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

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Argument

In a thorough, 39-page summary-judgment opinion, the district court concluded that the record is replete with evidence from which a jury could determine that Defendants—the City of St. Louis Police Department, Major Angela Coonce, and Police Chief John Hayden—discriminated against Louis Naes because of his sex. Yet Defendants argue that Naes imagined this discrimination. Their attempt to characterize Naes as an "absurd conspiracy theori[st]," Resp. Br. 34, when the district court held that genuine and material factual disputes remain, should be rejected.

On the central question in this appeal—whether Title VII, the MHRA, and the Equal Protection Clause permit a governmental employer to transfer employees (or deny requested job transfers) because of sex—Defendants flail. The answer to that question is straightforward under the statutory and constitutional text. After an employee has "established that an employer has discriminated against [him] with respect to that employee's 'terms, conditions, or privileges of employment' because of a protected characteristic, the analysis is complete," precluding summary judgment for the employer. *Chambers v. District of Columbia*, 35 F.4th 870, 874-75 (D.C. Cir. 2022) (en banc); *see* U.S. Amicus Br. 13.

Defendants acknowledge that the starting point for every statutory- and constitutional-construction case is the text, *see* Resp. Br. 12, but still hang their hat on this Court's decision in *Muldrow v. City of St. Louis*, 30 F.4th 680

(8th Cir. 2022), which never considered Title VII's or the MHRA's words and did not involve an equal-protection claim at all, *see* Resp. Br. 6, 11-12. Nor did *Muldrow*, as Defendants suggest, *see id.* at 6, invent a categorical rule that discriminatory transfers cannot give rise to discrimination claims. On their face, 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). This Court should consider the relevant statutory and constitutional text and reverse.[1]

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.

Defendants concede that the district court erred in holding that discrimination based on sexual orientation does not equate to discrimination based on sex under the MHRA and the Equal Protection Clause. Resp. Br. 5 n.1. Our opening brief thoroughly discusses that legal error. Opening Br. 14-17. We therefore focus here only on explaining that Naes has adduced sufficient evidence to resist summary judgment on the issue of

[1] The plaintiff has petitioned for a writ of certiorari from this Court's decision in *Muldrow*. *See* No. 22-193 (U.S. filed Aug. 29, 2022). That petition presents the question whether Title VII prohibits discrimination as to all "terms, conditions, or privileges of employment," or whether its reach is limited to discriminatory employer conduct that courts determine causes materially significant disadvantages for employees. The Supreme Court recently requested a response to the petition, which is currently due on November 10, 2022.

discriminatory intent, *infra* 3-5, and that a discriminatory transfer decision is actionable under Title VII, the MHRA, and the Equal Protection Clause, *infra* at 6-16.

A. Naes presented sufficient evidence of discrimination under the summary-judgment standard.

Defendants' challenge to the district court's determination that genuine disputes of material fact remain as to whether they engaged in sex discrimination does not survive scrutiny.

1. Defendants maintain that they transferred Naes because of deficient performance, not because of his sex. Resp. Br. 23. But they do no more than identify genuine disputes of material fact that, at this stage, must be resolved in Naes's favor. *Jackson v. United Parcel Serv., Inc.*, 643 F.3d 1081, 1085 (8th Cir. 2011).

In arguing that they selected L.R. over Naes because of merit, not sex (Resp. Br. 23, 29-36), Defendants ignore the evidence—considered by the district court, App. 1395; R. Doc. 137, at 32—that supports the contrary conclusion. App. 1313, 1317-19, & 1322-23; R. Doc. 116-1. For instance, a police captain told Naes why he had been transferred: in the captain's words, Naes "got whacked by the Lesbian Mafia." App. 1313; R. Doc. 116-1. Naes also marshalled evidence that he was more qualified for the Animal Abuse Investigator position because he had 15 years' experience while L.R. had about 8 years' experience. App. 460; R, 108-1; App. 1288-89, 1292; R. Doc. 116-1. Defendants also get no help from their assertion that none of the three

candidates for the Animal Abuse Investigator role had taken a communications seminar. Resp. Br. 30-31. Because L.R. had less than 15 years' experience, she had to complete the communications seminar to meet the Animal Abuse Investigator position's minimum qualifications. App. 1288-89; R. Doc. 116-1. But she had not done so. *Id.* In contrast, Naes's experience level meant that he met the job description's minimum qualifications without completing the seminar. *Id.*

Defendants argue that Naes admitted that the purported audit of his unit was the reason behind his transfer. Resp. Br. 28. That's wrong. The "audit" was pretext for the transfer. Thus, Naes admitted that Defendant Coonce relied on a sham audit to support the transfer request, but as our opening brief details (at 6-7), and the district court concluded, the concerns that Defendants enumerated in that report were fabricated. App. 1383, 1389, 1390, 1392; R. Doc. 137, at 20, 26, 27, 29. Naes also presented evidence that this purported audit was not an audit at all—legitimate departmental audits must evaluate a police unit as a whole, but the report that Defendants produced made no reference to the unit and targeted only Naes. App. 567, 569; R. Doc. 108-1 at 13, 15; App. 1288-89, 1292; R. Doc. 116-1.

Defendants note that police department employees can be "transferred at the discretion of the Police Commissioner" with "no reason or basis." Resp. Br. 4-5. That means only that the Police Department has wide latitude to transfer employees for *nondiscriminatory* reasons. It does nothing to rebut the showing that *Naes's* transfer was discriminatory. Nor does it refute the

inference that the nine reasons Defendants gave Naes to explain his transfer—three of which the district court held were indisputably false, App. 1383, 1389, 1390; R. Doc. 137, at 20, 26, 27—are "unworthy of credence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 134 (2000).

2. Defendants seek to cast aside the district court's discrimination analysis based on Naes's supposed "chronic procedural default" in purportedly violating a local rule of the Eastern District of Missouri, which provides that "[a]ll matters set forth in the moving party's Statement of Uncontroverted Material Facts shall be deemed admitted for purposes of summary judgment unless specifically controverted by the opposing party." Resp. Br. 25 (quoting E.D. Mo. L.R. 4.01(e)). But Naes did not fail to dispute Defendants' facts with record evidence. *Supra* at 3-5; *see e.g.*, App. 555-634; R. Doc. 108-1 (Plaintiff's Statement of Controverted Material Facts); App. 1364-1367; R. Doc. 137, at 1-4 (summary-judgment opinion citing Plaintiff's unsealed Statement of Controverted Material Facts). And the lower court itself found no deficiency in Naes's Statement of Controverted Material Facts or his opposition to Defendants' motion for summary judgment.

In any case, Defendants have forfeited this argument by not raising it below. App. 324-338; R. Doc. 115. Moreover, even if it might be "proper," Resp. Br. 25, for a district court to grant summary judgment to a party based on her opponent's failure to comply with a local rule, *see Nw. Bank & Tr. Co. v. First Ill. Nat'l. Bank*, 354 F.3d 721, 724 (8th Cir. 2003), a district court is not *obligated* to do so. Here, the district court did not deem Defendants' facts

admitted, and Defendants have not demonstrated why that constitutes an alternative ground for affirmance.

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.

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

a. Title VII and the MHRA create no minimum level of actionable harm.

Apparently appreciating that a materiality requirement cannot be squared with Title VII's text, Defendants argue that a discriminatory job transfer (or discriminatory denial of a requested transfer) does not impose an Article III injury-in-fact. Resp. Br. 13. They could not be more wrong. *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 796-97 (2021) (observing that "there is no dispute" that a plaintiff who seeks only nominal damages has alleged an injury in fact); *see also, e.g., Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017); *Ellis v. Bhd. of Ry., Airline and S.S. Clerks, Freight Handlers, Exp. and Station Emps.*, 466 U.S. 435, 442 (1984). Discriminatory job transfers invariably involve Article III injuries-in-fact. *See Threat v. City of Cleveland*, 6 F.4th 672, 678 (6th Cir. 2021). "Refusing an employee's request for a transfer while granting a similar request to a similarly situated employee is to treat the one employee worse than the other." *Chambers*, 35 F.4th at 874.

When an employer "does this because of the employee's 'race, color, religion, sex, or national origin'" it "has surely discriminated against the first

employee because of a protected characteristic." *Chambers*, 35 F.4th at 874. And discrimination itself causes an Article III injury. That is certainly true with a discriminatory job transfer or refusal of a job transfer—a decision that goes to the most "fundamental term or condition of employment": the "position itself." U.S. Br. 12; *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). Discrimination (of course) causes "harm traditionally recognized as providing a basis for a lawsuit in American courts." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200 (2021). This injury includes stigmatic or emotional harm, an injury that has traditionally supported liability. *See, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954); *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986). And it is undisputed that Naes suffered emotional harm. App. 159; R. Doc. 104-9 at 17.

b. *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), does not help Defendants. In *Burlington*, the Supreme Court held that Title VII's antiretaliation provision, Section 704(a) of the Act—which does not refer to "terms, conditions, or privileges of employment"—reaches conduct *outside* the workplace. *See* 548 U.S. at 61-64; *compare* 42 U.S.C. § 2000e-2(a)(1) (prohibition against disparate treatment), *with* 42 U.S.C. § 2000e-3(a) (prohibition against retaliation). This conclusion tells us nothing about the meaning of the phrase "terms, conditions, or privileges of employment," the language at issue in this case, and, in any event,

Defendants' conduct here (transferring Naes and denying Naes's request for a transfer) occurred *in* the workplace.

To the extent that *Burlington* is relevant at all, it supports Naes. At most, *Burlington* reads a run-of-the-mill materiality requirement into Title VII's antiretaliation provision. But Defendants' rule—that transfers or refusals to transfer are nonactionable—does more than simply "separate significant from trivial harms." *Burlington N.*, 548 U.S. at 68. If Title VII's antidiscrimination provision includes a materiality requirement akin to the *Burlington* standard of harm for retaliation claims, *id.*, or the law in the Sixth Circuit, *see Threat*, 6 F.4th at 678, then it would *cover* (not exempt) every discriminatory transfer. That is because every reassignment based on race, sex, or another protected characteristic harms an individual under *Burlington's* materiality standard. *See Burlington N.*, 548 U.S. at 69; U.S. Br. 12.

c. The Supreme Court's hostile-work-environment decisions support Naes's position. The Supreme Court's hostile-work-environment precedent expressly rejects the view that "in prohibiting discrimination with respect to 'compensation, terms, conditions, or privileges' of employment, Congress was concerned with" eliminating only discriminatory conduct that results in "tangible" harm. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986). Yet Defendants advocate for precisely that limitation. Resp. Br. 16.

In arguing for a strict adverse-employment-action requirement, Defendants point out that, in the hostile-work-environment context, "Title

VII prohibits only conduct that amounts to an 'objectively hostile or abusive work environment.'" Resp. Br. 14. That's true, but irrelevant when the plaintiff pursues discrimination claims involving discrete actions like the transfer decisions at issue here. A job transfer and a "denial of a transfer" are "discrete discriminatory acts" distinct from employee-on-employee harassment that, over time, results in a hostile work environment. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114, 115 (2002). Without accounting for this distinction, Defendants cite *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), and *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998)—decisions about Title VII's hostile-work-environment doctrine—that do not involve discrete acts of discrimination imposed directly by an employer. Resp. Br. 14-15. Instead, these cases concern harassment that permeates the workplace and that may only be imputed to the employer based on agency principles. *Nat'l R.R. Passenger Corp.*, 536 U.S. at 114, 115.

Even if we assume (counterfactually) that plaintiffs bringing standard disparate-treatment claims have to prove that they suffered severe or pervasive discrimination, denials of job transfer requests or forced reassignments would always meet that threshold. To reiterate: "[i]t is difficult to imagine a more fundamental term or condition of employment than *the position itself*," *Chambers*, 35 F.4th at 874—that is, the denial or forced acceptance of a job transfer affects an employee's every moment in the workplace and is, thus, by definition, the imposition of a *pervasive* harm. *Meritor*, 477 U.S. at 72. It is emphatically not "a mere offensive utterance,"

Harris, 510 U.S. at 23, or occasional employee-on-employee misconduct, *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998), that might not rise to the level of discrimination with respect to the terms or conditions of employment.

d. Rejecting Defendants' arguments would not impose unreasonable obligations or litigation burdens on employers or courts. Defendants argue that "[c]ourts are not required to devote the considerable time and resources necessary to entertain and adjudicate challenges to personnel decisions not resulting in any tangible harm to any employee." Resp. Br. 16. But, again, transfer decisions do impose tangible harm: they determine the most fundamental term or condition of employment, the job itself. Moreover, applying Title VII and the MHRA as they were written and intended presents no risk of transforming Title VII into "a general civility code for the American workplace," *Oncale*, 523 U.S. at 80, because, again, transfer decisions are "discrete discriminatory acts" distinct from employee-on-employee harassment that may, over time, result in a hostile work environment, *Nat'l R.R. Passenger Corp.*, 536 U.S. at 115.

Liability for disparate-treatment discrimination is limited in other ways. Most importantly, employment practices are actionable only when the plaintiff can prove that the employer intentionally discriminated on the basis of race, color, religion, sex, or national origin—that is, the employer's actions must have been taken "because of" one of these protected characteristics. 42 U.S.C. § 2000e-2(a)(1); *see Tex. Dep't Cmty. Affs. v. Burdine*, 450 U.S. 248, 253

(1981); *Oncale*, 523 U.S. at 80-81. That can be a substantial burden. *See Burdine*, 450 U.S. at 257-59; *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509-12 (1993).

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

Defendants seek to impose an adverse-employment-action on Naes's equal-protection claim, noting that "[t]he elements for an equal-protection gender discrimination in employment claim under § 1983 are the same as the elements for a Title VII claim." Resp. Br. 22. As our opening brief explains (at 34-35), it's true that proof of intentional discrimination is a common element of Title VII and equal-protection employment discrimination claims, and a plaintiff pursuing either claim in federal court must allege an Article III injury-in-fact, Opening Br. at 35. But any additional adverse-employment-action requirement would lack any foothold in the constitutional text. Defendants offer no answer to this straightforward point.

Defendants note that plaintiffs pursuing equal-protection claims with indirect evidence often rely on the *McDonnell Douglas* burden-shifting framework to prove they suffered intentional discrimination. Resp. Br. 22. In *McDonnell Douglas*, the plaintiff challenged an employment practice covered by Title VII when he showed that "despite his qualifications he was rejected" when he applied for a job. *McDonnell Douglas Corp.*, 411 U.S. at 802. The Court explained that the plaintiff could establish his prima facie case of discrimination "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." *Id.* In subsequent cases, plaintiffs challenged employer decisions other than failures to hire. So, courts came to describe the *McDonnell Douglas* burden-shifting framework as requiring the plaintiff to show some "adverse employment action," that is, some job-related decision. *See, e.g.*, *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1211 n.5 (8th Cir. 1985) (challenging a job reassignment). When courts use this phrase to describe the test for proving discriminatory intent with circumstantial evidence, they are not creating a level-of-harm requirement.

Whether a plaintiff intends to prove his claim with direct or indirect evidence of discrimination, the source of the plaintiff's discrimination claim—here the Equal Protection Clause's text—is the same. The *McDonnell Douglas* burden-shifting framework simply offers one potential method of proof. Put differently, whether an equal-protection violation has occurred does not turn on whether there is direct evidence in the form of a police-department memo stating that it transfers women but not men to certain job assignments or whether only circumstantial evidence shows that the police department's conduct was motivated by unlawful discrimination. Having direct evidence of discrimination generally will make it easier for an employment-discrimination plaintiff to *prove* an equal-protection claim. But

whether a plaintiff has been discriminated against has nothing to do with the kind of evidence used to prove that discrimination.

Moreover, and again (*see* Opening Br. 35-36), the Equal Protection Clause does not use Title VII's "terms, conditions, or privileges of employment" language. A "game of telephone" has converted the meaning of these words into "something quite different from the original message," *Threat*, 6 F.4th at 679, improperly narrowing Title VII's coverage, *see Chambers*, 35 F.4th at 875. But regardless of the meaning of "terms, conditions, or privileges" in Title VII, that phrase does not appear in the Equal Protection Clause, and no decision of this Court holds that proof of an "adverse employment action," whether "tangible," or not, is an element of an equal-protection claim. Put differently, this Court should reject Defendants' request that it map an (already incorrect) interpretation of Title VII's words onto the Constitution, which prohibit state actors from making any sex-based employment decision unless substantially related to an important state purpose. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 533 (1996).

3. Defendants' sex-based transfer decisions constitute actionable discrimination under this Court's precedent.

Even under Defendants' impermissibly narrow understanding of Title VII, the MHRA, and the Equal Protection Clause, Naes suffered an "adverse employment action," so Defendants are not entitled to summary judgment. Defendants do not engage with the precedent, cited in Naes's opening brief (at 37-40), showing that a discriminatory transfer that results in a significant

change in working conditions is actionable under Title VII or that Naes's transfer-denial claim is actionable under this Court's refusal-to-transfer and hiring-related precedent. Instead, they try to add a new layer to this Court's adverse-employment-action precedent, arguing that a Title VII plaintiff must show that her injuries would be considered harmful by a wide swath of employees as opposed to being viewed as injurious by the plaintiff. Resp. Br. 17, 21.

Although overruled precedent in the D.C. Circuit once required an employment decision to be harmful to a reasonable person in the employee's shoes, *see Brown v. Brody*, 199 F.3d 446, 457 (D.C. Cir. 1999), *overruled by Chambers*, 35 F.4th at 873, this Court has not required that an "adverse employment action" be harmful from the perspective of a reasonable employee, or as Defendants would have it, harmful to a majority of employees. Instead, the adverse-employment-action standard imposed by this Court asks only whether an employment decision 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)).

Naes has suffered both subjective and objective harm. As Defendants concede, Naes "earned less overtime pay in his new assignment." Resp. Br. 17. Defendants emphasize that Naes did not pursue as much overtime in his new position because the opportunities for work were far less "enjoyable." *Id.* Thus, defendants do not even attempt to dispute that the transfer

imposed subjective harm on Naes. The record reflects that instead of working independently on his own animal-abuse cases, Naes was relegated to tasks available to non-detective officers, like patrolling a fixed area. App. 591; R. Doc. 108-1. And a jury could find for Naes under an objective standard: that a reasonable employee in Naes's shoes would prefer autonomously managing detective cases, assigned directly by the Chief of Police, over non-detective work. App. 1257; R. Doc. 116-1; App. 691; R. Doc. 108-7.

Defendants next complain that there is insufficient record evidence to demonstrate that the change to Naes's schedule constitutes a materially significant disadvantage. Resp. Br. 20. Though the statute imposes no requirement of this sort, Defendants' argument is wrong on its own terms. As Defendants themselves point out, Naes testified that he prefers not to work weekends. *Id.* (citing App. 153; R. Doc. 104-9, at 11). Defendants suggest that this testimony is not specific enough to demonstrate that requiring Naes to work on the weekends imposed an adverse action. First, as already explained, Naes need not prove that the injury he suffered was objectively harmful, meaning he doesn't have to prove that other reasonable Officers prefer not to work on the weekends, and his testimony that working the weekends caused him an injury is sufficient. Moreover, at the summary-judgment stage, all reasonable inferences must be drawn in Naes's favor, and it's reasonable to infer most people prefer not to work on the weekends. *See* Opening Br. 38.

Defendants make the same mistake in their gripes over the evidence that the Animal Abuse Investigator position—the position that Naes was transferred out of—was more prestigious. Resp. Br. 21. They say that no witness other than Naes testified that "the Nuisance Unit assignment was considered 'prestigious' or 'coveted.'" *Id.* They cite no authority, however, for the idea that Naes's testimony is not enough to create a genuine dispute of material fact on this issue. And they do not dispute (nor could they) that, as the animal abuse detective, Naes "got direct assignments from the Chief of Police," App. 1257; R. Doc. 116-1; App. 691; R. Doc. 108-7, an obvious attribute of prestige.

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 3,875 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 October 31, 2022, this reply 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. I will serve the attorney participants in this case with paper copies of the reply brief once it has been accepted by the Court at:

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