CASES FOR MARCH 2021 AMEDIATE EEO TRAINING

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BOSTOCK V. CLAYTON COUNTY, 140 S. CT. 1731 (2020).

Held: Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of being homosexual or transgender.

Overturns prior Fourth Circuit decisions holding Title VII does not apply to sexual orientation. See Wrightson v. Pizza Hut of America, 99 F.3d 138 (4th Cir 1996) ("Title VII does not afford a cause of action for discrimination based upon sexual orientation"); Murray v. North Carolina Department of Public Safety, 611 Fed. Appx. 166 (4th Cir. 2015) ("Title VII does not protect against sexual orientation discrimination"); Hinton v. Virginia Union University, 185 F. Supp. 3d 807 (E.D. Va. 2016) ("it is explicitly the law of the Fourth Circuit that Title VII does not protect against discrimination based on sexual orientation"); Barr v. Virginia Alcoholic Beverage Control, Civil Action No. 3:17-CV-326-HEH, 2017 U.S. Dist. LEXIS 119136 (E.D. Va. 2017) ("it is explicitly the law of the Fourth Circuit that Title VII does not protect against discrimination based on sexual orientation").

Notable quotes from the majority decision:

"Sometimes small gestures can have unexpected consequences. Major initiatives practically guarantee them. In our time, few pieces of federal legislation rank in significance with the Civil Rights Act of 1964. There, in Title VII, Congress outlawed discrimination in the workplace on the basis of race, color, religion, sex, or national origin. Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and

undisguisable role in the decision, exactly what Title VII forbids. Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters' imagination supply no reason to ignore the law's demands."

"The question isn't just what "sex" meant, but what Title VII says about it. Most notably, the statute prohibits employers from taking certain actions "because of " sex. And, as this Court has previously explained, "the ordinary meaning of 'because of ' is 'by reason of ' or 'on account of.'" In the language of law, this means that Title VII's "because of " test incorporates the "'simple'" and "traditional" standard of but-for causation. That form of causation is established whenever a particular outcome would not have happened "but for" the purported cause. In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause. This can be a sweeping standard. Often, events have multiple but-for causes. So, for example, if a car accident occurred both because the defendant ran a red light and because the plaintiff failed to signal his turn at the intersection, we might call each a but-for cause of the collision. When it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some other factor that contributed to its challenged employment decision. So long as the plaintiff's sex was one but-for cause of that decision, that is enough to trigger the law."

"An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It doesn't matter if other factors besides the plaintiff's sex contributed to the decision. And it doesn't matter if the employer treated women as a group the same when compared to men as a group. If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee - put differently, if changing the employee's sex would have yielded a different choice by the employer - a statutory violation has occurred. Title VII's message is "simple but momentous": An individual employee's sex is "not relevant to the selection, evaluation, or compensation of employees."

"The statute's message for our cases is equally simple and momentous: An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge. Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the

individual employee's sex plays an unmistakable and impermissible role in the discharge decision."

"An employer musters no better a defense by responding that it is equally happy to fire male and female employees who are homosexual or transgender. Title VII liability is not limited to employers who, through the sum of all of their employment actions, treat the class of men differently than the class of women. Instead, the law makes each instance of discriminating against an individual employee because of that individual's sex an independent violation of Title VII."

Notable quotes from the dissent:

"There is only one word for what the Court has done today: legislation. The document that the Court releases is in the form of a judicial opinion interpreting a statute, but that is deceptive. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on any of five specified grounds: "race, color, religion, sex, [and] national origin." 42 U.S.C. §2000e-2(a)(1). Neither "sexual orientation" nor "gender identity" appears on that list. For the past 45 years, bills have been introduced in Congress to add "sexual orientation" to the list, and in recent years, bills have included "gender identity" as well. But to date, none has passed both Houses. Last year, the House of Representatives passed a bill that would amend Title VII by defining sex discrimination to include both "sexual orientation" and "gender identity," H. R. 5, 116th Cong., 1st Sess. (2019), but the bill has stalled in the Senate. An alternative bill, H. R. 5331, 116th Cong., 1st Sess. (2019), would add similar prohibitions but contains provisions to protect religious liberty. This bill remains before a House Subcommittee. Because no such amendment of Title VII has been enacted in accordance with the requirements in the Constitution (passage in both Houses and presentment to the President, Art. I, §7, cl. 2), Title VII's prohibition of discrimination because of "sex" still means what it has always meant. But the Court is not deterred by these constitutional niceties. Usurping the constitutional authority of the other branches, the Court has essentially taken H. R. 5's provision on employment discrimination and issued it under the guise of statutory interpretation. A more brazen abuse of our authority to interpret statutes is hard to recall"

"The Court tries to convince readers that it is merely enforcing the terms of the statute, but that is preposterous. Even as understood today, the concept of discrimination because of "sex" is different from discrimination because of "sexual orientation" or "gender identity." And in any event, our duty is to interpret statutory terms to "mean what they conveyed to reasonable people at the time they were written." If every single living American had been surveyed in 1964, it would have been hard to find any who thought that discrimination because of sex meant discrimination because of sexual orientation - not to mention gender identity, a concept that was essentially unknown at the time. The Court attempts to pass off its decision as the inevitable product of the textualist school of statutory interpretation championed by our late colleague Justice Scalia, but no one should be fooled. The Court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated - the theory that courts should "update" old statutes so that they better reflect the current values of society."

BABB V. WILKIE, 140 S. CT. 1168 (2020).

The federal-sector provision of the Age Discrimination in Employment Act holds the federal government to a stricter standard than applies to private employers or state and local governments under the ADEA.

"The federal-sector provision of the Age Discrimination in Employment Act of 1967 (ADEA), 88 Stat. 74, 29 U. S. C. §633a(a), provides (with just a few exceptions) that personnel actions affecting individuals aged 40 and older "shall be made free from any discrimination based on age." We are asked to decide whether this provision imposes liability only when age is a "but-for cause" of the personnel action in question. We hold that §633a(a) goes further than that. The plain meaning of the critical statutory language ("made free from any discrimination based on age") demands that personnel actions be untainted by any consideration of age. This does not mean that a plaintiff may obtain all forms of relief that are generally available for a violation of §633a(a), including hiring, reinstatement, backpay, and compensatory damages, without showing that a personnel action would have been different if age had not been taken into account. To obtain such relief, a plaintiff must show that age was a but-for cause of the challenged employment decision. But if age discrimination played a lesser part in the decision, other remedies may be appropriate."

"If age discrimination plays any part in the way a decision is made, then the decision is not made in a way that is untainted by such discrimination. This is the straightforward meaning of the terms of §633a(a), and it indicates that the statute does not require proof that an employment decision would have turned out differently if age had not been taken into account. To see what this entails in practice, consider a simple example. Suppose that a decision-maker is trying to decide whether to promote employee A, who is 35 years old, or employee B, who is 55. Under the employer's policy, candidates for promotion are first given numerical scores based on non-discriminatory factors. Candidates over the age of 40 are then docked five points, and the employee with the highest score is promoted. Based on the non-discriminatory factors, employee A (the 35-year-old) is given a score of 90, and employee B (the 55-year-old) gets a score of 85. But employee B is then docked 5 points because of age and thus ends up with a final score of 80. The decision-maker looks at the candidates' final scores and, seeing that employee A has the higher score, promotes employee A. This decision is not "made" "free from any discrimination" because employee B was treated differently (and less favorably) than employee A (because she was docked five points and A was not). And this discrimination was "based on age" because the five points would not have been taken away were it not for employee B's age. It is true that this difference in treatment did not affect the outcome, and therefore age was not a but-for cause of the decision to promote employee A. Employee A would have won out even if age had not been considered and employee B had not lost five points, since A's score of 90 was higher than B's initial, legitimate score of 85. But under the language of §633a(a), this does not preclude liability. .... What follows instead is that, under §633a(a), age must be the but-for cause of differential treatment, not that age must be a but-for cause of the ultimate decision."

"We are not persuaded by the argument that it is anomalous to hold the Federal Government to a stricter standard than private employers or state and local governments. That is what the statutory

language dictates, and if Congress had wanted to impose the same standard on all employers, it could have easily done so.

"Remedies should not put a plaintiff in a more favorable position than he or she would have enjoyed absent discrimination. But this is precisely what would happen if individuals who cannot show that discrimination was a but-for cause of the end result of a personnel action could receive relief that alters or compensates for the end result. Although unable to obtain such relief, plaintiffs are not without a remedy if they show that age was a but-for cause of differential treatment in an employment decision but not a but-for cause of the decision itself. In that situation, plaintiffs can seek injunctive or other forward-looking relief."

OUR LADY OF GUADALUPE SCHOOL V. MORRISSEY-BERRU, 140 S. CT. 2049 (2020).

Our Lady of Guadalupe School v. Morrissey-Berru involved two cases in which the employers asserted the "ministerial exception" defense to employment discrimination laws. One case involved Agnes Morrissey-Berru, who was employed at Our Lady of Guadalupe School, a Roman Catholic primary school. Morrissey-Berru was employed at Our Lady of Guadalupe School as a lay fifth or sixth grade teacher. She taught all subjects, including religion. Morrissey-Berru sued the school for age discrimination under the Age Discrimination in Employment Act after she was discharged. The second case concerns the Kristen Biel, who worked for about a year and a half as a lay teacher at St. James School, which was a Catholic primary school. She served as a long-term substitute teacher for a first grade class, and then was a full-time fifth grade teacher. Like Morrissey-Berru, Bile taught all subjects, including religion. Biel alleged her school discharged her because she had requested a leave of absence to obtain breast cancer treatment. Examining a variety of consideration, the Supreme Court found the ministerial exception barred their employment discrimination claims against their schools. The significance of Our Lady of Guadalupe School is that it broadens the circumstances a court must consider in deciding whether the ministerial exception applies well beyond those previously identified in Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U.S. 171 (2012), and holds the Hosanna-Tabor are not necessarily even relevant. Under Our Lady of Guadalupe School, "what matters, at bottom, is what an employee does."

The First Amendment provides that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. The Religion Clauses protect the right of churches and other religious institutions to decide matters of faith and doctrine without government intrusion. The independence of religious institutions in matters of faith and doctrine is closely linked to independence in what matters of church government. This does not mean that religious institutions enjoy a general immunity from secular laws, but it does protect their autonomy with respect to internal management decisions that are essential to the institution's central mission, including selection of the individuals who play certain key roles.

In Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U.S. 171 (2012), the United States Supreme Court recognized a "ministerial exception" which requires courts to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions, and which forecloses certain employment discrimination claims

brought against religious organizations. In Hosanna-Tabor, Cheryl Perich, a kindergarten and fourth grade teacher at an Evangelical Lutheran school, filed suit in federal court claiming that she had been discharged because of a disability, in violation of the Americans with Disabilities Act of 1990 (ADA). The school responded that the real reason for her dismissal was her violation of the Lutheran doctrine that disputes should be resolved internally and not by going to outside authorities. The Supreme Court held the ministerial exception barred her lawsuit. It declined "to adopt a rigid formula for deciding when an employee qualifies as a minister" but identified four circumstances that it considered. First, it found the teacher's church had given her the title of "minister, with a role distinct from that of most of its members." She was not a pastor or deacon, did not lead a congregation, and did not regularly conduct religious services. But she was classified as a "called" teacher, as opposed to a lay teacher, and after completing certain academic requirements, she was given the formal title "'Minister of Religion, Commissioned." Second, the court found teacher's position "reflected a significant degree of religious training followed by a formal process of commissioning." Third, the court founds the teacher held herself out as a minister of the church by accepting the formal call to religious service and by claiming certain tax benefits. Fourth, the teacher's job duties "reflected a role in conveying the Church's message and carrying out its mission." The church charged her with "leading others toward Christian maturity'" and "'teaching faithfully the Word of God, the Sacred Scriptures, in its truth and purity and as set forth in all the symbolical books of the Evangelical Lutheran Church." Although she also provided instruction in secular subjects, she taught religion four days a week, led her students in prayer three times a day, took her students to a chapel service once a week, and participated in the liturgy twice a year. She performed an important role in transmitting the Lutheran faith to the next generation. The circumstances examined in Hosanna-Tabor became the framework used by courts in applying the ministerial exception to employment discrimination cases involving religious organizations.

In Our Lady of Guadalupe School v. Morrissey-Berru, the Supreme Court emphasized that the considerations examined in Hosanna-Tabor are not the only factors a court may consider in deciding whether the ministerial exception bars an employment discrimination lawsuit, and that the ministerial exception can apply even if none of the factors examined in Hosanna-Tabor are present. "In determining whether a particular position falls within the Hosanna-Tabor exception, a variety of factors may be important. The circumstances that informed our decision in Hosanna-Tabor were relevant because of their relationship to Perich's role in conveying the Church's message and carrying out its mission, but the other noted circumstances also shed light on that connection. In a denomination that uses the term "minister," conferring that title naturally suggests that the recipient has been given an important position of trust. In Perich's case, the title that she was awarded and used demanded satisfaction of significant academic requirements and was conferred only after a formal approval process, and those circumstances also evidenced the importance attached to her role. But our recognition of the significance of those factors in Perich's case did not mean that they must be met - or even that they are necessarily important - in all other cases." "Take the question of the title "minister." Simply giving an employee the title of "minister" is not enough to justify the exception. And by the same token, since many religious traditions do not use the title "minister," it cannot be a necessary requirement. "For related reasons, the academic requirements of a position may show that the church in question regards the position as having an important responsibility in elucidating or teaching the tenets of the faith. Presumably the purpose of such requirements is to make sure that the person holding the

position understands the faith and can explain it accurately and effectively. But insisting in every case on rigid academic requirements could have a distorting effect. This is certainly true with respect to teachers. Teaching children in an elementary school does not demand the same formal religious education as teaching theology to divinity students. Elementary school teachers often teach secular subjects in which they have little if any special training. In addition, religious traditions may differ in the degree of formal religious training thought to be needed in order to teach. In short, these circumstances, while instructive in Hosanna-Tabor, are not inflexible requirements and may have far less significance in some cases." "What matters, at bottom, is what an employee does."

PATTERSON V. WALGREEN CO., 140 S. CT. 685 (2020).

In Patterson V. Walgreen Co., 140 S. Ct. 685 (2020), the United States Supreme Court declined to hear an appeal of a case from the United States Court of Appeal involving religious accommodation required by Title VII of the Civil Rights Act of 1964. The majority if the Supreme Court justices did not issue a written opinion, but Justice Alito issued a concurring opinion signaling the Supreme Court may be prepared to hold in a future case that employers must demonstrate more than a de minimis burden in order to deny a religious accommodation under Title VII. Justice Alito's concurring opinion also signaled that, in a future case, the Supreme Court may rule on whether Title VII requires an employer to provide a partial accommodation for an employee's religious practices even if a full accommodation would impose an undue hardship, and whether an employer can show that an accommodation would impose an undue hardship based on speculative harm.

"[W]e should reconsider the proposition, endorsed by the opinion in Trans World Airlines, Inc. v. Hardison, 432 U. S. 63, 84, 97 S. Ct. 2264, 53 L. Ed. 2d 113 (1977), that Title VII does not require an employer to make any accommodation for an employee's practice of religion if doing so would impose more than a de minimis burden. Title VII prohibits employment discrimination against an individual "because of such individual's . . . religion," §§2000e-2(a)(1) and (2), and the statute defines "religion" as "includ[ing] all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." §2000e(j) (emphasis added). As the Solicitor General observes, Hardison's reading does not represent the most likely interpretation of the statutory term "undue hardship"; the parties' briefs in Hardison did not focus on the meaning of that term; no party in that case advanced the de minimis position; and the Court did not explain the basis for this interpretation. I thus agree with the Solicitor General that we should grant review in an appropriate case to consider whether Hardison's interpretation should be overruled. The Solicitor General also agrees that two other issues raised in the petition are important, specifically, (1) whether Title VII may require an employer to provide a partial accommodation for an employee's religious practices even if a full accommodation would impose an undue hardship, and (2) whether an employer can show that an accommodation would impose an undue hardship based on speculative harm. But the Solicitor General does not interpret the decision below as turning on either of those questions. While I am less sure about this interpretation, I agree in the end that this case does not present a good vehicle for revisiting

Hardison. I therefore concur in the denial of certiorari, but I reiterate that review of the Hardison issue should be undertaken when a petition in an appropriate case comes before us."

COMCAST CORP. V. NAT'L ASS'N OF AFRICAN AMERICAN-OWNED MEDIA, 140 S. CT. 1009 (2020).

In Comcast Corp. v. Nat'l Ass'n of African American-Owned Media, the Supreme Court held that a plaintiff in a Section 1981 case must plead and prove "but-for" causation, and that the "motivating factor" causation standard under Title VII of the Civil Rights Act of 1964 does not apply under Section 1981. The Supreme Court also rejected application of the burden shifting framework of McDonnell Douglas Corp. v. Green under Section 1981, or under Title VII, in determining whether a plaintiff's complaint sufficiently alleges facts demonstrating but-for causation. The Supreme Court declined to consider ESN's argument that Section 1981 prohibits discrimination not only in outcomes but also in processes.

Section 1 of the Civil Rights Act of 1866 includes the language codified today in 42 U.S.C. §1981(a), commonly referred to as "Section 1981," stating "all persons ... shall have the same right ... to make and enforce contracts, to sue, be parties, [and] give evidence ... as is enjoyed by white citizens." In Comcast, a Black entrepreneur named Byron Allen owned Entertainment Studios Network ("ESN"), which operated the television networks Justice Central.TV, Comedy.TV, ES.TV, Pets.TV, Recipe.TV, MyDestination.TV, and Cars.TV. He repeatedly negotiated with Comcast to carry the networks, but Comcast declined, citing lack of demand for his programming, bandwidth constraints, and its preference for news and sports programming that his networks did not offer. ESN sued Comcast, alleging Comcast systematically disfavored "100% African American-owned media companies" in violation of Section 1981. The district court dismissed the case, holding ESN failed to allege facts plausibly showing that, but for racial animus, Comcast would have contracted with ESN. The Ninth Circuit reversed, holding the district court used the wrong causation standard when assessing ESN's pleadings because, according the the Ninth Circuit, a Section 1981 plaintiff doesn't have to point to facts plausibly showing that racial animus was a "but for" cause of the defendant's conduct, and instead need only alleged facts plausibly showing that race played "any role" in the defendant's decisionmaking process. The Ninth Circuit's ruling was contrary to the law of other federal circuits, such as the Seventh Circuit, under which "to be actionable, racial prejudice must be a but-for cause ... of the refusal to transact." The Supreme Court heard the case to resolve the disagreement among the circuits over Section 1981's causation requirement.

The Supreme Court held that a plaintiff in a Section 1981 case must plead and prove "but-for" causation, and that the "motivating factor" causation standard under Title VII of the Civil Rights Act of 1964 does not apply under Section 1981. "While the statute's text does not expressly discuss causation, it is suggestive. The guarantee that each person is entitled to the "same right ... as is enjoyed by white citizens" directs our attention to the counterfactual - what would have happened if the plaintiff had been white? This focus fits naturally with the ordinary rule that a plaintiff must prove but-for causation. If the defendant would have responded the same way to the plaintiff even if he had been white, an ordinary speaker of English would say that the plaintiff received the "same" legally protected right as a white person. Conversely, if the defendant would

have responded differently but for the plaintiff 's race, it follows that the plaintiff has not received the same right as a white person."

The Supreme Court rejected ESN's argument that the "motivating factor" causation standard under Title VII of the Civil Rights Act of 1964 should apply under Section 1981. "This Court first adopted Title VII's motivating factor test in Price Waterhouse v. Hopkins, 490 U. S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989). There, a plurality and two Justices concurring in the judgment held that a Title VII plaintiff doesn't have to prove but-for causation; instead, it's enough to show that discrimination was a motivating factor in the defendant's decision. Once a plaintiff meets this lesser standard, the plurality continued, the defendant may defeat liability by establishing that it would have made the same decision even if it had not taken the plaintiff 's race (or other protected trait) into account. In essence, Price Waterhouse took the burden of proving but-for causation from the plaintiff and handed it to the defendant as an affirmative defense. But this arrangement didn't last long. Congress soon displaced Price Waterhouse in favor of its own version of the motivating factor test. In the Civil Rights Act of 1991, Congress provided that a Title VII plaintiff who shows that discrimination was even a motivating factor in the defendant's challenged employment decision is entitled to declaratory and injunctive relief. A defendant may still invoke lack of but-for causation as an affirmative defense, but only to stave off damages and reinstatement, not liability in general. While this is all well and good for understanding Title VII, it's hard to see what any of it might tell us about §1981. Title VII was enacted in 1964; this Court recognized its motivating factor test in 1989; and Congress replaced that rule with its own version two years later. Meanwhile, §1981 dates back to 1866 and has never said a word about motivating factors. So we have two statutes with two distinct histories, and not a shred of evidence that Congress meant them to incorporate the same causation standard. Worse yet, ESN's fallback position - that we should borrow the motivating factor concept only at the pleadings stage - is foreign even to Title VII practice. To accept ESN's invitation to consult, tinker with, and then engraft a test from a modern statute onto an old one would thus require more than a little judicial adventurism, and look a good deal more like amending a law than interpreting one. What's more, it's not as if Congress forgot about §1981 when it adopted the Civil Rights Act of 1991. At the same time that it added the motivating factor test to Title VII, Congress also amended §1981 (adding new subsections (b) and (c) to §1981). But nowhere in its amendments to §1981 did Congress so much as whisper about motivating factors.

The Supreme Court declined to consider ESN's argument that Section 1981 prohibits discrimination not only in outcomes but also in processes. "[ESN] reminds us that one of the amendments to §1981 defined the term "make and enforce contracts" to include "making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U. S. C. §1981(b). In all this, ESN asks us to home in on one word, "making." By using this particular word, ESN says, Congress clarified that §1981(a) guarantees not only the right to equivalent contractual outcomes (a contract with the same final terms), but also the right to an equivalent contracting process (no extra hurdles on the road to securing that contract). And, ESN continues, if the statute addresses the whole contracting process, not just its outcome, a motivating factor causation test fits more logically than the traditional but-for test. Comcast and the government disagree. As they see it, the Civil Rights Act of 1866 unambiguously protected only outcomes - the right to contract, sue,

be a party, and give evidence. When Congress sought to define some of these terms in 1991, it merely repeated one word from the original 1866 Act (make) in a different form (making). No reasonable reader, Comcast and the government contend, would think that the addition of the present participle form of a verb already in the statute carries such a radically different meaning and so extends §1981 liability in the new directions ESN suggests. And, we are told, the statute's original and continuing focus on contractual outcomes (not processes) is more consistent with the traditional but-for test of causation. This debate, we think, misses the point. Of course, Congress could write an employment discrimination statute to protect only outcomes or to provide broader protection. But, for our purposes today, none of this matters. The difficulty with ESN's argument lies in its mistaken premise that a process-oriented right necessarily pairs with a motivating factor causal standard. The inverse argument - that an outcome-oriented right implies a but-for causation standard - is just as flawed. Either causal standard could conceivably apply regardless of the legal right §1981 protects. We need not and do not take any position on whether §1981 as amended protects only outcomes or protects processes too, a question not passed on below or raised in the petition for certiorari. Our point is simply that a §1981 plaintiff first must show that he was deprived of the protected right and then establish causation - and that these two steps are analytically distinct."

The Supreme Court rejected application of the burden shifting framework of McDonnell Douglas Corp. v. Green under Section 1981, or under Title VII, in determining whether a plaintiff's complaint sufficiently alleges facts demonstrating but-for causation. It also declined to take a position on whether McDonnell Douglas Corp. v. Green, which was a Title VII case, applies to Section 1981 cases. "[ESN] asks us to consider the burden shifting framework of McDonnell Douglas Corp. v. Green, 411 U. S. 792, 802, 804, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Like the motivating factor test, McDonnell Douglas is a product of Title VII practice. Under its terms, once a plaintiff establishes a prima facie case of race discrimination through indirect proof, the defendant bears the burden of producing a race-neutral explanation for its action, after which the plaintiff may challenge that explanation as pretextual. This burden shifting, ESN contends, is comparable to the regime it proposes for §1981. It is nothing of the kind. Whether or not McDonnell Douglas has some useful role to play in §1981 cases, it does not mention the motivating factor test, let alone endorse its use only at the pleadings stage. Nor can this come as a surprise: This Court didn't introduce the motivating factor test into Title VII practice until years after McDonnell Douglas. For its part, McDonnell Douglas sought only to supply a tool for assessing claims, typically at summary judgment, when the plaintiff relies on indirect proof of discrimination. Because McDonnell Douglas arose in a context where but-for causation was the undisputed test, it did not address causation standards. So nothing in the opinion involves ESN's preferred standard. Under McDonnell Douglas's terms, too, only the burden of production ever shifts to the defendant, never the burden of persuasion. So McDonnell Douglas can provide no basis for allowing a complaint to survive a motion to dismiss when it fails to allege essential elements of a plaintiff's claim."

BAZEMORE V. BEST BUY, NO. 18-2196 (4TH CIR. 2020).

"Title VII prohibits racial or sexual harassment that creates a hostile work environment for the harassed employee. To make such a claim, Bazemore must show she was subjected to (1) unwelcome conduct, (2) based on her race or sex, that was (3) severe or pervasive enough to

make her work environment hostile or abusive and (4) imputable to ... her employer." Bazemore v. Best Buy, No. 18-2196 (4th Cir. 2020), provides a useful guide to what the Fourth Circuit requires a plaintiff to allege in her complaint to satisfy the fourth element of Title VII claim for hostile work environment, i.e., that the objectionable conduct is imputable to the employer.

"[T]he existence of unwelcome conduct, based on an employee's race or sex, that is severe or pervasive enough to create a hostile work environment, is not on its own enough to hold an employer liable. For an employer to be liable, the harassing employee's conduct must also be imputable to the employer. And to survive a Rule 12(b)(6) motion to dismiss, an employee must allege sufficient facts to plausibly satisfy the imputability requirement." "Here, Creel, according to the complaint, made the allegedly harassing remark. But Bazemore alleges that Creel is her coworker, not her supervisor. Therefore, imputing Creel's harassment to Best Buy requires Bazemore to show that Best Buy knew, or should have known, about the harassment and failed to take action reasonably calculated to stop it."

"While Bazemore alleged that Best Buy knew of Creel's conduct by virtue of her complaint to the corporate human resources department, she does not allege that Best Buy failed to stop it. Instead, Bazemore asserts that Hayes contacted her three days after she reported what Creel said and within two weeks Creel received a written warning. Importantly, she does not assert that Creel, or anyone else at Best Buy, harassed her again. The district court correctly held that, given those assertions, Bazemore has not pled that Best Buy failed to act to stop Creel's harassment. A remedial action that effectively stops the harassment will be deemed adequate as a matter of law."

"To be sure, Bazemore's allegations express her belief that the action taken by Best Buy in response to her complaint was inadequate. She alleged she expected "maybe a sit down with the General Manager, [or] maybe a store meeting reminding the staff about the ethics policy, especially considering it happened in such a public manner on the sales floor, and so many people knew about it." But Title VII does not prescribe specific action for an employer to take in response to racial or sexual harassment, or require that the harasser be fired, as Bazemore suggests should have happened to Creel. As noted above, it is enough for an employer to take action "reasonably calculated" to stop the harassment." "Plaintiffs often feel that their employer 'could have done more to remedy the adverse effects of the employee's conduct. But Title VII requires only that the employer take steps reasonably likely to stop the harassment."

"Bazemore's] allegations do not state a plausible claim because, so long as discipline is reasonably calculated to end the behavior, the exact disciplinary actions lie within Best Buy's discretion." "This Court does not sit as a kind of super-personnel department weighing the prudence of employment decisions made by firms charged with employment discrimination."

"Bazemore's complaint makes clear that in response to her complaints, Best Buy took steps that were not only reasonably calculated to end Creel's behavior, but that did, in fact, end it. In light of those allegations, whether or not Best Buy could have done more is irrelevant. Thus, even construing Bazemore's pro se allegations liberally, we agree with the district court that Creel's conduct is not imputable to Best Buy."

"Bazemore's allegations that Creel's racist and sexist joke changed the environment at work and caused her to suffer physically and psychologically do not aid her in imputing Creel's conduct to Best Buy. Those allegations only go to the third element of her hostile work environment claim - that Creel's harassment was so severe or pervasive that it made the environment at work hostile or abusive."

"Bazemore asserted in her Opposition to Best Buy's Motion to Dismiss that other employees have been fired for using the n-word. As the district court noted, these allegations lack dates, detail or context. Accordingly, they are too general to be compared to Bazemore's allegations about Creel's conduct. The court further held that even if the allegations were comparable to the present case, they do not plausibly allege that Creel's conduct is imputable to Best Buy because Bazemore acknowledges in her complaint that Creel was disciplined for her conduct. We agree. Once again, it is not our role to micro-manage Best Buy's disciplinary procedures. As a matter of law, Best Buy is only required to discipline in a way reasonably calculated to end the behavior. Bazemore does not allege that Best Buy failed to do this."

ELLEDGE V. LOWE'S HOME CENTERS, LLC, NO. 19-1069 (4TH CIR. 2020).

Elledge v. Lowe's Home Centers, LLC, No. 19-1069 (4th Cir. 2020), provides a useful refresher on Fourth Circuit law on reasonable accommodation under the Americans with Disabilities Act, especially in regard to reassignment as a reasonable accommodation. Importantly, in Elledge the Fourth Circuit held that the ruling in U.S. Airways v. Barnett, 535 U.S. 391 (2002), that an employed is not required to reassign an employee with a disability as a reasonable accommodation if doing so would violate an established seniority-based hiring system, also applies to an established non-seniority qualifications-based hiring system.

The ADA provides that no covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees. In order to count as a "qualified individual" entitled to the ADA's protections, a person must be able with or without reasonable accommodation to perform the essential functions of the employment position that such individual holds or desires. A function is essential as long as it bears more than a marginal relationship to the job at issue. The ADA further provides that, in any determination of a position's essential functions, consideration shall be given to the employer's judgment. The employer's business judgment - that is, the judgment of the entity that defined the employee's role in the first place - commences the analysis. The decision about a position's essential functions belongs, in the first instance, to the employer; it accordingly merits considerable deference from the courts. While the ADA identifies a position's written job description as relevant to the employer's judgment on this question, it does not posit that description as dispositive. Rather, a court performing the essential functions inquiry must consult the full range of evidence bearing on the employer's judgment, including the testimony of senior officials and those familiar with the daily requirements of the job.

The threshold question is whether the job duties impacted by the employee's disability bear more than a marginal relationship to the job at issue, i.e., whether they are essential job functions.

The next question is whether the employee is a "qualified individual" under the ADA, that is, whether he was able to perform these essential functions with or without reasonable accommodation.

If the employee is a qualified individual with a disability, the final question is whether the employee could perform the essential functions of his job with reasonable accommodation. The ADA defines "reasonable accommodation" as one that "may include job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies and other similar accommodations." The the ADA defines "reasonable accommodation" in a way that is illustrative rather than exhaustive. The purpose of such language is to indicate that the range of reasonable accommodations is broad and that its contours are clarified by, but not limited to, the specifically enumerated items. It is also to suggest that what counts as a reasonable accommodation is not an a priori matter but one that is sensitive to the particular circumstances of the case. And finally, the text teaches that what will serve as a reasonable accommodation in a particular situation may not have a single solution, but rather, many possible solutions. The actor responsible in the first instance for reducing this wide solution-space to a concrete accommodation is not the judiciary, or even the disabled employee - it is the employer. To the extent an employee may be accommodated through a variety of measures, the employer, exercising sound judgment, possesses "ultimate discretion" over these alternatives. Provided the employer's choice of accommodation is reasonable, not even a well-intentioned court may substitute its own judgment for the employer's choice. Claims for reassignment under the ADA must be handled with care because of reassignment's unique status under the law.

Although "reassignment to a vacant position" appears in the middle of 42 U.S.C. § 12111(9)'s undifferentiated list of possible accommodations, other circuits, as well as the interpretive guidance of the EEOC, persuasively recognize reassignment as an accommodation of "last resort." Reassignment's "last among equals" status is not only clearly attested in the legal landscape; it also respects core values underlying the ADA and employment law more generally. It recognizes that basic fairness in such a context rests atop an often-rickety three-legged stool, whose legs are the employer, the disabled employee, and - easiest to neglect - the other employees. First, consider the employer. Allowing other reasonable forms of accommodation to take precedence over reassignment protects the employer's discretion over hiring. This discretion is what makes it possible for the employer to discharge its responsibility to promote workplace stability as its workforce changes over time, and - to the extent appropriate - to reward merit through predictable advancement. Such discretion is also fundamental to the employer's freedom to run its business in an economically viable way. The disabled employee also benefits. Although an employer may accommodate through reassignment at any point, reassignment's last-resort status encourages employers to take reasonable measures to accommodate their disabled employees in the positions they already hold. The employee is thereby saved from being hurled into an unfamiliar position with a different set of demands; instead, he is allowed to maintain and to grow the investment he has already made in his present job. Finally, deemphasizing reassignment helps preserve a fair balance in the relationship between a disabled employee and his colleagues. Reassignment is unique in its potential to disrupt the settled expectations of other employees, so much so that no employer is required to reassign where reassignment would bump

another employee from his position, or block reasonable, long-time workplace expectations. Holding reassignment in reserve for unusual circumstances bolsters the confidence of other employees that the misfortune of a colleague will not unfairly deprive them of opportunities for which they themselves have labored. In this way, not only fairness, but also workplace comity and morale are well served.

The Supreme Court in U.S. Airways v. Barnett has given further guidance on a disabled employee's right to receive reassignment under the ADA. In Barnett, a disabled employee who could not be accommodated in his present position, claimed a legal right to reassignment to a mailroom position, even though reassignment to said position would have contravened his employer's long-standing, seniority-based hiring system. The Court held that a plaintiff/employee (to defeat a defendant/employer's motion for summary judgment) need only show that an accommodation seems reasonable on its face, i.e., ordinarily or in the run of cases. Under this rule, it denied the employee's claim, finding that an employer's disability-neutral, seniority-based hiring system presumptively trumped the employee's otherwise reasonable request for reassignment. Elledge argues that his claim for reassignment not only survives Barnett, but that Barnett actually requires it. To do so, Elledge reads Barnett as articulating an almost sui generis exception - the well-entrenched, seniority-based hiring system - to a general ADA norm requiring reassignment where no other reasonable accommodation is possible. Lowe's best-qualified hiring system, not at all fitting within this niche exception, could not, says Elledge, have insulated it from its statutory mandate to reassign him to either of the vacant positions he had identified. This reading, however, disconnects Barnett's holding from its reasoning. It recasts the ADA - a shield meant to guard disabled employees from unjust discrimination - into a sword that may be used to upend entirely reasonable, disability-neutral hiring policies and the equally reasonable expectations of other workers. But Barnett's holding must be understood in light of the principles undergirding it. The first principle is Barnett's articulation of the end, or purpose, of the ADA, which is naturally read to express some limit on what is required under the ADA's reasonable accommodation provision. The end of the ADA is equality of opportunity for disabled employees. But that does not in turn mean the end of all preferences for the disabled. "[P]references will sometimes prove necessary," the Court announced, "to achieve the Act's basic equal opportunity goal. The Act requires preferences... that are needed for those with disabilities to obtain the same workplace opportunities that those without disabilities automatically enjoy." Stated otherwise, Barnett does not require employers to construct preferential accommodations that maximize workplace opportunities for their disabled employees. It does require, however, that preferential treatment be extended as necessary to provide them with the same opportunities as their non-disabled colleagues. The other key principle is the value of stability in employee expectations - the third leg of the stool mentioned above - which the Court invoked as the "most important" reason justifying the precedence of the employer's seniority-based system over the disabled employee's otherwise valid right to reassignment. The Court accordingly refused to compel the substitution of a complex case-specific accommodation decision made by management for the more uniform, impersonal operation of seniority rules, thereby undermining employees' expectations of consistent, uniform treatment. Such interests are to be jealously guarded insofar as they represent employees' personally costly investments in their own careers.

Just as these principles jointly justified the Court in upholding the integrity of the seniority-based hiring system at issue in Barnett, they justify upholding the integrity of Lowe's practices as well. Lowe's advanced its employees in accordance with a special kind of best-qualified hiring system. As a way of consistently identifying and promoting internal talent, Lowe's merit-based approach examined an employee's record of experience and qualifications as well as, for an employee advanced to the next round in the hiring process, his performance in interview settings. For many of its senior-level positions, Lowe's nested within this merit-based system an "Enterprise Succession Management Process." This process represented Lowe's continuous effort to identify talent intra-departmentally and, by providing special training and attention, to prime its most competent employees for promotion into the heightened responsibilities of the department's director-level positions. This system is, on its face, disability neutral. It invites, rewards, and protects the formation of settled expectations regarding hiring decisions. And most importantly, it is a reasonable, orderly, and fundamentally fair way of directing employee advancement within the company. In the ordinary run of cases, reassignment in contravention of such a policy would not be reasonable.

LEMON V MYERS BIGEL, NO. 19-1380 (4TH CIR. 2020).

Lemon v Myers Bigel, No. 19-1380 (4th Cir. 2020), provides a useful summary of Fourth Circuit law on the meaning of "employee" under Title VII of the Civil Rights Act of 1964.

Title VII prohibits employers from discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race," or from discriminating "against any of his employees... because he has opposed any practice made unlawful by this subchapter." 42 U.S.C § 2000e-2(a), 3(a). As the text makes clear, the protections of Title VII's anti-discrimination and anti-retaliation provisions extend only to employees. In focusing on employees, and the terms and conditions of employment, Congress chose to protect those least able to combat the effects of invidious discrimination in the workplace. The threshold inquiry in any Title VII case must, therefore, be whether the plaintiff alleging unlawful discrimination or retaliation is, in fact, an employee.

Title VII defines "employee" as "an individual employed by an employer." 42 U.S.C. § 2000(e)(b). The Supreme Court has stated that Congress's words should be interpreted to "describe the conventional master-servant relationship as understood by common-law agency doctrine," Clackamas Gastroenterology Associations, P.C. v. Wells, 538 U.S. 440, 445 (2003). Clackamas further specified that the principal guidepost for courts applying the principles of agency doctrine must be the common-law element of control. And finally, Clackamas gauged control through a set of six non-exhaustive factors: [1] Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work, [2] Whether and, if so, to what extent the organization supervises the individual's work, [3] Whether the individual reports to someone higher in the organization, [4] Whether and, if so, to what extent the individual is able to influence the organization, [5] Whether the parties intended that the individual be an employee, as expressed in written agreements and contracts, and [6] Whether the individual shares in the profits, losses, and liabilities of the organization. Courts are responsible for merging these factors into a judgment that embraces all the circumstances presented in a particular case.

And circuits relying on Clackamas to resolve disputes similar to the present one have not deviated from the principal guidepost of common law control.

Appellant Shawna Lemon practiced patent law at Myers Bigel (MB), first as an associate and then as a shareholding partner and equal owner of the firm. Around ten years after her elevation to MB's partnership and its Board of Directors, Lemon applied for short term leave. A vote of the full Board, however, found Lemon did not qualify for the leave. Interpreting this denial, and certain events that followed, as driven by retaliatory and race-based motivations, Lemon resigned. She then filed suit, alleging claims of race- and gender-based discrimination under Title VII and racial discrimination under § 1981. The problem was that Lemon, an equity partner at MB, was not an "employee" of the firm she sought to sue. Pressed at argument, Lemon could not identify any Title VII case authority that supported her position, but stated that the law must make room for novelty. While we respect her candor, we are unable to embrace the novelty and thus affirm the trial court's dismissal of her action. .... As a partner and coequal owner of MB, with an equal vote on all matters substantially impacting the firm, Shawna Lemon was not an employee. To hold otherwise would be to stretch the concept of "employee" well past its breaking point and needlessly upend understandings that have been central to the organization of firm partnerships for decades.

LAIRD V. FAIRFAX COUNTY, NO. 18-2511 (4TH CIR. 2020)

In Laird v. Fairfax County, No. 18-2511 (4th Cir. 2020), the Fourth Circuit ruled that if an employee voluntarily requests a transfer, and the employer agrees to it, then there is no actionable adverse action, and any claim of discrimination or retaliation under the Americans with Disabilities Act based in the transfer must fail. The ruling also presumably applies to claims under Title VII, the ADEA, and other civil rights statutes.

The ADA prohibits employers from discriminating against qualified individuals on the basis of disability. An employer unlawfully discriminates against an employee by, among other things, failing to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee. A reasonable accommodation may involve job restructuring, part-time or modified work schedules, and reassignment to a vacant position. The ADA also prohibits retaliation against employees who seek the Act's statutory protections. When a plaintiff alleges that her employer unlawfully discriminated or retaliated against her in violation of the ADA, she can prove her claim through direct and indirect evidence. Otherwise, the plaintiff may proceed under the burden-shifting framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Applying the McDonnell Douglas framework to Laird's claims, the district court found that her case faltered at the first step - the prima facie case. The district court explained that Laird failed to show that the County had taken an adverse action against her. Whether the record reasonably shows that Laird experienced an adverse action is the central issue on appeal.

What qualifies as an "adverse action" differs slightly depending on whether the claim is for unlawful discrimination or retaliation. For a discrimination claim, the plaintiff must show that her employer took an action that adversely affected employment or altered the conditions of the workplace. But for a retaliation claim, the plaintiff is not so limited since the scope of the

antiretaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm. However, although the scope of actions that qualify as an adverse action may differ, the required effect or adversity from such actions is described in very similar language for both claims. An alleged retaliatory action must be materially adverse, meaning that the plaintiff must show that the action well might have dissuaded a reasonable worker from making or supporting a charge of discrimination. In other words, the harm must be a significant detriment, not relatively insubstantial or trivial. Similarly, for a discrimination claim, the adverse action must result in some significant detrimental effect, requiring more than a position that is less appealing to the plaintiff. Ultimately, retaliation claims and discrimination claims require fact-specific analysis that depends on the particular circumstances of the case. Setting aside the difference in scope, both claims share a common element: an adverse action, meaning some action that results in some significant detriment to the employee.

Laird asserts that she was effectively demoted because of her disability and because she pursued a complaint of disability discrimination. But this claim fails for a simple reason: If an employee voluntarily requests a transfer, and the employer agrees to it, there is no actionable adverse action. In sum, a transfer is not an adverse action when it is voluntarily requested and agreed upon. That is what happened here: Laird requested a lateral transfer, and the County agreed to place her in a position with the same pay and similar responsibilities. Because Laird showed no adverse action, the district court correctly determined that she failed to make out a prima facie case of discrimination and retaliation.

ASHFORD V. PRICEWATERHOUSECOOPERS LLP, NO. 18-1958 (4TH CIR. 2020).

A useful refresher on Fourth Circuit law on the enforceability of arbitration agreements under Title VII of the Civil Rights Act of 1964.