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Michael Mahoney

Lucas Allison

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How *Threat* Threatened, But Preserved, Title VII's Materially Adverse Requirement in §703(a)(1) Employment Discrimination Actions

By Michael Mahoney and Lucas Allison

In *McDonnell Douglas v. Green,* the Supreme Court stated "[t]he broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions. In the implementation of such decisions, it is abundantly clear that that Title VII tolerates no racial discrimination, *subtle or otherwise.*"[1] (Emphasis added.) As Title VII is currently interpreted by American courts, this is simply not true. Proof of discrimination alone has never been enough, though courts initially understood that Congress intended to let the law grow and change over time to reflect new social attitudes.[2]

Threat v. City of Cleveland

Title VII of the Civil Rights Act of 1964 (commonly referred to as "Title VII") is the portion of that law focused on discrimination against employees by employers.[3] In §703(a)(1), Title VII describes unlawful employment practices:

> It shall be an unlawful employment practice for an employer. . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race. . .[4]

In July 2021, Cleveland EMS captains brought a Title VII lawsuit against the City of Cleveland and their supervisor, Nicole Carlton. Carlton made decisions on how to assign captains to shifts based on their race: To "diversify" shifts, Carlton moved a number of Black captains from their preferred day shift to the night shift. The captains recognized that these shift changes were improper and, consequently, filed suit against Carlton and the City of Cleveland. However, the trial court turned *Threat* and the other plaintiffs away. The District Court decided that, "[the Plaintiffs] must still show a genuine dispute of material fact as to whether Defendants took a *materially adverse* employment action against them."[5] (Emphasis added.) In other words, prior Sixth Circuit cases have held that shift changes are not harmful to employees. Therefore, the Court dismissed the captains' complaint as *de minimis non curat lex,* or "the law does not concern itself with trifles."[6]

As shown above, Title VII §703(a)(1) mentions an employee's "terms, conditions, or privileges" of employment, but does not mention "materially adverse" anywhere.[7] Despite the absence of "materially

adverse" in the language of §703(a)(1), the Sixth Circuit has consistently applied the *de minimis* standard in prior §703(a)(1) cases. Ultimately, the Court adopts language from §703(b), the "materially adverse" requirement, and introduces a test applicable to that part of the law (the *de minimis* standard) to fact patterns inappropriately. The Department of Justice asserted as much in its brief in support of neither party.[8]

This raises the question: What does "materially adverse" *really* mean in §703(a)(1) employment discrimination cases? In the Sixth Circuit, "materially adverse" used to mean that shift changes were *de minimis* harms—a mere "trifle." *Threat* has called this precedent into question, but under very specific factual circumstances

A case of first impression

Threat was the first employment discrimination case in the Sixth Circuit involving a shift change that altered *both* a term and privilege of employment under §703(a)(1). This presented the Court with an opportunity to shine new light onto the application of §703(a)(1) to discriminatory shift change cases. Unfortunately, instead of breaking down each key term of §703(a)(1) and clarifying the weight and scope of each term, the Court produced an analytical half-measure, and missed the opportunity to simplify Title VII: instead of removing hurdles for Title VII plaintiffs, the Sixth Circuit lowered these hurdles to an unclear degree in an uncertain number of situations.[9]

In this paper, the authors address *Threat*'s key takeaway: that an employer is now less likely to successfully claim an employment action is *de minimis* under Title VII §703(a)(1) than before *Threat*. This conclusion seems to run against the Supreme Court's decisions in *Burlington Industries, Inc. v. Ellerth*[10] and *Burlington Northern and Santa Fe*, two cases that outline the *de minimis* standard for Title VII's anti-retaliation provision, § 704.[11] Part II discusses in greater detail the facts of *Threat v. City of Cleveland, Ohio*, and the Court's holding.[12] Part III analyzes the Court's reasoning, and explains why the Court's analysis of the facts is both unhelpful and problematic. Part IV discusses the ramifications of *Threat*. Part V concludes with an attempt to solve the riddle and make *Threat* more informative for other courts and potential litigants.

Threat's facts and the court's holding

In Cleveland, EMS captains are assigned shifts through a seniority-based bidding system, "giving longer-tenured captains shift preference."[13] In 2017, EMS captains bid for their 2018 shift assignments, and the bidding system produced a day shift staffed entirely by Black captains.[14] The EMS Commissioner, Nicole Carlton, reassigned Reginald Anderson, a Black captain, to the night shift over his seniority-based objection and replaced him with a white captain to "diversify the shift."[15] When Anderson voiced frustration with Carlton's race-based shift reassignment, Carlton asked all captains to rebid for their shifts.[16] When the rebidding process reproduced a day shift staffed by all Black captains, Carlton again reassigned Anderson to the night shift and replaced him with a white captain.[17] Anderson and four other Black captains filed a Title VII employment discrimination action against the City of Cleveland and Commissioner Carlton.[18]

The district court granted Carlton's motion for summary judgement on the employment discrimination claim, holding that the shift reassignment was not a "materially adverse employment action)."[19] The Sixth Circuit reversed, finding that Anderson had presented sufficient evidence to support a finding that Carlton's discriminatory shift change was more than a mere trifle.[20]

In holding that the shift assignment was "materially adverse," the Court stated, "[S]urely the distinction between an 8:00 a.m. and 8:00 p.m. start time is a term of employment. How could the *when* of employment not be a *term* of employment?"[21] As to Anderson's seniority privileges, the Court concluded that his seniority-based privileges of employment were altered when Carlton changed his shift based on his race over his objections.[22] Ultimately, the court held that "[w]hen an employee's race is a basis for a shift change that denies the privileges of that employee's seniority, the employer has discriminated on the basis of race in the terms and privileges of employment."[23]

The Court's reasoning: pulling together terms and privileges of employment

Threat was the first Sixth Circuit case to address both a term and a privilege of employment in a Title VII §703(a)(1) claim.

For lower courts, attorneys and litigants looking to the Sixth Circuit for guidance, one would imagine that the Court would thoughtfully lay out how Anderson's seniority-based privileges impacted the materially adverse analysis. Instead, the Court merely provides dictionary definitions of "term" and "privilege," then states that,

> Pulling the meaning of these key terms together… [*t]he race-based shift change. . . prohibited [Anderson] from exercising his seniority rights*, and diminished his supervisory responsibilities when the city imposed the night shift on him.[24]

The City and Carlton attacked this reasoning. Both argued that under Title VII, employee lawsuits must state a claim using the words materially "adverse employment action."[25] The Court rejected their interpretation, reasoning that whether an employee states her claim using the words "discrimination based on race in 'terms' **or** 'privileges' of employment" or "discrimination based on race in materially adverse terms of employment," the conclusion is the same: a cognizable Title VII claim.[26]

The Court's reasoning is unhelpful and problematic. The reasoning is unhelpful because it does not specify how the Court weighed Anderson's seniority-based privileges when it conducted the "materially adverse" analysis. Readers are left to wonder how, and under what circumstances, Sixth Circuit courts should weigh employment privileges that define the scope and importance of an employee's terms of employment.

The Court's reasoning is also problematic: by reasoning that "materially adverse terms" is not required language in a Title VII lawsuit, and that discrimination based on race in 'terms' or 'privileges' of employment is sufficient, the Court clarified one issue but created another. The Court's reasoning blurs the line between the race-based shift change and the race-based erosion of Anderson's seniority-based privileges. Readers must wonder what role Anderson's seniority-based privileges played in the "materially adverse" analysis. The Court

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never indicated any meaningful difference between the race-based shift change and the race-based erosion of Anderson's seniority-based privileges. As far as one can tell, the Court merely determined that the shift change was "materially adverse" and concluded, therefore, the employment action was also "materially adverse" to Anderson's seniority-based privileges.

By "pulling the meaning of these key terms together," the Court also pulled together the analysis of the race-based shift change and race-based erosion of Anderson's seniority privileges. This was an incredible mistake. The Court missed a valuable opportunity to explain how the presence of a seniority-based privilege affects the "materially adverse" analysis. "Like the game of telephone," the Court's silence on how a privilege affects the "materially adverse" analysis has created a risk that Sixth Circuit courts will "convert the ultimate message" of *Threat* "into something quite different from the original message":[27] that a privilege which affects a term is reducible to the term itself.

Threat's implications

The most serious ramification of *Threat* is that the *de minimis* standard is weakened. The *Threat* court "sweeps in" a substantial amount of materiality and adversity to either a term or to a privilege of employment when discrimination occurs on the basis of race, and provides little clarity on the interaction of those two elements, as discussed above. This new development for the Sixth Circuit loosens the harm and injury requirements of Title VII litigation. Nevertheless, because the Court chose to analyze "terms" and "privileges" together, *Threat* has a safety valve: another judge could have the same fact pattern in front of her, save for a union bargaining for the privilege of choosing shifts, and that Court could say that the *de minimis* threshold has not been reached. The "privilege" negotiated by the union in *Threat* is not present, so the same employer action yields a different result.

Scaling the *de minimis* threshold back is ultimately a positive development for workers who are discriminated against by their employers, but the change also has an ambiguous scope. At face value, more claims should be able to pass summary judgment if they can prove discrimination, which will give the law more teeth in litigation. But it's never quite that simple—what will come when an employer decides to appeal an adverse summary judgment ruling? The Court held here that "When an employee's race is a basis for a shift change that denies the privileges of that employee's seniority, the employer has discriminated on the basis of race in the terms *and* privileges of employment."[28] (Emphasis added.) This compound ruling leaves wiggle room for a less sympathetic judge to apply the *de minimis* standard with respect to a term or privilege if either one exists in isolation. Where *Threat* weakens this *de minimis* standard and recognizes the harm in discrimination itself, a case without a union to establish a privilege may not make a compelling enough showing of harm. Because the Court does not discuss the terms in isolation, and because the shift change has been seen as *de minimis* by the Sixth Circuit in situations where a worker's union did not establish a privilege to select a shift, *Threat* may not actually depart from the previous decisions as radically as it first appears. This would make *Threat* a much less significant and much more narrow precedent.

Another weakness of *Threat* as precedent is the Sixth Circuit precedent that changes to employee shifts are almost always *de minimis*.[29] The District Court recognized "no material difference between a day shift and night shift" in *Threat,* and decisions as recent as 2020 held this seemingly contrary position to *Threat*.[30] The Court's decision in *Threat* was not appealed, so it will not be heard *en banc* by the Sixth Circuit. But if a similar fact pattern emerges, *Threat*'s language about shift changes may prevail over this rather extensive body of case law.

Additionally, experts are unsure how the *Threat* ruling may impact an employer's diversity initiatives.[31] While an initiative should never cause harm to an applicant or employee, an employer may struggle to craft an initiative without a clear definition of Title VII harm. The *Threat* court was unwilling to say shift changes show a materially adverse action in all cases despite making clear that shift hours are *always* a term of employment.

Because of this ambiguity from the Court, a worker whose shift is changed by his or her employer will not know the chances of success in a lawsuit. A worker without a union would be discouraged from filing a Title VII lawsuit due to the narrowness of *Threat*. Also, while employers are more likely to settle now than before *Threat*, they would be more inclined to settle these cases if the Court more firmly stated these involuntary shift changes with discriminatory intent (or pretext) are categorically impermissible. From the employer's perspective, the law is unclear as to how much an employer can change an employee's shift before it becomes a Title VII infraction, and this "we will know it when we see it" type of jurisprudence may worry employers who are making good faith efforts to comply with the law.

Down the road, the Sixth Circuit could become a bright red thumb in the jurisprudence on Title VII, diverging from Supreme Court precedent in similar cases such as *Burlington Northern and Santa Fe*.[32] The split between §§703 and 704 may draw attention to the issue, as the majority of these prior cases deal solely with §704.[33] Because these retaliation cases have defined a materially adverse employment action, the Supreme Court may draw from *Burlington Northern* or *Ellerth* to help define the term in this context. The current disposition of the Supreme Court on this issue is unclear, but there has been an undeniable ideological shift in the Court over the past five years. Additionally, a more liberal Supreme Court ruled on at least one previous 5-4 decision on Title VII early in the decade that significantly narrowed Title VII workplace harassment claims.[34] Pulling the two together, there is cause for concern about the future of §703(a)(1) Title VII requirements if the Supreme Court weighs in.

As it stands, *Threat* has been cited for its holding on one occasion by the D.C. Circuit about a month after the case was decided in *Smith v. Blinken*.[35] It is unclear how influential *Threat* will be outside the Sixth Circuit, but it has already been used in a judge's opinion denying summary judgment on a Title VII action. That is remarkable, and the authors hope *Threat* continues to press the issue when used as a precedent to avoid granting summary judgment. For the reasons outlined in this paper, the authors have reservations about the long-term viability of *Threat* to do this, but perhaps *Smith v. Blinken* will be the start of a positive trend.

Threat had the potential to be a much stronger precedent for §703(a)(1) claims under Title VII. It seems the Court wanted to toe the line between the Sixth Circuit's prior decisions that applied the *de minimis* standard in §703(1) while moving toward the position of the Department of Justice that no threshold for a discriminatory employer action exists.[36] In choosing to toe this line, the *de minimis* standard is weakened, so it should be easier for employees suing in the Sixth Circuit to show they have a case. That is a step in the right direction, and it should be commended even if it is ultimately a half-measure.

If one must live with *Threat*, what needs to be clarified in future cases? Above all, the "terms," "privileges" and "conditions" of this opinion need to be sorted with respect to the "materially adverse" test the Court preserved. Each of these three words carries some weight in the analysis performed by the *Threat* Court, but how much weight is given to each word and at what balance is unclear.[37] If *Threat* is going to be a useful template for other courts, then clarifying the threshold for an action on these factors when discrimination occurs is key.

For example, the decision could have said that a shift change exceeds the *de minimis* threshold with respect to "terms" when a shift is changed from day to night, or perhaps a twelve-hour change in shift times is material *per se*. Alternatively, those facts could give a plaintiff a rebuttable presumption, making the employer prove that the harm caused by this action was not substantial enough. This could be repeated for "conditions" (which were left untouched by *Threat*) and "privileges." It is not a perfect solution, but this direction would have been clearer than "§703(a)(1) means what we have said it means."[38] Additionally and most importantly, this solution would make employers work harder to dismiss a complaint that has merit under §703(a)(1).

However, at the outset, the authors remarked that the decision in *Threat* was a missed opportunity. It was a chance for the Court to stop reading in language that is not found in the law being applied. The Court refused to take that step, claiming it "cannot just toss the *de minimis* rule aside."[39] As the authors observed, this is simply not true; courts made that rule, and courts could stop applying it tomorrow. As the *McDonnell Douglas* decision stated, "it is abundantly clear that that Title VII tolerates no racial discrimination."[40] The Sixth Circuit took a step in the right direction, but refused to continue walking to the proper conclusion.[41] The authors have offered bridge analyses that might make this decision workable, but the ultimate solution is to live up to the words of the *McDonnell Douglas* court and tolerate no discrimination.[42]

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1. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973).
2. *Rogers v. E.E.O.C.*, 454 F.2d 234 (5th Cir. 1971), at 238.
3. 42 U.S.C. 2000e-2.
4. *Id.*
5. *Threat v. City of Cleveland*, 1:19-CV-2105, 2020 WL 5982303, at *3 (N.D. Ohio Oct. 8, 2020), aff'd in part, rev'd in part and remanded sub nom. *Threat v. City of Cleveland, Ohio*, 6 F.4th 672 (6th Cir. 2021).
6. *Id.* "Not all undesirable or unfair work conditions that employees face are material for purposes of Title VII. . . 'Reassignments without changes in salary, benefits, title, or work hours usually do not constitute adverse employment actions.'" (Citation omitted.)
7. 42 U.S.C. 2000e-2(a)(1).
8. *Michael THREAT, et al., Plaintiffs-Appellants, v. CITY OF CLEVELAND, OH, et al., Defendants-Appellees.*, 2021 WL 124790 (C.A.6), 5, in pertinent part: "The United States files this brief to inform the Court of its view that a shift assignment on the basis of race is actionable under Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1), and that no further showing of "material" harm or adversity is required."
9. *Id.*
10. 524 U.S. 742 (where an employee had not suffered a *tangible* employment action in relation to multiple instances of workplace sexual harassment; defining *tangible* employment actions as discharge, demotion, or undesirable assignment).
11. 548 U.S. 53 at 68-70, the Court imported the *tangible* employment action language from *Ellerth*, renaming it *materially adverse* employment actions to better fit the statutory language. *See also* EEOC guidelines for Race and Color based Employment Actions, https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination#V.
12. *Policastro v. Northwest Airlines*, 297 F.3d 535 (6th Cir. 2002) at 540 (describing the judicial standard for adverse employment actions).
13. *Threat* at 675.
14. *Id.*
15. *Id.* at 676.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 676-677.
20. *Id.* at 678. (holding that "[m]oving an employee from the day shift to the night shift over the employee's seniority based objections alters the 'terms' and the 'privileges' of an individual's employment.").
21. *Id.* at 677.
22. *Id.* at 678. (stating that "losing out on a preferred shift may diminish benefits that a senior employee has earned.").
23. *Id.* at 680.
24. *Id.* at 678.
25. *Id.* (Citing *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 402 (6th Cir. 2008)) (stating that "materially adverse employment actions" are actions which "constitute a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits.")
26. *Id.* at 679.
27. *Id.*
28. *Threat*, 6 F.4th 672 at 678.
29. See generally *Harper v. Elder*, 803 Fed.Appx 853 (6th Cir. 2020); *Stewart v. Esper*, 815 Fed. Appx. 8 (6th Cir. 2020).
30. See *Supra*, note 9.
31. Race-Based Shift Change to Diversify Shift Staffing Can Be Adverse Employment Action, Constitute Discrimination Under Title VII: Sixth Circuit, Practical Law Legal Update w-032-0823.
32. 548 U.S. 53.
33. *Id.*
34. *Vance v. Ball State University*, 570 U.S. 421 (2013), holding that Title VII supervisors are those with the ability to take a tangible employment action against a victim, which essentially abrogated the doctrine of hostile work environments established in *Mack v. Otis Elevator Co*, 326 F.3d 116.
35. *Smith v. Blinken*, 2021 WL 3737455 (D.D.C. 2021) (in pertinent part, an employee of the State Department who feared interacting with a harasser at the gym, access to which is a privilege of employment, or giving up working late hours to avoid the perpetrator could reasonably claim that she was unable to take advantage of the privileges and conditions of her employment due to a materially adverse employer action).
36. *Michael THREAT, et al., Plaintiffs-Appellants, v. CITY OF CLEVELAND, OH, et al., Defendants-Appellees.*, 2021 WL 124790 (C.A.6), 5.
37. *Threat* (6th Cir.) at 680.
38. *Id.*
39. *Id* at 679.
40. *McDonnell Douglas* at 801.
41. *Threat* (6th Cir) at 679.
42. *McDonnell Douglas* at 801.