district court, however, and concludes that, under this Court's binding precedent, a governmental employer may subject an employee to workplace discrimination without legal consequence, that would only underscore a need for the en banc Court's intervention.

1. Title VII and the MHRA do not limit prohibited employer conduct to "adverse employment actions."

a. As in any case of statutory construction, the analysis should begin with the statute's words. *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013). The "statutory text, aided by established principles of interpretation, controls." *DeBough v. Shulman*, 799 F.3d 1210, 1212 (8th Cir. 2015) (quoting *POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 112 (2014)). The statute's words here do not limit prohibited employer conduct to "adverse employment actions," but state only that employers may not "discriminate" because of sex "with respect to" the "compensation, terms, conditions, or privileges" of employment. 42 U.S.C. § 2000e-2(a)(1); *see also* Mo. Ann. Stat. § 213.055(1)(a) (same).

Those capacious words, taken together, "evince[] a congressional intent to strike at the *entire spectrum* of disparate treatment of men and women in employment." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (emphasis added) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)). Put differently, "compensation, terms, conditions, or privileges of employment" comprise all of "the 'incidents of employment' or [conduct] that form[s] 'an aspect of the relationship between the employer and employees.'" *Hishon v. King & Spalding*, 467 U.S. 69, 75 (1984) (citations and

footnote omitted); *see also Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 62 (2006) (describing "terms, conditions, or privileges of employment" as the attributes of the employer-employee relationship that "affect employment or alter the conditions of the workplace").

Dictionary definitions contemporaneous with Title VII's enactment "confirm what fluent speakers of English know" about the definitions of "discriminate," "terms," "conditions," and "privileges." *See Threat v. City of Cleveland*, 6 F.4th 672, 677 (6th Cir. 2021) (Sutton, J.).

First, "discriminate" means "to make a difference in treatment or favor on a class or categorical basis in disregard of individual merit." *Discriminate*, Webster's Third New International Dictionary 647-48 (1961) (Webster's Third). "As used in Title VII, the term 'discriminate against'" thus "refers to 'distinctions or differences in treatment that injure protected individuals.'" *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1753 (2020).

Precedent that treats the word "discriminate" in Title VII as demanding proof of a so-called "adverse employment action" is therefore wrong. *See generally* Lidge III, Ernest F., *The Meaning of Discrimination: Why Courts Have Erred in Requiring Employment Discrimination Plaintiffs to Prove that the Employer's Action was Materially Adverse or Ultimate*, 47 U. Kan. L. Rev. 333 (1999). No adverse-employment-action requirement can be derived from the word "discriminate" because it connotes any differential treatment. *Chambers v. District of Columbia*, 35 F.4th 870, 873 (D.C. Cir. 2022) (en banc).

"Terms" are defined as "propositions, limitations, or provisions stated or offered for the acceptance of another and determining (as in a contract) the nature and scope of the agreement." *Terms*, Webster's Third 2358 (1961). A "condition" is "something established or agreed upon as a requisite to the doing or taking effect of something else." *Condition*, Webster's Third 473 (1961).

And a "privilege" is "a peculiar right, immunity, prerogative, or other benefit." *Privilege*, Webster's Third 1805 (1961). Thus, even benefits that an employer "is under no obligation to furnish by any express or implied contract … may qualify as a 'privileg[e]' of employment under Title VII." *Hishon*, 467 U.S. at 75. For that reason, then, a privilege "may not be doled out in a discriminatory fashion, even if the employer would be free under the employment contract simply not to provide the benefit at all." *Id.*

Title VII is thus not limited to "adverse employment actions" that impose pocketbook injuries or to conduct that employers or courts view as particularly harmful. Indeed, "[t]he unadorned wording of the statute admits of no distinction between 'economic' and 'non-economic' discrimination or 'tangible' and 'intangible' discrimination." *Chambers*, 35 F.4th at 874.

i. Job transfers (and transfer denials) alter terms, conditions, or privileges. Under this straightforward understanding of Title VII's text, an employer may not transfer an employee or deny an employee a transfer because of sex. As the Equal Employment Opportunity Commission has

explained, "job assignments" are workplace "terms, conditions, or privileges of employment." EEOC Compliance Manual § 613.1(a), 2006 WL 4672701; *see also* EEOC Compliance Manual § 2-II, 2009 WL 2966754. Work assignments determine the nature and scope of the employee's job, are agreed to between the employer and employee, and invest both parties with particular obligations and rights.

*Re*assignments, therefore, necessarily alter previously established workplace "terms, conditions, or privileges." A reassignment alters terms, conditions, or privileges when it changes "the *when* of employment," *Threat*, 6 F.4th at 677, results in "a loss of prestige and responsibility," *Hinson v. Clinch Cnty.*, 231 F.3d 821, 830 (11th Cir. 2000), requires an experienced employee to take on "menial duties," *Burns v. Johnson*, 829 F.3d 1, 11 (1st Cir. 2016), removes an employee from a role demanding specialized training, *Rodriguez v. Board of Education*, 620 F.2d 362, 364, 366 (2d Cir. 1980), downgrades an employee's title or prestige, places an employee under new management, or otherwise alters a reasonable employee's workplace experience. That is because, as the United States has explained, "'it is difficult to imagine a more fundamental term or condition of employment than the position itself.'" *Chambers*, 35 F.4th at 874 (quoting the position taken by the United States before the Supreme Court, Br. for Resp't in Opp. at 13, *Forgus v. Shanahan*, 141 S. Ct. 234 (2020) (No. 18-942), 2019 WL 2006239, at *13)).

Here, the forced transfer altered the *when* of Naes's employment. *See Threat*, 6 F.4th at 677. He previously worked weekends only voluntarily and to earn overtime, but, after the transfer, he was required to work weekends. *See* App. 692; R. Doc. 108-7. Naes cannot simply disregard this sex-based change in his schedule by not reporting for work on the weekends; instead, the police department could presumably discipline him, including by terminating his employment, if he failed to adhere to his schedule. The department's discriminatory transfer thus imposed terms or conditions on Naes's employment and denied him work privileges (the opportunities for voluntary weekend overtime).

The transfer also changed Naes's job responsibilities. Naes could no longer put his specialized training as an Animal Abuse Investigator to use. Instead of working as a detective, he had more menial job tasks such as answering service calls, filing police reports, and patrolling areas on foot. App. 581; R. Doc. 108-1.

ii. *Muldrow* did not consider the statutory text. *Muldrow* assumed for the purposes of its analysis that the plaintiff, a sergeant in the St. Louis Police Department, had been discriminated against on the basis of sex, but concluded that the forced transfer and subsequent denial of a sought-after transfer were not actionable under Title VII because they did not amount to so-called "adverse employment actions." 30 F.4th at 689–690. "[A]s a result of her transfer, Sergeant Muldrow was required to work a rotating schedule including weekends, wear a police uniform, drive a marked police vehicle,

and work within a controlled patrol area." *Id.* at 685. Her "salary remained the same," but she was no longer eligible for $17,500 in annual overtime pay from the FBI although "other overtime opportunities were available to her." *Id.*

This Court did not consider whether these changes to Muldrow's job altered the "compensation, terms, conditions, or privileges" of her employment under Title VII's unadorned text. *See Threat*, 6 F.4th at 677; *see also Chambers*, 35 F.4th at 874. Likewise, in analyzing whether the police department violated Title VII in denying Muldrow a sought-after transfer, the court did not consider whether that employment decision constituted a discriminatory refusal to "hire" or otherwise qualified as discrimination "with respect to" the "terms, conditions, or privileges" of Muldrow's employment. 42 U.S.C. § 2000e-2(a)(1). *Muldrow*, therefore, does not bind this Court on these questions of statutory interpretation—which, again, the Court did not consider.

b. The EEOC—the agency charged by Congress with enforcing Title VII—has explained that "[i]n accordance with Congressional intent," Title VII's "terms, conditions, or privileges" language "is to be read in the broadest possible terms." EEOC Compliance Manual, § 613.1(a), 2006 WL 4672701 (2009). Thus, "[t]he phrase 'terms, conditions, and privileges' has come to include a wide range of activities or practices which occur in the work place." *Id.* Of special salience here, the agency has observed that "job assignments" are workplace "terms, conditions, or privileges of

employment." EEOC Compliance Manual § 613.1(a), 2006 WL 4672701 (2006); *see also* EEOC Compliance Manual § 2-II, 2009 WL 2966754 (2009). In short, work assignments are terms, conditions, or privileges of employment because they determine the nature and scope of the employee's job, are agreed to between the employer and employee, and invest both parties with particular rights and obligations. This longstanding EEOC guidance, based on an ordinary understanding of the statute's text, is entitled to judicial respect. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110 n.6 (2002) (EEOC interpretations entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

c. Title VII's enactment record underscores the breadth of "terms, conditions, or privileges of employment." Congress borrowed sweeping language from the National Labor Relations Act (NLRA) in drafting Title VII. *See Hishon*, 467 U.S. at 76 n.8. Like Title VII, Section 8(d) of the NLRA uses the phrase "terms and conditions," 29 U.S.C. § 158(d), connoting an expansive set of mandatory subjects of collective bargaining, including transfers, *e.g.*, *Gruma Corp.*, 350 NLRB 336, 336 (2007), work rules, *e.g.*, *Virginia Mason Hosp.*, 357 NLRB 564, 566 (2011), and safety practices, *e.g.*, *Public Serv. Co. of New Mexico*, 364 NLRB No. 86, slip op. at 5-6 (2016). Denial of compensation or any other monetizable work benefit is not required to constitute "terms and conditions" of employment.

Even closer on point, NLRA Section 8(a)(3) makes unlawful "discrimination in regard to … any term or condition of employment" to

encourage or discourage membership in a labor organization. 29 U.S.C. § 158(a)(3). Employers can violate this provision by causing even "comparatively slight" changes to employee "terms and conditions." *Randall, Div. of Textron, Inc. v. NLRB*, 687 F.2d 1240, 1249 (8th Cir. 1982); *see also, e.g.*, *Wendt Corp.*, 369 NLRB No. 135, slip op. at 3, 17 (2020) (finding discriminatory the employer's reassignment of a welder to work using a saw, despite no change in compensation). "[T]here is little doubt," for instance, that even a one-day transfer *with no loss of pay or benefits* is a "term or condition" under the NLRA. *Microimage Display Div. of Xidex Corp. v. NLRB*, 924 F.2d 245, 252 (D.C. Cir. 1991).[8]

d. Congressional action in the decades since Title VII's 1964 enactment shows that that district court was wrong in suggesting, *see* App. 437-41; R. Doc. 147, that the statute reaches only pocketbook or other monetizable harms such as a change in promotion potential.

[8] For other examples of "terms and conditions" under NLRA Section 8(a)(3) that go well beyond monetizable harm, *see Advertiser's Mfg. Co.*, 280 NLRB 1185, 1190–91 (1986), *enforced*, 823 F.2d 1086 (7th Cir. 1987) (removing telephone privileges violated NLRA's antidiscrimination provision); *Goodman Inv. Co.*, 292 NLRB 340, 340, 349 (1989) (eliminating an employee's free parking space constituted unlawful discrimination); *Mid-South Bottling Co.*, 287 NLRB 1333, 1342–43 (1988), *enforced*, 876 F.2d 458 (5th Cir. 1989) (refusal to allow an employee to borrow a dolly for personal use was discrimination in the terms and conditions of employment); *F & R Meat Co.*, 296 NLRB 759, 767 (1989) (depriving employees of "the free coffee they had previously enjoyed" constituted unlawful discrimination).

i. *First*, consider Congress's response to the Supreme Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). There, a Black woman challenged "the conditions of her employment," *id.* at 179, under the then-existing version of 42 U.S.C. § 1981, which prohibited "racial discrimination in the making and enforcement of private contracts," *id.* at 171 (quoting *Runyon v. McCrary*, 427 U.S. 160, 168 (1976)). She was hired as a teller and file coordinator but was assigned tasks like "sweeping and dusting," which her employer did not impose on her white colleagues. *Id.* at 178.

According to the Court, this discrimination was not actionable under Section 1981 only because it did not abridge Patterson's right to make or enforce contracts but rather involved "postformation conduct." *Patterson*, 491 U.S. at 180, 189. As relevant here, the Court concluded that although the employer's conduct would have been "actionable under the more expansive reach of Title VII of the Civil Rights Act of 1964" because of its prohibition on discrimination in an employee's "terms, conditions, or privileges of employment," *id.* at 180, the employer was free, under Section 1981, to impose "discriminatory working conditions" during the performance of Patterson's contract, *id.* at 177; *see also id.* at 180.

In response, "Congress promptly repudiated that interpretation" of Section 1981 in the Civil Rights Act of 1991. *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1021 (2020) (Ginsburg, J., concurring). Because "the Court's interpretation … crippled the statute's deterrent value and left millions of workers without federal protection against employment

discrimination," H. R. Rep. No. 102-40, pt. 1, at 92 (1991), Congress amended Section 1981 to expressly parallel Title VII. *Compare* 42 U.S.C. § 1981(b) *with* 42 U.S.C. § 2000e-2(a)(1). Section 1981 now prohibits discrimination not only in making and enforcing contracts but, like Title VII, also in "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b).

Put differently, Congress's mechanism for expanding Section 1981 to cover discriminatory work assignments was to add three of the words at issue here—"terms," "conditions," and "privileges"—to the statute. It is clear, then, that Congress agreed with the Supreme Court's view that Title VII's "expansive" "terms, conditions, or privileges of employment" would have covered Patterson's claim, which was "plain[ly]" a challenge to "the conditions of her employment," *Patterson*, 491 U.S. at 179—even though those conditions did not cause immediate monetary harm or concern the type of "benefits" that the district court believed were required to make Naes's claims actionable. *See* App. 437–44; R. Doc. 147. Naes's claims are, therefore, the very types of claims that Congress thought of as actionable when it overruled *Patterson*.

ii. *Second*, in the 1991 Civil Rights Act, Congress expanded the monetary relief available to disparate-treatment plaintiffs, such as Naes, by amending Title VII to authorize compensatory and punitive damages. Prior to 1991, plaintiffs could recover monetary relief only for discriminatory workplace practices that were "also found to have some concrete effect on the plaintiff's

employment status, such as a denied promotion, a differential in compensation, or termination." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 254 (1994). But, with the changes in the 1991 Act, a plaintiff could, regardless of whether she had suffered quantifiable, compensation-related injury, recover compensatory awards for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." 42 U.S.C. § 1981a(b)(3).

"[T]he new compensatory damages provision" was "in addition to," and did "not replace or duplicate," the previously available remedies for backpay and lost fringe benefits like vacation pay and pension benefits or the other equitable remedies available for discrimination affecting terms, conditions, or privileges of employment. *See Landgraf*, 511 U.S. at 253. Today, a plaintiff can recover damages "in circumstances in which there has been unlawful discrimination in the 'terms, conditions, or privileges of employment' even though the discrimination did not involve a discharge or a loss of pay." *Id.* at 254 (citation omitted); *see id.* at 254 n.7 (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)). In other words, the 1991 amendments underscored that plaintiffs like Naes may obtain retrospective relief even when a discriminatory transfer is not accompanied by a pay-related detriment or predictable monetary harm. *Id.* at 254.

Notably, the 1991 Act made these changes without disturbing the statute's existing injunctive remedies for these same types of non-monetizable injuries, 42 U.S.C. § 2000e-5(g)(1) (empowering courts to grant

"any other equitable relief as the court deems appropriate"), which had always covered situations involving the types of terms, conditions, and privileges at issue here. So, prior to 1991, if an employer had a policy of considering requests for lateral transfers from white, male employees only, a district court surely would have had the power to enjoin that policy at the time of Title VII's enactment. *See, e.g.*, *Bing v. Roadway Express, Inc.*, 485 F.2d 441, 448 (5th Cir. 1973) (disparate-impact decision affirming an injunction against employer's no-transfer rule because it operated to Black employees' detriment and thus violated Title VII).

Though Naes has alleged compensation-related discrimination (he lost $12,000 in overtime compensation, App. 1249; R. Doc. 116-1), the 1991 Act's amendments show that the district court erred in suggesting that a Title VII plaintiff must show monetizable harm. *See* App. 437–41; R. Doc. 147. This Court should reverse on that basis alone.

2. The Equal Protection Clause does not limit prohibited employer conduct to "adverse employment actions."

Defendants argued below that their actions here pass constitutional muster because, in their view, the forced transfer and subsequent refusal to transfer did not violate Title VII—that is, Defendants argued that because their conduct did not result in what they view as an "adverse employment action"—a requirement that, if it exists at all, is statutory—they did not violate the Equal Protection Clause. App. 66–68; R. Doc. 104, at 14–16. That cannot be right. It's true that proof of intentional discrimination is a common

element of Title VII and equal-protection employment-discrimination claims, but any adverse-employment-action requirement has no constitutional foothold.

Instead, to prove an equal-protection sex-discrimination claim, a plaintiff must suffer only intentional sex discrimination. Then, the burden shifts to the party seeking to uphold sex-based government action to establish that the sex discrimination is justified by an important governmental interest and that the means employed are substantially related to that interest. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 533 (1996).

Mapping an (incorrect) interpretation of Title VII's words onto the Constitution would allow state actors to exercise sex-based decision making without *any* justification. But Fourteenth Amendment equal-protection scrutiny requires that *all* government-imposed sex classifications be justified by "exceedingly persuasive" interests. *See, e.g.*, *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690 (2017). Here, the police department has supplied no "exceedingly persuasive justification" for treating Naes differently based on his sex, as emphasized by the district court's finding that three of the police department's proffered legitimate reasons for transferring Naes and failing to transfer him were pretextual. App. 1392; R. Doc. 137, at 29.

The only injury an equal-protection plaintiff must show is an Article III injury-in-fact, which Defendants do not and could not contest Naes has suffered. *See Gratz v. Bollinger*, 539 U.S. 244, 262 (2003). Therefore, if, as Defendants suggested below, App. 66; R. Doc. 104, at 14, Title VII and the

Equal Protection Clause require the same degree of injury, a cramped interpretation of Title VII and the MHRA's text must be rejected, and Naes's injuries are actionable under both the statute and the Constitution. Conversely, if this Court holds that Naes must prove a narrowly defined "adverse employment action" to succeed on his Title VII and MHRA disparate-treatment claims, his equal-protection claim should still be remanded for trial because it does not require that purported statutory element. After all, "adverse employment action" is at most shorthand for the statutory words "terms, conditions, or privileges of employment," *Threat v. City of Cleveland*, 6 F.4th 672, 679 (6th Cir. 2021)—words that do not appear in the Equal Protection Clause.

3. Defendants' sex-based transfer decisions constitute actionable discrimination, even under an impermissibly narrow understanding of Title VII, the MHRA, and the Equal Protection Clause, because they amounted to "adverse employment actions" under this Court's precedent.

a. Naes's forced transfer is actionable because it resulted in a "significant change in working conditions" under this Court's precedent. The district court erred by holding that the Naes's forced transfer was not actionable under this Court's case law. To be sure, this Court has held in some cases—wrongly, in our view—that an employer's discriminatory transfer on the basis of a Title VII protected characteristic is not actionable under Title VII unless an employee can show that the transfer caused a significant

disadvantage. *See, e.g.*, *Muldrow v. City of St. Louis*, 30 F.4th 680, 688 (8th Cir. 2022). But a claim that an employer was motivated by discrimination in transferring an employee *is* actionable under Title VII when it "results in a significant change in working conditions." *Tadlock v. Powell*, 291 F.3d 541, 546 (8th Cir. 2002) (quoting *Fisher v. Pharmacia & Upjohn*, 225 F.3d 915, 919 (8th Cir. 2000)). A "significant change in working conditions" includes a transfer to "a less prestigious position." *Id.* at 546–47. *See Zotos v. Lindbergh School Dist.*, 121 F.3d 356, 362 (8th Cir. 1997) (teacher's transfer from class for gifted students to regular classroom constituted an adverse employment action).

For example, in *Fisher*, the plaintiff was transferred from the corporate sales unit, which the employer touted as its premier sales unit, to a "less prestigious unit, thereby effectively diminishing his title." 225 F.3d at 920. The transfer significantly altered the plaintiff's working conditions because he was taken "out of the lead contact position with ... important client accounts in the corporate [sales unit]," and was placed in a position in which he sold to less lucrative clients and covered a smaller sales territory. *Id.*

As in *Fisher*, Naes was transferred to a less prestigious unit. Working as a detective was more prestigious than working as an officer because, as a detective, Naes "got direct assignments from the Chief of Police." App. 1257; R. Doc. 116-1; App. 691; R. Doc. 108-7. Moreover, just as the plaintiff in *Fisher* was transferred out of a lead contact position with an important client, Naes

was transferred away from a project that he had built and for which he was the lead. App. 691; R. Doc. 108-7.

In Naes's new position, the control he had over his schedule diminished, which is a materially significant disadvantage. Before the transfer, Naes consistently worked the same weekday shift and had holidays off. App. 1320–21; R. Doc. 116-1. He sometimes worked weekends but only when he volunteered to do so. *See* App. 692; R. Doc. 108-7. As a patrol officer, he was required to work weekends and was sometimes required to work holidays, and his shifts alternated, making his schedule less predictable. *Id.*; App. 1320–21; R. Doc. 116-1. It makes sense that Naes preferred to take weekends off because working weekends causes "inconvenience resulting from a less favorable schedule," *Ginger v. District of Columbia*, 527 F.3d 1340, 1344 (D.C. Cir. 2008), by, for example, interfering with family obligations and social engagements, *see Spees v. James Marine, Inc.*, 617 F.3d 380, 392 (6th Cir. 2010) (concluding that the employer violated Title VII when it required an employee to work the night shift because of her sex). *See also Hampton v. Borough of Tinton Falls Police Dep't*, 98 F.3d 107, 116 (3d Cir. 1996) (assigning employee to an undesirable schedule may violate Title VII); *Greer v. St. Louis Reg'l Med. Ctr.*, 258 F.3d 843, 845-46 (8th Cir. 2001) (giving female employee a worse on-call duty schedule violates Title VII).

b. Naes's transfer-denial claim is actionable under this Court's refusal-to-transfer and hiring-related precedent. When the City permanently hired L.R. over Naes in 2019, a jury could conclude that it again violated Title VII.

In *Bonenberger v. St. Louis Metropolitan Police Department*, 810 F.3d 1103 (8th Cir. 2016), for example, this Court held that a transfer denial constituted an adverse employment action because the position's duties, regular schedule and hours, greater prestige, and potential increased opportunity for promotion, "in combination, offered a material change in working conditions." *Id.* at 1107-08. Here, as the district court initially explained, Naes presented sufficient "evidence that his transfer was at least a demotion in form, if not in rank and pay." App. 1375; R. Doc. 137, at 12. As already described (at 3, 37), had his transfer request been granted, Naes would have received assignments directly from the Chief of Police, meaning the person with sole authority to promote officers would have been familiar with Naes's work. App. 1257–58; R. Doc. 116-1. A jury could conclude that this benefit would have tangibly changed Naes's career prospects. Indeed, Defendants' own evidence showed that L.R.'s career was advanced because her supervisors were familiar with her work. App. 577–78; R. Doc. 108-1. The transfer denial was also sufficiently harmful to constitute an adverse employment action under *Bonenberger* because in the Animal Abuse Investigator position, Naes would have received media coverage for his work, App. 1258; R. Doc. 116-1, had an office in police headquarters, App. 842; R. Doc. 108-19, and had the opportunity to work overtime on his own cases, App. 591; R. Doc. 108-1.

Everyone agrees that, under Title VII's straightforward text, a failure or refusal to hire is an "adverse employment action." 42 U.S.C. § 2000e-2(a)(1);

see, e.g., *Bonenberger*, 810 F.3d at 1107 n.6; *Torgerson v. City of Rochester*, 643 F.3d 1031, 1036 (8th Cir. 2011); *Shelton v. Boeing Co.*, 399 F.3d 909, 912 (8th Cir. 2005) (acknowledging that a refusal to hire is actionable under Title VII); *Woodland v. Joseph T. Ryerson & Son, Inc.*, 302 F.3d 839, 842 (8th Cir. 2002) (same); *Tyler v. Univ. of Arkansas Bd. of Trustees*, 628 F.3d 980, 987 (8th Cir. 2011) (same). Indeed, a refusal to rehire was the employment decision at issue in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 797 (1973).

There is no meaningful way to distinguish the harm suffered by Naes here from the injury that a prospective employee would experience when confronted during the hiring process with sex-based decision making. That prospective employee, too, would experience no diminution in pay or formal change in job responsibilities or title if an employer failed to hire the prospective employee based on sex.

c. Naes's discriminatory transfer is actionable under this Court's compensation-related precedent. Naes presents sufficient evidence of actionable discrimination claims for another reason: The police department's discriminatory transfer led to a change in his "compensation," which is prohibited under Title VII. *See, e.g.*, *Joens v. John Morrell & Co.*, 243 F. Supp. 2d 920, 947–48 (N.D. Iowa 2003) (citing *Shannon v. BellSouth Telecommunications, Inc.*, 292 F.3d 712, 716 (11th Cir. 2002), for the proposition that "denial of overtime directly deprives an employee of compensation that the employee would otherwise have earned"); *Black v. Indep. Sch. Dist. No. 316*, 476 F. Supp. 2d 1115, 1124 (D. Minn. 2007) (providing "fewer overtime

opportunities" constitutes an "adverse employment action[]"). Because a jury could conclude that Naes lost $12,000 a year in overtime opportunities as a result of his transfer, App. 153; R. Doc. 104-9, at 11, the district court erred in granting summary judgment to Defendants.

Conclusion

This Court should reverse the district court's judgment in favor of Defendants on Naes's Title VII, MHRA, and Equal Protection Clause claims and remand for further proceedings on the merits.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. Rule 32(a)(7)(B) because it contains 9,982 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Palatino Linotype.

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CERTIFICATE OF SERVICE

I certify that, on August 8, 2022, this corrected brief was filed using the Court's CM/ECF system. All attorney participants in the case are registered CM/ECF users and will be served electronically via that system.

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