Comment

"Adverse Employment Action"—How Much Harm Must be Shown to Sustain a Claim of Discrimination Under Title VII?

I. INTRODUCTION*

"Adverse employment action" is judicial shorthand for determining whether a plaintiff showed that an employer's action sufficiently affected the employee's "compensation, terms, conditions, or privileges of employment."[1] This is a crucial element to sustain a § 703 claim under Title VII of the Civil Rights Act of 1964.[2] However, what does "adverse employment action" really mean and how much harm must be alleged to satisfy the § 703 harm element? Must an employee show some direct economic harm? Or a less tangible, indirect economic harm? Or what

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1. 42 U.S.C. § 2000e-2(a)(1) (2000).

2. 42 U.S.C. § 2000e-1 (2000); *see* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

about a non-economic harm? Courts have struggled with these questions. Since the seminal decision by the United States Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. White*,[3] which defined the harm standard for Title VII's companion § 704[4] claim under unlawful retaliation,[5] the circuits have become even more divided on how much harm must be alleged to sustain an action of discrimination under Title VII.

II. A CAUSE OF ACTION UNDER TITLE VII § 703(A)

Under § 703(a)(1) of Title VII,[6] it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[7] A plaintiff may establish a claim of discrimination through either direct or circumstantial evidence.[8] To establish a prima facie case of discrimination through circumstantial evidence, four elements, set forth by *McDonnell Douglas Corp. v. Green*[9] and its progeny, must exist.[10] A plaintiff must show that (1) he is a member of a protected class, (2) he applied and possessed at least the minimum objective qualifications for the position at issue, (3) he was subject to adverse employment action by the employer, and (4) he was replaced by someone outside the protected class or treated less favorably than other similarly situated employees outside the protected group.[11]

"Adverse employment action" is a judicially coined term for the actual language of § 703(a)(1), which states that the action must affect the employee's "compensation, terms, conditions, or privileges of employment."[12] Examples of employer actions that are clearly adverse include denying a position to an employee who meets the minimum qualification, decreasing employee compensation or denying an employee a raise, or transferring an employee to a position of less responsibility or pay.[13]

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3. 548 U.S. 53 (2006).
4. 42 U.S.C. § 2000e-3(a) (2000).
5. *See id.*
6. 42 U.S.C. § 2000e-2(a)(1) (2000).
7. *Id.*
8. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985).
9. 411 U.S. 792 (1973).
10. *Id.* at 802.
11. *Id.*
12. 42 U.S.C. § 2000e-2(a)(1).
13. Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).

All of these examples show some direct economic harm suffered by the employee.

III. A HISTORY OF SEMINAL SUPREME COURT CASES LEADING TO THE CONTROVERSY SURROUNDING ADVERSE EMPLOYMENT ACTION

In *Hishon v. King & Spalding*,[14] Elizabeth Hishon, a female associate, filed suit against King & Spalding, a law firm, alleging sex-based discrimination under Title VII. Prior to hiring Hishon, King & Spalding allegedly dangled the prospect of becoming partner as a recruiting device for young lawyers, such as Hishon, to join the firm. The firm promised that associates who received satisfactory evaluations would advance to partner status after five to six years of employment. A general standard existed that if an associate was not asked to become partner within that time frame, then the firm notified the associate to begin looking for another job. In other words, if the firm decided not to promote the associate to partner, the firm would terminate the associate's employment. In Hishon's sixth year of employment at the firm, she was due to be considered for partnership but was rejected. She worked her seventh year, and the partners again declined to promote her. At this point, Hishon's relationship with King & Spalding terminated, and she sued for sex-based discrimination under § 703 of Title VII.[15] Hishon alleged that by denying her the opportunity to become partner due to her sex, the firm discriminated against her with respect to a term, condition, or privilege of employment.[16]

The United States District Court of the Northern District of Georgia dismissed Hishon's case for failing to state a cognizable claim under Title VII, and the United States Court of Appeals for the Eleventh Circuit affirmed.[17] The United States Supreme Court granted certiorari to decide whether Hishon's complaint was properly dismissed.[18] The Court reversed and remanded the case, entitling Hishon to her day in court.[19]

In dictum, the Supreme Court broadly interpreted the § 703 "terms, conditions, or privileges of employment" language, especially with regard to privileges of employment.[20] The Court noted that a noncontractual benefit of employment may qualify as a "privilege" under § 703 if the

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14. 467 U.S. 69 (1984).
15. 42 U.S.C. § 2000e-2 (2000); *Hishon*, 467 U.S. at 71-72.
16. *Hishon*, 467 U.S. at 72, 75.
17. *Id*. at 72-73.
18. *Id*. at 73.
19. *Id*. at 78-79.
20. *See id*. at 75-76.

benefit is given in a discriminatory manner.[21] To fit within the scope of a privilege, the benefit must be "part and parcel of the employment."[22] In other words, "[t]hose benefits that comprise the incidents of employment, or that form an aspect of the relationship between the employer and employees, may not be afforded in a manner contrary to Title VII."[23] The Court observed that Hishon's situation is the type of privilege Title VII attempts to protect.[24] Given the specific facts of the case, "the opportunity to become a partner was part and parcel of an associate's status as an employee" of the firm.[25] Although ultimate employment actions, such as hiring and firing, always constitute § 703 adverse employment actions, this case assumes that a "failure to promote may be actionable independent of a discharge."[26] The 1984 case created a fuzzy line for how much harm a plaintiff must allege under § 703 to sustain a cause of action for discrimination, which later resulted in future conflicts between lower courts.[27] By suggesting that such a claim may be actionable absent an ultimate employment action, such as discharge, the Court broadened the "terms, conditions, or privileges of employment" language and opened the door for future claims asserting less direct economic harm.[28]

The Supreme Court subsequently noted that the harm needed for an actionable discrimination claim need not be accompanied by "tangible" or "economic" harm.[29] In *Meritor Savings Bank v. Vinson*,[30] a female

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21. *Id*. at 75 ("Such a benefit . . . may qualify as a 'privileg[e]' of employment under Title VII." (alteration in original)).

22. *Id*.

23. *Id*. at 75-76 (citation omitted) (internal quotation marks omitted).

24. *Id*. at 76.

25. *Id*.

> Thus, the benefit of partnership consideration was allegedly linked directly with an associate's status as an employee, and this linkage was far more than coincidental . . . . Indeed, the importance of the partnership decision to a lawyer's status as an associate is underscored by the allegation that associates' employment is terminated if they are not elected to become partners. These allegations, if proved at trial, would suffice to show that partnership consideration was a term, condition, or privilege of an associate's employment.

Id.

26. Michael J. Zimmer et al., Cases and Materials on Employment Discrimination 18 (7th ed. 2008).

27. *Compare* Davis v. Town of Lake Park, Fla., 245 F.3d 1232 (11th Cir. 2001) (setting the Eleventh Circuit standard that unless a hostile work environment is shown, only direct economic harm satisfies the harm element of § 703), *with* Wedow v. City of Kansas City, Mo., 442 F.3d 661 (8th Cir. 2006) (holding that noneconomic harm can be shown to satisfy the harm element of § 703).

28. *See Hishon*, 467 U.S. at 75-76.

29. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986).

bank teller, Vinson, claimed she was a victim of sex discrimination. Her discrimination claim was based on allegations of sexual harassment. The United States District Court for the District of Columbia found that Vinson had not sufficiently proved a claim of discrimination based on sexual harassment; however, the United States Court of Appeals for the District of Columbia Circuit disagreed, holding that a claim under Title VII may be predicated on sexual harassment.[31]

The Supreme Court held that the harm needed to demonstrate discrimination under Title VII is not limited to economic or tangible harm.[32] Instead, the Court held that a plaintiff may establish a claim of sex discrimination based on a hostile or abusive work environment that does not necessarily result in a corresponding economic loss.[33] Examples of workplace conduct that could be actionable under Title VII include "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."[34] This kind of workplace conduct is generally termed a "hostile work environment."[35] To limit claims to those truly in need of Title VII protection, the Court set a standard for the degree of sexual harassment that establishes the necessary harm for a discrimination claim: The sexual harassment "must be sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment."[36] Accordingly, the Court established that noneconomic harm that meets the "severe or pervasive" standard is sufficient to demonstrate an actionable § 703 claim, thereby broadening the "terms, conditions, or privileges of employment" language even further.[37]

These propositions were reaffirmed in subsequent cases before the Supreme Court.[38] In *Harris v. Forklift Systems, Inc.*,[39] the Court

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30. 477 U.S. 57 (1986).

31. *Id*. at 60-62.

32. *Id*. at 64.

33. *Id*. at 65.

34. *Id*. (citation omitted) (alteration in original) (internal quotation marks omitted).

> [S]uch sexual misconduct constitutes prohibited "sexual harassment," whether or not it is directly linked to the grant or denial of an economic *quid pro quo*, where "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."

Id. (quoting 29 CFR § 1604.11(a) (1985)).

35. *Id*.

36. *Id*. at 67 (citation omitted) (alteration in original) (internal quotation marks omitted).

37. *See id*. at 65-67.

38. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993) (holding that conduct meeting the hostile work environment standard can be the basis for an actionable claim of

added that the hostile work environment standard "takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury."[40] The Court held that such a claim cannot survive if the victim did not subjectively perceive the conduct as hostile because the conduct would then not actually alter the conditions of the victim's employment.[41] But the opinion stated that the lower courts could and should consider a variety of noneconomic factors when deciding whether an "environment is 'hostile' or 'abusive,'" including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[42]

In 2006 the Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. White*[43] set the standard for defining the harm, or adverse employment action, element required to prove retaliation under § 704.[44] To establish a retaliation claim under § 704, "a plaintiff must show that (1) he engaged in statutorily protected [activity]; (2) he suffered an adverse employment action;" and (3) a causal connection existed between the protected activity and the adverse action.[45] Section 704 retaliation claims and § 703 discrimination claims are commonly asserted together because the plaintiff's employment may be detrimentally affected in reprisal for having alleged unlawful employment discrimination. Many courts, before this decision, used the same standard to determine whether a plaintiff sufficiently showed an adverse employment action for § 703 discrimination claims and § 704 retaliation claims.[46] Although the Court's decision in *Burlington Northern* defined harm for § 704 retaliation claims, its analysis contrasted § 703 claims of discrimination.[47] The issue before the Supreme Court was "how

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discrimination under § 703); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998) (holding that an employee does not have to suffer a tangible job consequence to state a cause of action under § 703).

39. 510 U.S. 17 (1993).

40. *Id*. at 21.

41. *Id*. at 21-22.

42. *Id*. at 23.

43. 548 U.S. 53 (2006).

44. *See id.* at 61-64; 42 U.S.C. § 2000e-3 (2000).

45. Wallace v. Ga. Dep't of Transp., 212 F. App'x 799, 802 (11th Cir. 2006) (citation omitted) (internal quotation marks omitted).

46. *See*, *e.g.*, Lee v. Dep't of Veterans Affairs, 247 F. App'x 472, 477 (5th Cir. 2007) (discussing how the Supreme Court in *Burlington Northern* recently rejected the approach taken by this circuit that only ultimate employment decisions satisfied the "adverse employment action" element of both retaliation and discrimination claims).

47. *See Burlington Northern*, 548 U.S. at 61-64.

harmful an act of retaliatory discrimination must be in order to fall within the [anti-retaliation] provision's scope."[48] The United States Court of Appeals for the Sixth Circuit concluded that § 704 retaliation claims should be read *in pari materia*[49] with § 703 discrimination claims. Therefore, the Sixth Circuit required a link between the retaliatory conduct and the plaintiff's terms, conditions, or privileges of employment, even though that language is not written in § 704.[50]

The Supreme Court disagreed with the Sixth Circuit's interpretation and decided that Congress intentionally meant to leave the "terms, conditions, or privileges of employment" language out of § 704, despite its use in § 703.[51] The Court held that the statutes could not be read together because they differed not only in language but also in purpose.[52] The § 703 discrimination provision "seeks to prevent injury to individuals" in employment based on that individual's race, color, religion, sex, or national origin.[53] The § 704 antiretaliation provision, however, "seeks to prevent harm to individuals based on what" the employer does, meaning the employer's conduct in punishing plaintiffs for opposing the employer's practices that the plaintiff reasonably believes may violate § 703.[54] Accordingly, the Supreme Court concluded that the antiretaliation section, unlike the antidiscrimination section, "is not limited to discriminatory actions that affect the terms and conditions of employment."[55]

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48. *Id*. at 61. Section 704(a) establishes a claim under Title VII for retaliation: "It shall be an unlawful employment practice for an employer to discriminate against any of his employees" because that individual "opposed any practice" made unlawful by Title VII or "made a charge, testified, assisted, or participated in" a Title VII proceeding or investigation. 42 U.S.C. § 2000e-3(a) (2000).

49. *In pari materia* literally means "part of the same material" and is a canon of statutory interpretation. Linda D. Jellum & David Charles Hricik, Modern Statutory Interpretation: Problems, Theories, and Lawyering Strategies 172 (2006). "Generally, this canon reflects the common sense notion that if the legislature uses the same words when legislating on similar subjects, those words should be given the same meaning." *Id*.

50. *Burlington Northern*, 548 U.S. at 61.

51. *Id*. at 63.

> The underscored words in the substantial provision—"hire," "discharge," "compensation, terms, conditions, or privileges of employment," "employment opportunities," and "status as an employee"—explicitly limit the scope of that provision to actions that affect employment or alter the conditions of the workplace. No such limiting words appear in the anti-retaliation provision.

Id. at 62.

52. *Id*. at 63.

53. *Id*.

54. *Id*.

55. *Id*. at 64.

The Court had no occasion to set a standard regarding the harm or adverse employment action element for an actionable § 703 discrimination claim. The question of how much harm must be shown to state a claim of discrimination under § 703 is still unsettled. In light of the Supreme Court's holding, which broadened the standard of actionable harm for § 704 retaliation claims, courts of appeals consistently struggle with gauging the reach of the "terms, conditions, or privileges of employment" language of § 703.[56]

Taking the pertinent Supreme Court cases dealing with §§ 703 and 704 together, it seems clear that a plaintiff may sustain a claim of discrimination under § 703 by proving either that the employer's action was materially adverse to a term of employment, such as hiring, promotion, or retention, or that its agent engaged in severe or pervasive harassment (for example, showing of a hostile work environment).[57] At least under a hostile work environment basis for discrimination, a plaintiff need not show any type of economic loss to satisfy the harm element.[58] To the extent, however, that the plaintiff's claim alleges neither an employment detriment that entails immediate and obvious economic consequences nor severe and pervasive harassment, the circuit courts are left to reach their own conclusions about how much harm must be shown to satisfy the harm element of § 703.

IV. HOW THE COURTS OF APPEALS DEFINE THE HARM OR ADVERSE EMPLOYMENT ACTION ELEMENT TO SUSTAIN A CAUSE OF ACTION UNDER § 703

This section addresses the various standards adhered to by the courts of appeals concerning how much harm or adverse employment action must be shown to state a claim of discrimination under Title VII since the 2006 *Burlington Northern & Santa Fe Railway Co. v. White*[59] decision. These cases address how far courts expand the scope of adverse employment actions to meet the harm element under § 703 of Title VII.[60]

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56. *Compare Davis*, 245 F.3d 1232 (adhering to a strict standard that unless a hostile work environment is shown, only direct economic harm satisfies the harm element of § 703), *with Wedow*, 442 F.3d 661 (holding that adequate firefighting clothing is a privilege of employment that can be used to show the harm element of § 703).

57. Dean Rebecca Hanner, *De Minimis Discrimination*, 47 Emory L.J. 1121, 1153 (1998).

58. *Meritor*, 477 U.S. at 64.

59. 548 U.S. 53 (2006).

60. 42 U.S.C. § 2000e-2 (2000).

How a court defines the "terms, conditions, or privileges of employment" language of § 703 may well determine whether a plaintiff's complaint states a claim on which relief can be granted. If the standard is stricter, then it is harder for a plaintiff to bring an actionable discrimination claim under Title VII and survive summary judgment.

A. The Fifth and Eleventh Circuits Hold that Only Adverse Employment Actions Resulting in Direct Economic Harm Satisfy the Harm Element of § 703

The United States Courts of Appeals for the Fifth and Eleventh Circuits have the strictest limitation on the scope of the "terms, conditions, or privileges of employment" language of § 703. In both circuits, only those actions that directly and immediately cause economic harm are actionable for a discrimination claim.

Rather than use the phrase "adverse employment action" to describe an employer's action affecting the terms, conditions, or privileges of employment, the Fifth Circuit uses "ultimate employment action."[61] In *Earle v. Aramark Corp.*,[62] the Fifth Circuit held, without any explanation, that the employee failed to show a recognized ultimate employment action.[63] "Ultimate employment action" is defined as "adverse employer decisions," such as "hiring, granting leave, discharging, promoting, or compensating."[64] The employee's alleged harms, all of which failed, included "being denied administrative support, being denied access to training and leadership courses, being denied mentoring and training opportunities, being subject to the career management program for poor performance, and having employment resources withheld."[65] Similarly, in *McCoy v. City of Shreveport*,[66] the police officer's supervisor took the employee's gun and badge and placed her on paid administrative leave.[67] The Fifth Circuit held that the employee suffered no direct economic harm.[68] Although she was placed on leave, the leave was paid.[69] Thus, the court dismissed her claim for failing to sufficiently show adverse employment action under the circuit's ultimate employment standard.[70]

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61. Lee v. Dep't of Veterans Affairs, 247 F. App'x 472, 477 (5th Cir. 2007).
62. 247 F. App'x 519 (5th Cir. 2007).
63. *Id*. at 523.
64. *See* McCoy v. City of Shreveport, 492 F.3d 551, 559 (5th Cir. 2007).
65. *Earle*, 247 F. App'x at 523.
66. 492 F.3d 551 (5th Cir. 2007).
67. *Id*. at 559.
68. *Id*.
69. *Id*.
70. *Id*.

The Eleventh Circuit similarly views that only adverse employment actions resulting in direct economic harm satisfy the harm element under § 703, except the Eleventh Circuit applies the doctrine even more strictly. Although *Davis v. Town of Lake Park, Florida*[71] was decided before *Burlington Northern*, the case set the standard for the Eleventh Circuit to determine whether a party showed an adverse employment action to sustain a claim of discrimination under § 703.[72] To be actionable under § 703, the employer's action must have an adverse and material direct economic effect, typically resulting immediately after the action.[73] For example, firing an employee is an adverse employment action because the action results in a material change in the terms, conditions, or privileges of employment—the employee no longer receives all three.[74]

In *Davis* an African-American police officer, Davis, claimed racial discrimination based on a negative performance evaluation and a temporary demotion. Although the actions did not result in Davis suffering immediate economic harm, he attempted to demonstrate that both actions could hinder future job prospects.[75] Specifically, Davis claimed that both incidents "diminished his prestige and deprived him of experience," which would have otherwise resulted in him more likely obtaining a future promotion and consequently a higher salary.[76] The Eleventh Circuit held that both employer actions were not sufficiently adverse because neither had caused any economic injury.[77] The Eleventh Circuit set out the threshold test to satisfy the harm element under § 703 discrimination claims:

> [T]o prove adverse employment action in a case under Title VII's anti-discrimination clause, an employee must show a *serious and material* change in the terms, conditions, or privileges of employment. Moreover, the employee's subjective view of the significance and adversity of the employer's action is not controlling; the employment action must be materially adverse as viewed by a reasonable person in the circumstances.[78]

The court noted that any negative performance evaluation "carries with it the possibility that the employee's future prospects may be prejudiced

71. 245 F.3d 1232 (11th Cir. 2001).
72. *Id*. at 1239.
73. *Id*.
74. *Id*.
75. *Id*. at 1240.
76. *Id*.
77. *Id*.
78. *Id*. at 1239.

if that information is disclosed"; however, a "negative evaluation . . . will rarely, if ever, become actionable merely because the employee comes forward with evidence that his future prospects have been or will be hindered as a result."[79] Holding that Davis failed to meet the standard set forth for adverse employment actions, the court affirmed the lower court's judgment against him.[80]

Since the Supreme Court's decision in *Burlington Northern*, the Eleventh Circuit has persisted with its stringent *Davis* test. Recently, the Eleventh Circuit held that neither written reprimands without subsequent direct, economic harm nor being assigned temporary additional work constitute adverse employment actions.[81] The Eleventh Circuit emphasized that the harm must cause a direct economic impact.[82] In *Anderson v. United Parcel Service, Inc.*,[83] the Eleventh Circuit held that even if the employment action was a "contributing factor" that could have a tangible effect, this action is not enough to constitute an adverse employment action.[84] The employee in *Anderson* claimed racial discrimination after receiving a low Quality Performance Review (QPR) score.[85] However, the Eleventh Circuit affirmed the trial court's grant of summary judgment in favor of the employer because no evidence existed that the low scores were directly connected to a tangible harm.[86] Even though the QPR scores were a factor in determining an employee's eligibility for promotions and pay raises, the court held that a contributing factor is not enough to establish the harm element of § 703.[87]

The Eleventh Circuit recently re-emphasized its strict approach to § 703 discrimination claims.[88] In *Butler v. Alabama Department of*

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79. *Id*. at 1243.

80. *Id*. at 1246.

81. *See* Wallace v. Ga. Dep't of Transp., 212 F. App'x 799 (11th Cir. 2006); Grimsley v. Marshalls of Ma., Inc., 248 F. App'x 604, 609 (11th Cir. 2008) ("Although Grimsley's workload sometimes increased and he was occasionally assigned additional tasks, these kinds of temporary assignments, without a change in compensation or position, do not amount to a 'serious and material change in the terms, conditions, or privileges of employment.'" (quoting *Davis*, 245 F.3d at 1239)).

82. *See* Anderson v. United Parcel Serv., Inc., 248 F. App'x 97, 100-01 (11th Cir. 2007).

83. 248 F. App'x 97 (11th Cir. 2007).

84. *Id*. at 100-01.

85. *Id*. at 98.

86. *Id*. at 100-01.

87. *Id*.

88. *See*, *e.g.*, Butler v. Ala. Dep't of Transp., 536 F.3d 1209, 1215 (11th Cir. 2008) (holding that a § 703 claim will fail unless the employee can show that employer actions resulted in a serious and material change in employment).

Transportation,[89] an African-American employee, Alvarene Butler, filed suit based on racial discrimination. Butler's allegations included (1) being forced to perform manual labor while her counterpart Karen Stacey, a white employee, was excused from such work, (2) being required to report earlier to work while Stacey remained undisciplined for arriving later, (3) being disciplined for not calling in for unscheduled absences while Stacey remained undisciplined for the same conduct, (4) being docked pay for preapproved absences deemed leave with pay, and (5) being denied a promotion.[90] Butler was unable to prove sufficient harm to meet the Eleventh Circuit's definition of adverse employment action as defined in *Davis*.[91] Butler's allegation of being denied a promotion failed because she admitted that she was not yet qualified for the position because she had never taken the requisite test.[92] Butler's assertion that she was subjected to manual labor also failed since her job responsibilities specifically included such activities.[93] None of Butler's claims led to any change in her employment.[94] Accordingly, the Eleventh Circuit held that even if it took the rest of her claims collectively, she still failed to prove that her employer's actions constituted a "serious and material change in the terms, conditions, or privileges of employment."[95]

The Eleventh Circuit seems to hold that only those employer actions that result in direct economic harm will be sufficient to meet the harm element of § 703: "Although [§ 703] does not require proof of direct economic consequences in all cases, the asserted impact cannot be speculative and must at least have a tangible adverse effect on the plaintiff's employment."[96] The Eleventh Circuit reconciles this language with the Supreme Court cases holding that noneconomic harm can satisfy the "terms, conditions, or privileges of employment" language under § 703.[97] In *Baldwin v. Blue Cross/Blue Shield of Alabama*,[98] the Eleventh Circuit held that a claim of sex discrimination can be brought in either of two ways: "One is through a tangible employment action, such as a pay decrease, demotion or termination. The other way is through creation of a hostile work environment caused by sexual

89. 536 F.3d 1209 (11th Cir. 2008).
90. *Id.* at 1212.
91. *Id*. at 1215.
92. *Id*.
93. *Id*.
94. *Id*.
95. *Id*. (citation omitted) (internal quotation marks omitted).
96. *Davis*, 245 F.3d at 1239; *see Grimsley*, 248 F. App'x at 609 (11th Cir. 2008).
97. *See, e.g.*, Baldwin v. Blue Cross/Blue Shield of Ala., 480 F.3d 1287 (11th Cir. 2007).
98. 480 F.3d 1287 (11th Cir. 2007).

harassment that is sufficiently severe or pervasive to alter the terms and conditions of work."[99]

The Fifth and Eleventh Circuits are in the minority.[100] The majority of the circuits broaden the scope of § 703 to include not only direct but also indirect economic harm to satisfy the "terms, conditions, or privileges of employment" language, as well as certain kinds of noneconomic harm, provided it impacts the plaintiff's employment.[101]

B. The Majority of Circuits Hold that Adverse Employment Actions Resulting in Indirect Economic Harm Still Satisfy the Harm Element of § 703

Indirect economic harms are employer actions that indirectly cause an economic impact on the employee. While the majority of the circuits take varied approaches to what is considered adverse employment action, they all consider the requirement met by an employer's action that directly or indirectly causes an employee economic harm.[102]

One type of indirect economic harm occurs when an employer's action has or will affect the employee's future job prospects.[103] If an employer hinders an employee's future employment opportunities by inhibiting the employee's ability to be promoted or obtain employment elsewhere based on the action at issue, the employer's action causes an indirect economic impact on the employee. Therefore, some circuits take the approach that

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99. *Id*. at 1300 (citations omitted).

100. *See, e.g., McCoy*, 492 F.3d at 559 (defining "ultimate employment action"); *Davis*, 245 F.3d at 1239-40 (holding that to be actionable under § 703, the employer's action must have an adverse and material direct economic effect, typically resulting immediately after the action). These circuits hold that unless an employee can establish a hostile work environment, then only direct economic harms can satisfy the harm element of § 703. *See McCoy*, 492 F.3d at 559; *Davis*, 245 F.3d at 1239-40.

101. *See, e.g.*, Wiley v. Glassman, 511 F.3d 151, 157 (D.C. Cir. 2007) (holding that direct and indirect economic harm may satisfy the harm element of § 703); Wedow v. City of Kansas City, Mo., 442 F.3d 661, 671-72 (8th Cir. 2006) (holding that non-economic harm can be shown to satisfy the harm element of § 703).

102. *See*, *e.g.*, *Wiley*, 511 F.3d at 157 (holding that a denial of an employee's participation in a manager rotation program was adverse employment action because the denial directly affected the employee's opportunity for a future promotion); Joseph v. Leavitt, 465 F.3d 87, 91 (2d Cir. 2006) (holding that putting an employee on administrative leave with pay was not adverse employment action because it did not affect the terms, conditions, or privileges of his employment); Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (holding that adverse employment action must be supported with evidence of how it affected the employee's terms, conditions, or privileges).

103. *See, e.g., Holland*, 487 F.3d at 219 (holding that a blanket allegation that future opportunities have been hindered due to a job reassignment is not enough to show adverse employment action; rather, evidence should be presented showing how an employee will be affected in the future).

if an employee presents enough evidence to show that an employer's action obstructed the employee's future job opportunities, the harm element of § 703 will be satisfied.

In *Wiley v. Glassman*,[104] the United States Court of Appeals for the District of Columbia held that a denial of an employee's participation in a manager rotation program constitutes adverse employment action because the denial directly affected the employee's opportunity for a future promotion.[105] The D.C. Circuit held that "[a]n employment action may be sufficient to support a claim of discrimination if it results in 'materially adverse consequences affecting . . . future employment opportunities such that a reasonable trier of fact could find objectively tangible harm.'"[106] However, the United States Court of Appeals for the Seventh Circuit held that when an employee fails to present enough evidence showing that the employer's action influenced a future opportunity, the allegation will not constitute an adverse employment action.[107]

In *Whigum v. Keller Crescent Co.*,[108] an employee sued under § 703 for racial discrimination, alleging that he received an inadequate pay raise. After receiving a less than adequate pay increase, the employee requested to see his personnel file. In his personnel file, the employee discovered that a past dispute between him and two other coemployees was documented. The plaintiff contended that the dispute was misleading and ultimately resulted in his inadequate pay raise.[109] However, the Seventh Circuit held that the employee failed to show that the documentation of the quarrel influenced his pay raise or otherwise damaged his career prospects.[110]

Similarly, the United States Court of Appeals for the Fourth Circuit has held that speculation of being adversely affected in the future, without more, is not enough to satisfy the harm element under a § 703 claim of discrimination.[111] In *Holland v. Washington Homes, Inc.*,[112] the Fourth Circuit concluded that an employee claiming racial discrimi-

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104. 511 F.3d 151 (D.C. Cir. 2007).

105. *Id*. at 157.

106. *Id*. (ellipsis in original) (quoting Forkkio v. Powell, 306 F.3d 1127, 1131 (D.C. Cir. 2002)).

107. *See* Whigum v. Keller Crescent Co., 260 F. App'x 910, 913 (7th Cir. 2008) (holding that the employee failed to show that documentation of a dispute between him and another coemployee affected the terms, conditions, or privileges of his employment).

108. 260 F. App'x 910 (7th Cir. 2008).

109. *Id*. at 912.

110. *Id*. at 914.

111. *See Holland*, 487 F.3d at 219.

112. 487 F.3d 208 (4th Cir. 2007).

nation due to his reassignment to sell homes in another neighborhood did not suffer a material change to the terms, conditions, or privileges of his employment under § 703.[113] The employee's compensation consisted of a base salary, plus a one percent commission for each home sold.[114] The employee asserted that selling homes at his new location was more difficult because the area was blighted, and he would therefore suffer a loss in compensation.[115] The court rejected this argument because the employee merely alleged a blanket assertion that the reassignment would cause him future adverse consequences rather than showing how his compensation would likely be affected.[116] If the employee had offered evidence that the reassignment would have adversely affected his potential to sell homes, the court of appeals may have reconsidered his claim.[117] Such evidence could have included identifying where the neighborhood was located, "the type of home being sold, the crime rate, or information about the home values in the surrounding area" that would have resulted in a decrease in compensation due to the reassignment.[118] Unlike the stringent Fifth and Eleventh Circuits, these circuits allow a plaintiff to state a cause of action for discrimination under § 703 by showing the likelihood of indirect economic harm with respect to future job prospects.[119]

Lateral transfers may also result in indirect economic harm, such as having to relocate or drive a longer commute as a consequence of the transfer.[120] The United States Court of Appeals for the Tenth Circuit uses language similar to the other circuits, but the Tenth Circuit expressly states that it liberally interprets the "terms, conditions, or privileges of employment" language to sustain a claim of discrimination under § 703.[121] Nevertheless, in *Vann v. Southwestern Bell Telephone*

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113. *Id*. at 219.
114. *Id.* at 210.
115. *Id*. at 219.
116. *Id*.
117. *Id*.
118. *Id*.
119. *See, e.g., Holland*, 487 F.3d 208 (holding that an employee may satisfy the harm element of § 703 by a showing that the employer action hindered future employment opportunities).
120. *See*, *e.g.*, Brennan v. Tractor Supply Co., 237 F. App'x 9, 23-24 (6th Cir. 2007) (holding that an employee's lateral transfer does not constitute adverse employment action if the transfer does not result in a change in the terms, conditions, or privileges of employment).
121. *See* Haynes v. Level 3 Commc'ns, LLC, 456 F.3d 1215, 1222 (10th Cir. 2006) ("[W]e liberally interpret whether an adverse employment action exists and take a case-by-case approach, examining the unique factors relevant to the situation at hand." (citation omitted) (internal quotation marks omitted)).

Co.,[122] the Tenth Circuit held that an involuntary lateral transfer back to the employee's previous position 177 miles away did not constitute adverse employment action.[123] The employer had a policy that if an employee transferred but could not pass the required tests to work at the new location, the employer could initiate a "retreat" to the employee's previous location "on the basis of unsatisfactory performance . . . within six months of the transfer."[124] The employee failed the required tests, and the employer initiated a retreat, thereby forcing the employee to relocate 177 miles back to her previous position at her own expense.[125] To satisfy the harm element under § 703, the Tenth Circuit requires the lateral transfer to cause a significant change:

> [W]e have held that an involuntary transfer did not qualify as an adverse employment action where the transfer was purely lateral, in that the employee's pay, benefits, and job responsibilities remained the same, and where the new position increased the employee's commute from between five and seven minutes to between thirty and forty minutes. . . . However, we have reversed summary judgment where an employee submitted evidence that her transfer result[ed] in a significant change in responsibilities.[126]

Here, however, the Tenth Circuit rejected the employee's allegations that the retreat constituted an adverse employment action based on the specific facts of the case.[127] First, the employee had not yet sold her house at the previous location, and she was living with her mother at the new location; therefore, the move occasioned by the retreat would not require the employee to buy or sell a house.[128] Second, the employer had notified her that by transferring to the new location, she was assuming the risk of having to retreat at her own expense if she failed the required tests.[129] Given these facts, the Tenth Circuit held that the employee's transfer did not cause a significant change in the terms, conditions, or privileges of her employment.[130]

In *Brennan v. Tractor Supply Co.*,[131] the United States Court of Appeals for the Sixth Circuit held that an employee's lateral transfer

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122. 179 F. App'x 491 (10th Cir. 2006).
123. *Id*. at 492-93, 497-98.
124. *Id*. at 493 (citation omitted) (internal quotation marks omitted).
125. *Id*. at 494.
126. *Id*. at 497 (citations omitted) (alteration in original) (internal quotation marks omitted).
127. *Id*. at 498.
128. *Id*. at 497.
129. *Id*.
130. *Id.* at 498.
131. 237 F. App'x 9 (6th Cir. 2007).

was not an adverse employment action because the transfer did not result in a change in salary, benefits, job title, or work hours.[132] The employee believed the transfer amounted to a demotion because she had to report to a younger man.[133] The court held that "[a]n employee's subjective impressions as to the desirability of one position over another are not relevant," and a bruised ego resulting from having to report to a younger man was not sufficiently adverse to satisfy the harm element under § 703.[134]

Employees have alleged that investigations of an employee cause indirect economic harm, but some circuit courts tend to hold that these employer actions are not sufficient to meet the harm element of § 703.[135] In *Joseph v. Leavitt*,[136] the United States Court of Appeals for the Second Circuit held that an employee put on administrative leave with pay, pending a criminal investigation, did not constitute adverse employment action because the terms and conditions of his employment "did not include a right to expect that he would be allowed to continue his responsibilities while he was facing serious criminal charges."[137] The court stated that the scope of the harm element under § 703 discrimination does not extend to protect employees from investigations unless the investigation is exceptionally dilatory.[138] In *Mazumder v. University of Michigan*,[139] the Sixth Circuit, like the Second Circuit, held that an employer's action of investigating an employee was not considered an adverse employment action when the employee's workload and salary suffered no changes.[140] The court emphasized that the adverse employment action "standard filters out claims establishing merely a bruised ego," which could easily arise through an investigation.[141]

Unique situations arise in which a court must determine whether the plaintiff adequately showed sufficient harm to satisfy the harm element

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132. *Id*. at 23-24.
133. *Id*. at 24.
134. *Id*. (citation omitted) (alteration in original) (internal quotation marks omitted).
135. *See, e.g., Mazumder*, 195 F. App'x at 325 (holding that an employer's action of investigating an employee is not considered an adverse employment action when the employee's workload and salary suffered no changes).
136. 465 F.3d 87 (2d Cir. 2006).
137. *Id*. at 90-91.
138. *Id*. at 92.
139. 195 F. App'x 320 (6th Cir. 2006).
140. *Id*. at 325.
141. *Id*. (citation omitted) (internal quotation marks omitted).

under § 703.[142] The Second Circuit's standard defining adverse employment action includes both direct and indirect economic harm:

> A plaintiff sustains an adverse employment action if he or she endures a materially adverse change in the terms and conditions of employment. To be materially adverse a change in working conditions must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A change that is materially adverse could consist of . . . a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices . . . unique to a particular situation.[143]

In *Kassner v. 2nd Avenue Delicatessen, Inc.*,[144] the Second Circuit held that a waitress suffered an adverse employment action when her employer changed her shift and work stations, which consistently resulted in her earning less tips.[145] Specifically, her employer removed the waitress from the early dinner shift on Saturdays, which were the most profitable work shifts, and assigned her to the least desirable work station, the counter, for four consecutive days. Both actions by the employer resulted in the waitress suffering an indirect economic harm—receiving less tip income.[146] Accordingly, the plaintiff alleged sufficient adverse employment action to satisfy § 703's harm element.[147]

An agent's influence over an employer's decision to alter another employee's terms, conditions, or privileges of employment is another unique circumstance that could cause indirect economic consequences.[148] A supervisor is an agent of the employer. In *Brewer v. Board of Trustees of the University of Illinois*,[149] the Seventh Circuit held that a supervisor's influence over an employer's decision concerning the plaintiff's employment constituted an adverse employment action if the

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142. *Compare* Kassner v. 2nd Ave. Delicatessen, Inc., 496 F.3d 229 (2nd Cir. 2007) (holding that the Second Circuit's standard allows both direct and indirect economic harms to satisfy the harm element of § 703), *with Davis*, 245 F.3d 1232 (setting the Eleventh Circuit standard that unless a hostile work environment is shown, only direct economic harm satisfies the harm element of § 703).

143. *Kassner*, 496 F.3d at 238 (citations omitted) (second ellipsis in original) (internal quotation marks omitted).

144. 496 F.3d 229 (2d Cir. 2007).

145. *Id*. at 235-36, 240.

146. *Id*. at 239-40.

147. *Id*. at 240.

148. *See, e.g.*, Brewer v. Bd. of Trs. of the Univ. of Ill., 479 F.3d 908 (7th Cir. 2007).

149. 479 F.3d 908 (7th Cir. 2007).

employer relied solely on the agent's advice.[150] In this case, the plaintiff was terminated for suspicion of altering a parking permit. The plaintiff's supervisor failed to provide the employer with information tending to show that the altered permit was an honest mistake by the plaintiff. By withholding relevant information, the supervisor, or the agent, had some influence over the employer's decision to terminate the plaintiff.[151] The court held that minimal influence over an employer's decision was not enough to satisfy the harm element, but if evidence existed that the employer relied solely on the agent's comments in deciding to fire the plaintiff, then the harm element would be satisfied.[152] Here, however, the employer conducted an independent investigation of the plaintiff's activities before deciding to terminate the plaintiff; this independent investigation negated any allegation that the employer relied solely on the supervisor's opinion, and therefore the harm element of § 703 was not satisfied.[153]

The court in *Brewer* also addressed other situations when agents, such as coemployees or managers, make comments to the employer about another employee, thereby potentially influencing the terms and conditions of employment.[154] The court held that "whether other employees speak ill or spread rumor about one is not a very important aspect of one's employment, so long as such behavior is not severe or pervasive."[155] Unless the comments of others resulted in a hostile work environment, a plaintiff must still allege that statements by an employer's agent resulted in a material alteration in the terms, conditions, or privileges of employment to base a § 703 discrimination claim.[156]

Other unique situations that may result in indirect economic harm occur when an employer subjects an employee to extra work.[157] The Seventh Circuit defines adverse employment action as a materially adverse action "that diminishes an employee's compensation or benefits, constitutes a nominally lateral transfer but nonetheless reduces an employee's career prospects, or subjects an employee to altered working

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150. *Id*. at 917.
151. *Id*.
152. *Id*.
153. *Id*. at 918.
154. *See id*. at 917.
155. *Id*. (citation omitted).
156. *Id*. at 916-17.
157. *See, e.g.*, Minor v. Centocor, Inc., 457 F.3d 632, 634 (7th Cir. 2006) (holding that requiring an employee to work twenty-five percent longer to earn the same amount of income satisfies the harm element of § 703).

conditions that are degrading and humiliating."[158] The Seventh Circuit recognizes two bases for satisfying the harm standard under § 703—showing that the employer's action materially affected the terms, conditions, or privileges of employment or showing a hostile work environment.[159]

In *Minor v. Centocor, Inc.*,[160] the Seventh Circuit held that a sales representative failed to show sex or age discrimination when her employer required her to visit client accounts more frequently.[161] The employee claimed that the employer required her to work twenty-five percent longer to earn the same amount of income, which essentially resulted in a twenty percent reduction in her hourly pay rate.[162] This fact, by itself, could constitute adverse employment action.[163] However, the employee's claim failed because she did not show that women, and not men, were assigned these longer hours.[164]

In *Haynes v. Level 3 Communications, LLC*,[165] the Tenth Circuit held that a supervisor's repeated removal of an employee's accounts constituted an adverse employment action because the employee was not given the credit for sales that she deserved.[166] The employer based an employee's pay on the amount of sales made by each employee and whether the employee met the requisite sales quota. Without the credit for the sales, the employee had to work extra just to keep up with the other employees.[167] Accordingly, the supervisor's actions resulted in a detrimental effect on the employee's income, which met the harm standard under § 703.[168]

A general proposition adhered to by all circuits is that mere inconvenience or de minimis employer actions do not satisfy the harm element of § 703.[169] The Sixth Circuit expressly rejects "the rule that only 'ultimate employment decisions,' such as hirings, firings, promotions, and demotions, can be materially adverse" to sustain a claim of discrimina-

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158. *Whigum*, 260 F. App'x at 913.
159. *Baldwin*, 480 F.3d at 1300.
160. 457 F.3d 632 (7th Cir. 2006).
161. *Id*. at 633-34, 636.
162. *Id*. at 634.
163. *Id*.
164. *Id*. at 634, 636.
165. 456 F.3d 1215 (10th Cir. 2006).
166. *Id*. at 1223-24.
167. *Id.*
168. *Id.*
169. *See*, *e.g.*, Novotny v. Elsevier, 291 F. App'x 698, 703 (6th Cir. 2008) (holding that requiring an employee to turn in self-evaluation forms earlier than other coworkers is a de minimis employer action).

tion under § 703.[170] Although the Sixth Circuit adheres to a broader definition of what actions meet the terms, conditions, or privileges of employment language, de minimis employment actions do not meet the standard.[171] In *Novotny v. Elsevier*,[172] the Sixth Circuit held that an employee's allegations of sex discrimination were de minimis employment actions, and the employee therefore failed to assert a cause of action upon which relief could be granted under § 703.[173] First, the employer required the employee, out of suspicion, to remove blocks of time from the employee's private calendar. The employee had consistently labeled in her private calendar that she would be unavailable during specific times, such as Friday afternoons and Monday mornings. Second, the employer required her to turn in self-evaluations before other employees, and third, the employer placed the employee on a plan to improve work performance.[174] The court rejected all three allegations as insufficient adverse employment actions because such actions were de minimis and therefore fell short of the harm standard under § 703.[175]

De minimis employment actions may also include temporary leaves. The Sixth Circuit held in *Michael v. Caterpillar Financial Services Corp.*[176] that temporary paid administrative leave would not meet the harm element under § 703 unless it resulted in a material adverse change, which "might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation."[177]

Another example of a de minimis employment action includes denying a request for training. In *Box v. Principi*,[178] the United States Court of Appeals for the Eighth Circuit held that an employer's denial of a request for training was not an adverse employment action, alone, such as a reduction in title, salary, or benefits.[179] In a similar case, the same court held that an accumulation of employer actions that occurred after an employee returned from military leave was not materially

170. Michael v. Caterpillar Fin. Servs. Corp., 496 F.3d 584, 594 (6th Cir. 2007).
171. *Novotny*, 291 F. App'x at 703.
172. 291 F. App'x 698 (6th Cir. 2008).
173. *Id*. at 703.
174. *Id*.
175. *Id*.
176. 496 F.3d 584 (6th Cir. 2007).
177. *Id.* at 594.
178. 442 F.3d 692 (8th Cir. 2006).
179. *Id*. at 695-97.

adverse because none of the actions sufficiently affected the terms, conditions, or privileges of employment.[180] In *Clegg v. Arkansas Department of Correction*,[181] the employee was not reassigned back to all of her previous duties, was not welcomed back in a friendly manner, was not immediately given items needed for her job such as keys, was denied training, and was given only a "satisfactory" evaluation.[182] All of these actions, even in the aggregate, did not satisfy the harm element under § 703 because none of them resulted in a decrease in salary, benefits, or title.[183]

The majority of circuits appear to allow discrimination claims under § 703 when the plaintiff can present evidence showing direct or indirect economic harm as a result of the employer's action. However, sometimes an employer's action causes only noneconomic harm. The next section addresses how courts have handled such situations.

C. Whether Adverse Employment Actions Resulting in Noneconomic Harm Satisfy the Harm Element of § 703

The "terms, conditions, or privileges of employment" language under § 703 suggests, as the Supreme Court's hostile environment harassment cases demonstrate, that not all harm must be economic to sufficiently state a claim upon which relief may be granted. Employer action that affects the privileges of employment may involve noneconomic harm. For example, an employer who paints all the work desks pink for females and blue for males is clearly discriminating based on gender stereotypes.[184] A desk, or one's workspace, is inevitably part and parcel of an employee's job, but courts are reluctant to extend the scope of the harm element under § 703 to these situations because such actions are de minimis—no type of economic harm has been incurred.[185] The courts of appeals would more likely dismiss such a claim on the basis that either the employer's action is not materially adverse or the plaintiff has failed to show that the employer's conduct is severe or pervasive under the hostile work environment theory. However, the employer is openly violating Title VII by discriminating against individuals based on sex—a protected class.[186] The courts seem to find

180. Clegg v. Ark. Dep't of Corr., 496 F.3d 922, 927-28 (8th Cir. 2007).
181. 496 F.3d 922 (8th Cir. 2007).
182. *Id*. at 927.
183. *Id*. at 927-28.
184. Hanner, *supra* note 57, at 1161-63; *see also* Zimmer, *supra* note 26, at 20.
185. Hanner, *supra* note 57, at 1161-63; *see also* Zimmer, *supra* note 26, at 20.
186. Hanner, *supra* note 57, at 1161-63; *see also* Zimmer, *supra* note 26, at 20.

a middle ground between allowing actions protected under Title VII and discouraging frivolous lawsuits that do not result in sufficient harm.

The courts of appeals assess discrimination on the basis of noneconomic harm under § 703 through the hostile work environment paradigm.[187] The Supreme Court has reiterated that "[c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview."[188] Some policy reasons exist regarding why a court would hold that the plaintiff failed to show sufficient harm under a § 703 discrimination claim. First, the legal system is overloaded already, and by refusing to hear cases that do not meet the harm element, the courts are reducing the number of cases.[189] Second, the standard provides employers with room to run their business without the court system second-guessing the employer's decisions.[190]

Accordingly, most discrimination claims based on noneconomic harm will not be actionable unless the employer's conduct is severe or pervasive.[191] However, some courts of appeals have addressed situations in which no direct or indirect economic harm is evident.[192] Rather than using the hostile work environment approach, these courts have concluded that if the employer's action imposes a material detriment on the plaintiff, the harm element under § 703 is met.[193]

The Eighth Circuit, for example, has articulated this standard:

> [An] adverse employment action must be one that produces a material employment disadvantage. Termination, cuts in pay or benefits, and changes that affect an employee's future career prospects are significant enough to meet the standard, as would circumstances amounting to a constructive discharge. Minor changes in duties or working

187. *See, e.g.*, Garza v. Laredo Indep. Sch. Dist., No. 08-40387 2009 WL 221258 (5th Cir. Jan. 30, 2009) (holding that allegations of noneconomic harm are analyzed under a hostile work environment theory).

188. *Harris*, 510 U.S. at 21; *see also* Faragher v. City of Boca Raton, 524 U.S. 775, 786-87 (1998).

189. Zimmer, *supra* note 26, at 20.

190. *Id*.

191. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986).

192. *See*, *e.g.*, Davis v. Team Elec. Co., 520 F.3d 1080 (9th Cir. 2008) (holding that assigning more burdensome work responsibilities constitutes an adverse employment action).

193. *See, e.g., id.* at 1095-96.

> conditions, even unpalatable or unwelcome ones, which cause no materially significant disadvantage do not satisfy the prong.[194]

In *Wedow v. City of Kansas City, Missouri*,[195] the Eighth Circuit held that not providing female firefighters with adequate protective clothing and adequate locker facilities constituted adverse employment action.[196] The court held that such actions were not a mere inconvenience but instead were a part of the terms, conditions, and privilege of employment because these conditions jeopardized "her ability to perform the core functions of her job in a safe and efficient manner."[197] Although the employee did not suffer a direct or indirect economic harm, having adequate clothing was part and parcel of her employment, and therefore it constituted a term, condition, or privilege under § 703.[198]

The United States Court of Appeals for the Ninth Circuit held in *Davis v. Team Electric Co.*[199] that the employee successfully showed that she suffered adverse employment actions by her employer in a sex discrimination claim.[200] The employee was not invited to unofficial work meetings, was not allowed to enter the work trailer for breaks, and was sometimes ignored by her supervisors when she tried to communicate with them through the radio.[201] The employee's compensation was not affected, but she suffered other types of noneconomic harm sufficient to meet the terms, conditions, or privileges of employment requirement.[202] The court did not hold that she suffered discrimination based on the hostile work environment theory; instead, the court pursued her claims by finding that the employer's behavior, as a whole, was materially adverse.[203] Absent these extreme situations, the majority of the courts of appeals seem reluctant to extend claims alleging noneconomic harm under § 703 when such claims do not satisfy the hostile work environment test. The next section addresses how the courts of appeals should tackle the problem of how to define adverse employment action under § 703.

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194. Higgins v. Gonzales, 481 F.3d 578, 584 (8th Cir. 2007) (citations omitted) (alteration in original) (internal quotation marks omitted).
195. 442 F.3d 661 (8th Cir. 2006).
196. *Id*. at 671.
197. *Id*. at 671-72.
198. *Id*. at 672.
199. 520 F.3d 1080 (9th Cir. 2008).
200. *Id*. at 1090.
201. *Id*.
202. *Id*.
203. *Id*.

V. WHAT THE STANDARD FOR ADVERSE EMPLOYMENT ACTION SHOULD BE

A. The Underlying Problem: The Administrative Charge-Filing Period

The courts of appeals consistently struggle to come up with a foolproof standard of adverse employment action.[204] This is not a surprise because the differences between employer actions causing immediate economic harm and those actions having the potential for economic harm make it impossible for circuits to create a single definition of adverse employment action. In *Mattern v. Eastman Kodak Co.*,[205] the United States Court of Appeals for the Fifth Circuit, like other circuits, held that the time limitations period begins only when the unlawful employment practice occurs, meaning either discipline has been imposed or a benefit has been denied.[206] The chance that an employee will eventually suffer an adverse employment action does not "rise above having mere tangential effect on a possible future ultimate employment decision."[207] Courts are unwilling, and rightfully so, to expand the definition of "adverse employment actions" to those that may have a potential economic consequence.[208] Such an expansion is not the answer when the real problem lies in the plaintiff's ability to file a charge with the Equal Employment Opportunity Commission (EEOC) in a timely fashion.

Instead of focusing on a uniform definition, the courts should look at the underlying problem. Unless the harm alleged has an immediate economic impact, a plaintiff has a time limitations problem, and any standard followed by the circuits to meet the harm element of § 703 of Title VII[209] is inherently variable and consequently unknowable. For example, if the adverse employment action is premised on negative performance evaluations, courts consider many variables to determine

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204. *Compare* Davis v. Town of Lake Park, Fla., 245 F.3d 1232 (11th Cir. 2001) (holding that unless a hostile work environment is shown, only direct economic harm satisfies the harm element of § 703), *with* Wedow v. City of Kansas City, Mo., 442 F.3d 661 (8th Cir. 2006) (holding that direct, indirect, and noneconomic harm can be shown to satisfy the harm element of § 703). This is exemplified by the various standards of how to satisfy the harm element of § 703 followed by the different courts of appeals. *Compare Davis*, 245 F.3d 1232, *with Wedow*, 442 F.3d 661.

205. 104 F.3d 702 (5th Cir. 1997).

206. *Id.* at 708.

207. *Id*.

208. *See, e.g., id.*

209. 42 U.S.C. § 2000e-2 (2000).

whether the harm element has been satisfied. Some variables include (1) the likeliness that the employer will rely on the evaluation when making a decision that may affect the employee's terms, conditions, or privileges of employment, (2) how soon the evaluation will have an economic impact on the employee's terms, conditions, or privileges, and (3) how much weight the employer places on the evaluation. These factors are unknown until the economic harm actually occurs and the employee knows or should know of the adverse employment action. Consequently, if the statutory time period to file a charge with the EEOC is measured from the date of a negative evaluation rather than from any more tangible adverse term of employment that is based in whole or in part on that evaluation, the charge-filing period frequently will expire before the employee even knows of the possibility of actionable discrimination.

In a nondeferral state such as Georgia, a plaintiff must file a charge with the EEOC within 180 days after the alleged adverse employment action, and if the state is in a deferral jurisdiction, the time limitation is extended to 300 days.[210] However, because a plaintiff must give the EEOC up to 60 days to review the charge, the plaintiff, as a practical matter, has no more than 240 days to file a charge under state law in a deferral state. Six to eight months is typically not enough time for a potential economic harm to materialize into a tangible harm. For example, employers who conduct annual reviews may not use those reviews until months later when promotions are given or discipline becomes an issue. If the type of adverse employment action fails to create an immediate economic harm, the brevity of charge-filing periods under state or local and federal law sharply reduces any chance for an aggrieved person ultimately to bring a judicial action.

Rather than try to define a uniform standard for various types of adverse employment actions with varying potential to ripen into tangible harm within a brief period of time, the United States Congress should fix the underlying timeliness problem by amending the statute. For employer actions that do not produce an immediate and tangible harm, the current statute of limitations should be amended to cure the problems surrounding a plaintiff's ability to bring a timely action under § 703.

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210. *See* 42 U.S.C. § 2000e-5(e)(1) (2000), *amended by* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009); Wilkerson v. Grinnell Corp., 270 F.3d 1314, 1317 (11th Cir. 2001).

B. A Proposed Solution: Amending the Statute Relating to the Administrative Charge-Filing Period for Title VII Actions

To eliminate the time limitation problem, two different charge-filing periods should apply, with which period to apply depending on whether the § 703 harm element is based on an employer action causing an immediate economic harm or the potential for economic harm. The solution is divided into two categories: immediate and delayed.

The immediate solution would only apply to direct economic harms. Because direct economic harms immediately affect a term or condition of employment, there is no need to amend the time limitation for a plaintiff to bring suit. Therefore, the current charge-filing period would be triggered on the occurrence of the adverse employment action. For example, the economic harm is predictable with hirings and firings because the impact of the adverse employment action is apparent and immediate. Another type of harm falling under the immediate solution includes lateral transfers. The move or commute change has an immediate effect on the employee's terms and conditions of employment. Accordingly, an aggrieved person would have either 180 or 300 days to file a charge with the EEOC (in the latter case after having filed a charge under state or local law and providing the state or local agency at least 60 days to process or dismiss that charge before day 300). When Congress created the statute, it intended to strike a balance between protecting employees with legitimate claims and preventing employers from being burdened by stale suits. The immediate solution accomplishes both of these goals.

All other employer actions that do not cause an immediate economic harm fall under the delayed solution. This solution covers situations when, as with negative evaluations, the employer's action has potential economic consequences that may not become tangible and recognizable until a later date. Instead of the charge-filing time period being triggered by the occurrence of the alleged unlawful employment practice, the period would begin when adverse discipline is imposed or benefits are denied in complete or partial employer reliance on previous discriminatory conduct.

For purposes of the delayed solution, a presumption would exist that the employer's action affects the terms and conditions of employment only when it results in the imposition of a tangible employment detriment or the denial of a tangible employment benefit. For example, employee evaluations are assumed to affect an employee's terms and conditions of employment because an employer would not bother doing the evaluations if they were not used for discipline or beneficial purposes. The time limitations period would not start when a poor

evaluation was given but instead would begin when the evaluation actually caused a benefit to be denied or discipline to be imposed. Therefore, each benefit denied or discipline imposed due to the past adverse employment action would trigger a new administrative charge-filing period. This approach would eliminate any speculation or uncertainty about whether, and if so, how quickly and likely the adverse employment action will cause a tangible economic harm.

The delayed solution is not a new concept in the legal field. The United States Court of Appeals for the First Circuit has implemented a similar solution. *Thomas v. Eastman Kodak Co.*[211] supports the position that for employer actions causing a potential for economic harm, the charge-filing period should begin when the economic impact actually occurs and not when the underlying discriminatory act occurred.[212] In this case, the plaintiff alleged racial discrimination after he was laid off. The nondiscriminatory layoff decision was based on previous discriminatory performance appraisals, which occurred outside the statutory time period.[213] Rejecting the employer's argument that the time period started on the date of the evaluations, the First Circuit held that the date the employee received notice of his layoff triggered the limitations period.[214]

The First Circuit created a notice rule to determine when the charge-filing period began: "[A]n employer action only triggers the running of the statute of limitations if that action has concrete, negative consequences for an employee, and the employee is aware or should have been aware of those consequences."[215] The only types of situations that would cause the limitations period to begin on the occurrence of an adverse employment action would be those concerning direct economic harms. These harms would fall under the immediate solution that does not require an amendment to the charge-filing time period. However, the court also held that "an employer could be exposed to Title VII liability for harms stemming from discriminatory evaluations some years after the evaluations were conducted, if the evaluations first cause tangible harm to the employee at that later point."[216] This situation would fall under the delayed solution regarding employer actions that do not cause an immediate tangible harm.

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211. 183 F.3d 38 (1st Cir. 1999).
212. *Id*. at 49.
213. *Id*. at 42.
214. *Id*.
215. *Id*. at 49.
216. *Id.* at 50-51.

Similarly, the proposal here is that a putative plaintiff begins to consider filing an administrative charge when he receives notice of harm. But, as in *Thomas*, the applicable charge-filing period begins to run when the plaintiff receives notice of harm; it would not ordinarily be delayed until he acquires knowledge that the harm was imposed as a result of unlawful employer discrimination.[217] In this respect, the mechanics of the proposed trigger date for delayed violations operates just as with immediate violations. The common underlying premise is that once an employee may be expected to realize the immediacy of tangible harm, he is under a duty to investigate the possibility that the harm resulted from unlawful employer conduct and, if so, to file a charge promptly.[218]

With respect to timeliness, employer actions that have only delayed the potential to cause economic harm are more analogous to hostile work environment claims based on pervasive but nonsevere conduct than to claims concerning conduct causing immediate economic harm. This is because both potential economic harms and hostile work environment claims concern a period of time when the harm has yet to become tangible and recognizable to the employee.

The United States Supreme Court has already created a special definition of when the charge-filing period begins for unlawful employment actions regarding nonsevere but pervasive hostile work environment. In *National Railroad Passenger Corp. v. Morgan*,[219] the Supreme Court decided whether a Title VII plaintiff could file suit under a hostile work environment theory based on a series of events—none sufficiently severe standing alone that the employee should have realized she had sustained actionable harm under the Court's precedent[220]—that preceded the beginning of the applicable administrative charge-filing period.[221] The Court carved out an exception for nonse-

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217. *Id.* at 49. An exception does exist in which the charge-filing period is delayed for cases in which employers actively conceal the discrimination. Vidal v. Chertoff, 293 F. App'x 325, 330 n.3 (2008) ("Under equitable estoppel, an employer is estopped from asserting the filing period if the employer misrepresented or concealed facts necessary to support a discrimination charge." (citations omitted) (internal quotation marks omitted)).

218. This proposal does not change the "notice of decision" rule of *Delaware State College v. Ricks*, 449 U.S. 250 (1980), which runs the charge-filing period from the date an employee should reasonably know that tangible harm has been or will be imposed. *Id.* at 256-62.

219. 536 U.S. 101 (2002).

220. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993) (stating the standard for a hostile work environment claim to be actionable under § 703).

221. *Nat'l R.R. Passenger Corp.*, 536 U.S. at 105.

vere but pervasive hostile work environment claims.[222] It distinguished them from discrete acts, such as termination, a promotion denial, or for that matter, claims based on the one-time occurrence of severe conduct that by itself could have created a hostile or abusive work environment from the standpoint of a reasonable person.[223] By their nature, the nonsevere but pervasive genre of hostile work environment claims concerns repeated conduct, and the unlawful employment action is based on the cumulative effect of a series of separate acts:

> The timely filing provision only requires that a Title VII plaintiff file a charge within a certain number of days after the unlawful practice happened. It does not matter, for purposes of the statute, that some of the component acts of the [nonsevere but pervasive] hostile work environment fall outside the statutory time period. Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability.[224]

Accordingly, the Supreme Court held that the administrative charge-filing period is triggered after "any act that is part of the hostile work environment."[225] Like nonsevere hostile environment claims, potential, as opposed to immediate economic, harms deal with subtle employer actions when the plaintiff would not realize the necessity or desirability of investigating whether there is an underlying discriminatory motivation until their effects are realized.

Congress amended Title VII to take a similar approach to pay discrimination.[226] In *Ledbetter v. Goodyear Tire & Rubber Co.*,[227] the plaintiff sued her former employer alleging illegal pay discrimination in violation of Title VII. Ledbetter argued that during the course of her employment she was given poor evaluations based on her sex and that as a result, her pay did not increase as much as it would have if she had been evaluated in a nondiscriminatory manner. Accordingly, each pay decision from the past continued to negatively affect Ledbetter's pay throughout her employment. The issue before the Court was whether

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222. *See id.* at 115.
223. *See id.*
224. *Id*. at 117.
225. *Id*. at 118.
226. *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (to be codified at 42 U.S.C. § 2000e-5) (amending Title VII "to clarify that a discriminatory compensation decision or other practice that is unlawful under such Acts occurs each time compensation is paid pursuant to the discriminatory compensation decision or other practice").
227. 550 U.S. 618 (2007).

Ledbetter could bring a Title VII suit for pay discrimination when the unlawful employment practice (that is, disparate pay) occurred during the statutory time period, but the basis for the unlawful employment practice (that is, discriminatory evaluations) occurred outside the limitations period.[228]

The Court held that "[t]he EEOC charging period is triggered when a discrete unlawful practice takes place. A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination."[229] In other words, every decrease in pay did not trigger a new time period even though her employer's past discriminatory practices were not actually realized until years after their discovery by Ledbetter.[230] Therefore, the Court held that Ledbetter's suit was untimely because the charge-filing period was triggered when the employer gave the poor evaluations that were the basis of subsequent pay decisions.[231]

"[C]urrent effects alone cannot breath life into prior, uncharged discrimination . . . . [S]uch effects in themselves have 'no present legal consequences.'"[232] The Court supported its decision based on policy: the time limitation to file an EEOC charge protects employers from defending claims that are long past.[233] Although the Court admitted that the charge-filing period is "short by any measure," the majority reasoned that Congress's intent when it wrote the statute was to encourage the quick resolution of employment discrimination allegations.[234]

The majority opinion disregards a significant distinction between Ledbetter's situation, which concerned an employer action that subtly caused economic harm that was difficult to detect, and situations that cause immediate and obvious economic harm.[235] Unlike hirings and firings, which are easy to detect, bad evaluations that have the potential to affect an employee's terms and conditions are typically not realized until a later time. Therefore, Ledbetter did not realize she was being discriminated against until years after the poor evaluations were given and had already affected her pay.[236] As the dissent points out, count-

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228. *See id*. at 621-23.
229. *Id*. at 628.
230. *Id*.
231. *Id*. at 628-29.
232. *Id*. at 628 (quoting United Air Lines, Inc. v. Evans, 431 U.S. 553, 558 (1977)).
233. *Id*. at 630.
234. *Id*. at 630-31.
235. *See id.* at 638-39.
236. *Id.* at 645 (Ginsburg, J., dissenting).

ing both the pay-setting decision and the actual payment of a discriminatory wage as unlawful practices in relation to the charge-filing period is "more in tune with the realities of the workplace, and more respectful of Title VII's remedial purpose."[237] Ledbetter's situation is a prime example of how employer actions having the potential for economic harm may not be realized until long after the time limitation period has run when the time period is triggered by the occurrence of an unlawful employment action that fails to create an immediate and noticeable economic consequence.

The two types of situations (that is, those that produce an immediate economic harm and those that produce a potential for tangible harm) should be distinguished and handled differently. Unlawful employment actions that are easy to identify, such as termination, trigger the charge-filing period on the day the action occurred. However, unlawful employment actions that create a potential for economic harm, such as discriminatory evaluations, should trigger a new limitations period once the employer's action causes discipline to be imposed or a benefit to be denied.

Ledbetter faced the same speculation and uncertainty that arises with employer actions causing the potential for economic harm, such as when the evaluations would produce a tangible, economic consequence. Congress recognized the impossibility to timely file a discrimination charge for discriminatory compensation decisions when the underlying discrimination occurred outside the time period but its effects continued to impact the employee's terms and conditions of employment.[238]

On July 31, 2007, the House of Representatives passed the Lilly Ledbetter Fair Pay Act, [239] which eases the time restrictions for wage discrimination suits so that a new time period is triggered each time an employee is paid pursuant to a previous discriminatory employer action. [240] Therefore, each pay check would constitute a new unlawful employment practice that triggers a new charge-filing period. Thus, this Act not only defers the running of the charge-filing period until a tangible harm (for example, a reduced raise) results from a prior discriminatory act like an adverse evaluation, it also addresses the reality that some pay decisions, although imposing immediate tangible harm, in fact, may not be manifest until several small discriminatory pay decisions create salary differentials that in the aggregate become apparent to a reasonable

237. *Id.* at 646.
238. *See* H.R. 2831, 110th Cong. (2007).
239. H.R. 2831, 110th Cong. (2007).
240. *See id.* § 3.

employee. The Senate introduced a bill called the Fair Pay Restoration Act,[241] which mirrors the Lilly Ledbetter Fair Pay Act.

During the election campaign of President Barack Obama, the Lilly Ledbetter Fair Pay Act was a top priority. Not only does President Obama outwardly support pro-employee legislative reforms, but both he and Joe Biden cosponsored the bill as senators.[242] Therefore, it was not a surprise that on January 29, 2009, the Lilly Ledbetter Fair Pay Act of 2009[243] was the first bill signed into law by President Obama.[244] The passing of the bill overturns the Supreme Court's decision in *Ledbetter* and makes it easier for Title VII plaintiffs challenging pay discrimination to file timely EEOC charges.

The 2007 Supreme Court case of *Ledbetter* illustrated the near impossibility of filing a timely EEOC charge for discriminatory employer actions that have no tangible consequences until years later. Implementing the immediate and delayed solutions with the corresponding charge-filing periods would benefit all parties. Employees would be the obvious beneficiaries of the amendment because legitimate actions would have the ability to be adjudicated and not time-barred. Additionally, the speculation problem of when the employer action will cause a tangible effect on the employee's terms and conditions of employment is eliminated. Rather than jumping the gun against employers, employees would be able to give employers the benefit of the doubt when they suspect discrimination.[245] By addressing the underlying timeliness problem, the proposal would relieve the circuits from struggling with how to define adverse employment action for purposes of § 703's harm element.

VI. CONCLUSION

The United States Supreme Court has yet to set a standard for plaintiffs to satisfy the harm requirement of § 703 of Title VII[246] discrimination claims. Since its decision in *Burlington Northern &*

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241. S. 1843, 110th Cong. (2007).

242. *See* The Library of Congress, http://www.thomas.loc.gov/cgi-bin/bdquery/D?d110:1:,/temp/~bdo5Fi:@@@Pl/bss/110search.html.

243. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 42 U.S.C. § 2000e-5).

244. *See* Lilly Ledbetter Fair Pay Act of 2009, http://whitehouse.gov/briefing_room/LillyLedbetterFairPayActPublicReview/.

245. *Thomas*, 183 F.3d at 51. However, even under the Lilly Ledbetter Fair Pay Act of 2009, employees who delay filing until after suffering several pay denials may be time barred with regard to pay denials occurring before the applicable 180-day or 300-day period even though their claims based on later pay denials would be preserved.

246. 42 U.S.C. § 2000e-2 (2000).

Santa Fe Railway Co. v. White,[247] in which the Court set a standard for the harm element of the closely related antiretaliation claim under § 704,[248] the courts of appeals differ on how to analyze § 703 claims.[249] Aside from establishing a hostile work environment as a basis for satisfying the harm requirement under § 703, the lower courts differ on how much harm must be asserted to meet the requirement—only direct economic harms, direct or indirect economic harms, or the broadest view that includes noneconomic harms.[250]

The allowable time period for timely filing administrative complaints, a condition precedent to the time filing of a judicial action under Title VII, is the underlying problem. Instead of attempting to define adverse employment action and continuing to speculate on an inherently variable area, Congress should focus on the time limitations period just as it has in pay discrimination suits. The issue is best resolved by dividing the answer into two solutions. Under an immediate solution, which concerns adverse employment actions causing immediate economic harm, the time limitations period should remain the same. Under the delayed solution, which concerns adverse employer actions that may cause economic harm, the administrative charge-filing period for Title VII actions should be amended. The time period should begin when the employer action actually causes an economic harm. Therefore, a plaintiff should be able to file Title VII suits against employers based on adverse employment actions that occurred earlier, but materialized later into a tangible economic harm. Until this issue is decided, the standard to meet the terms, conditions, or privileges of employment of § 703's harm requirement will remain unsettled.

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247. 548 U.S. 53 (2006).

248. 42 U.S.C. § 2000e-3 (2000); *see Burlington Northern*, 548 U.S. 53 (2006).

249. *Compare* Davis v. Town of Lake Park, Fla., 245 F.3d 1232 (11th Cir. 2001) (holding that unless a hostile work environment is shown, only direct economic harm satisfies the harm element of § 703), *with* Wedow v. City of Kansas City, Mo., 442 F.3d 661 (8th Cir. 2006) (holding that direct, indirect, and noneconomic harm can be shown to satisfy the harm element of § 703).

250. *Compare Davis*, 245 F.3d 1232, *with Wedow*, 442 F.3d 661.