

2nd Circ. Ruling Clarifies Title VII Claim Standards

By **Carolyn Wheeler** (October 19, 2023)

Although it does not break new ground legally, the U.S. Court of Appeals for the Second Circuit's opinion in *Banks v. General Motors LLC* comes at a crucial time when courts are reevaluating standards that apply to Title VII claims of discrimination in the "terms, conditions, or privileges" of employment. [1]

In the *Banks* case, Billie Banks brought claims against her employer. She alleged racial and sexual harassment; race and sex discrimination related to a delay in her return to work after medical leave, and her reassignment to a different position; and retaliation for complaining about the discrimination.



Carolyn Wheeler

All of the claims involved questions about whether General Motors' actions affected the terms, conditions or privileges of her employment, and the Second Circuit reversed the U.S. District Court for the Western District of New York's grant of summary judgment to the company on all her claims.

In 2022, in *Chambers v. District of Columbia*, the U.S. Court of Appeals for the D.C. Circuit held in an en banc decision that when an employer transfers an employee or denies an employee's request for a transfer because of the employee's race, color, religion, sex or national origin, the employer violates Title VII because that action constitutes discrimination in the employee's terms, conditions or privileges of employment.[2]

The full U.S. Court of Appeals for the Fifth Circuit has also weighed in on a similar question. In *Hamilton v. Dallas County* on Aug. 18, the court held that a facially discriminatory policy of assigning work shifts based on sex violates Title VII.[3]

Similarly, in *Threat v. City of Cleveland* in 2021, the U.S. Court of Appeals for the Sixth Circuit held that a racially discriminatory shift assignment is actionable even if there is no pay differential because a work shift is a term of employment.[4]

This term, in *Muldrow v. City of St. Louis*, the U.S. Supreme Court will decide if a plaintiff must demonstrate a particular level of harm to prove a discriminatory forced transfer violates Title VII.[5]

Factual Background of the Banks Case

According to the court's opinion, Banks is an African American woman who worked at a General Motors plant in Lockport, New York, for over 30 years, most recently as a site safety supervisor.

Beginning in 2002, Banks began to experience pervasive racially and sexually offensive conduct, and remarks directed at her and others by supervisors and coworkers.

The offensive conduct directed at others included people being called racial slurs and finding nooses in their work sites. Banks filed a formal internal complaint in September 2013 and an EEOC charge a month later, alleging race and sex-based discrimination.

In September 2013, Banks began a period of disability leave to recuperate from the stress caused by the hostility and discrimination she faced at the Lockport Plant. While she was on leave, General Motors suspended her sick leave benefits, but later reinstated them retroactively in early 2014.

Banks and her doctor indicated she was ready to return to work in April 2014, but General Motors retained a psychiatrist who spoke with her and determined she should not return because she lacked the conflict resolution skills for this work environment.

She eventually returned in September 2014 and was assigned to a safety representative role that had no supervisory responsibilities, involved the performance of menial tasks and was on a less desirable shift. Six months after Banks returned to work, General Motors reinstated her to her original shift and assigned her some primary responsibilities.

Banks filed suit in November 2014, asserting claims of hostile work environment, race and sex-based disparate treatment, and retaliation in violation of Title VII, the New York State Human Rights Law, and Title 42 of the U.S. Code, Section 1981. The district court granted summary judgment to General Motors on all of Banks' claims.

Second Circuit Reverses on All Claims

Hostile Environment

The Second Circuit applied familiar standards to Banks' hostile work environment claims and concluded the conduct Banks described was both severe and pervasive enough to alter her work environment when considering the totality of the circumstances.[6]

Discrimination in Terms and Conditions

In considering Banks' discrimination claims, the court stated she would have to show she had suffered an adverse job action. It explained that under its precedents, an adverse action is easy to identify because it involves material changes that are "more disruptive than a mere inconvenience or an alteration of job responsibilities" but that does not necessarily have economic consequences.[7]

The court then applied that concept to the two actions she challenged — the delay in allowing her to return to work and her reassignment when she came back.

The court readily concluded that the delay in allowing Banks to return to work was an adverse action, then went on to assess the evidence that it was discriminatory.

The court concluded that she had marshaled extensive evidence that the psychiatrist's reasons for refusing to allow her to return were rooted in racial stereotypes, in that he said her upbringing was the cause of her "breakdown" and that she lacked "conflict resolution skills," blaming her for reacting to discrimination and implying her reactions to harassment were disproportionate, and thus implicating the stereotype of the "angry Black woman." [8]

The court also considered the reassignment from the position of safety supervisor to safety representative to be an adverse action. The court stated that a job transfer can be an adverse action if the new work assignment was less prestigious, less suited to her skills and abilities, or less conducive to career advancement.

The court discussed evidence that Banks' new assignment had all those effects because it

stripped her of supervisory responsibilities, moved her to a less-desirable shift, excluded her from supervisory meetings and reduced her interactions with management, all of which a jury could find reduced her chances for promotion.[9]

The court emphasized that the district court erroneously held Banks' reassignment was not an adverse action because she did not claim a loss of salary or benefits, because a lateral transfer that does not have economic consequences can still be adverse if it has other negative consequences as it did in this case.

Retaliation

The court applied the standard applicable to retaliation claims — that the challenged action must be one that might well have dissuaded a reasonable employee from making or supporting a charge of discrimination.[10]

The court held that the temporary suspension of benefits, the delayed return to work and the reassignment all constituted adverse actions under that standard.

The suspension of benefits, although temporary, was clearly adverse because the Supreme Court held in *Burlington Northern & Santa Fe Railway Co. v. White* in 2006 that the plaintiff's temporary suspension without pay was an adverse action even though she later received backpay, and Banks' situation was the same.

In discussing the reassignment, the court noted that it had held this action was adverse for purposes of Banks' discrimination claim, so it also constituted an adverse action for purposes of her retaliation claim.

Significance of the Decision

The Second Circuit's thorough opinion explicates and applies the standards relevant to hostile environment, discrimination and retaliation claims that involve changes in the terms, conditions or privileges of employment, and there is nothing surprising in its treatment of Banks' claims of harassment or retaliation.

Although the Second Circuit did not join the debate about the appropriate standard for evaluating discrimination in terms and conditions of employment, it provides many useful lessons for practitioners.

It is notable that the court did not engage in any scrutiny of the continuing validity of the standard it applies to discrimination in terms, conditions or privileges of employment. In light of recent decisions from the Sixth, D.C. and Fifth Circuits, the Second Circuit's decision to adhere to precedent without comment is striking.

The court offered no criticism of the decisions of its sister circuits, but obviously did not embrace them. The court cited the D.C. Circuit's Chambers decision for the proposition that Title VII is not limited to economic or tangible discrimination, but it did so in discussing Banks' hostile environment claim.[11]

Although aware of the D.C. Circuit's groundbreaking decision, it did not follow the D.C. Circuit's reasoning that if there is no requirement of "objectively tangible harm," then any discrimination in a term, condition or privilege of employment is actionable.

The Chambers court concluded that any such textual harm requirements "frustrate[] Title

VII's purpose of ending discrimination in the workplace." [12] But the Second Circuit apparently did not share that concern.

Similarly, the Second Circuit cited the Sixth Circuit's decision in *Threat* only for the propositions that Title VII does not require economic harm and that a shift schedule counts as a term of employment. [13]

The Second Circuit did not follow the logic of the Sixth Circuit in concluding that Title VII prohibits all discrimination that passes a *de minimis* threshold. [14] The Second Circuit did not cite *Hamilton*, another shift assignment case, at all.

The Second Circuit agrees with these other circuits that the harm plaintiffs must prove is not necessarily economic but continues to require a showing of an adverse action which it describes as one involving material changes that are "more disruptive than a mere inconvenience."

Although *Banks* was able to make a sufficient showing for the court of appeals to reverse the grant of summary judgment to General Motors, it is not clear that the *Chambers* case or the *Muldrow* case would have met that standard.

The benefit of the D.C. Circuit's plain language approach is that it "saves courts the trouble of administering an open-ended requirement of objectively material injury found nowhere in the statute's text," as the Sixth Circuit described in its *Threat* opinion. [15]

If all discrimination in the terms, conditions or privileges of employment is actionable, there will be more consistent outcomes in cases challenging such decisions.

While the law remains in flux, and until the Supreme Court decides *Muldrow*, the Second Circuit's analysis is very helpful to employees and their lawyers who want guideposts for determining whether the conditions surrounding challenged employment actions are sufficiently material to be actionable in jurisdictions that have not adopted the D.C. Circuit's approach.

Banks was reassigned to a job that might have affected her career trajectory because it provided less contact with management, and the court found that to be a factor that supported her claim of discrimination.

Her new job stripped her of supervisory responsibilities, and the court found that analogous to a demotion and therefore a factor that supported her claim. Her new job placed her in a less desirable shift and that too contributed to the court's conclusion that the transfer was actionable.

In summing up, the court said that despite the fact that *Banks* did not claim a loss of salary or benefits, a jury could find her reassignment adverse because of "its impact on *Banks*'s work hours, title, responsibilities, and opportunities to interact with management." [16] Critically, the court stressed that whether a particular action is adverse is not a question of law, but a factual issue for a jury to decide.

The Second Circuit also provided helpful guidance on proving retaliation claims. It clarified that temporal proximity can be sufficient to establish a causal connection, that temporary loss of benefits can be adverse even if later reinstated, and that an employment action that meets the standard for actionable discrimination will also meet the standard for actionable retaliation. [17]

Because the Second Circuit did not dispose of Banks' claims on the ground that the challenged actions were not sufficiently adverse to be actionable, its decision is a very helpful reminder that another challenging aspect of proving a violation of Title VII is marshaling the evidence of discriminatory animus. This decision provides a useful catalog of the types of evidence that can support a race discrimination claim.

Its discussion of evidence of the severity of threatening behavior, of racism and racial animus, of the impact of racist behavior directed at other employees, and of invidious racial stereotypes provides a roadmap for employees and their lawyers who attempt to challenge persistent race discrimination.[18]

When the Supreme Court considers the appropriate standard for evaluating a claim of sex discrimination in a transfer case in *Muldrow*, it will grapple with the text of Title VII and its own prior decisions setting standards for sexual harassment and retaliation, and how those standards might affect the proper interpretation of the central discrimination provision in Title VII.

The Supreme Court has asked whether a plaintiff challenging a transfer decision as discriminatory must make a showing that it caused a significant disadvantage.

The Second Circuit's standard of requiring a material change that is "more disruptive than a mere inconvenience," but not necessarily causing any economic harm, will likely be one approach the Supreme Court will consider in exploring the idea of a significant disadvantage.[19]

The most straightforward answer to the Supreme Court's question is: "No, there is no need to show a significant disadvantage." Such a showing is unnecessary because the text of Title VII requires only that the plaintiff establish discrimination in the terms, conditions or privileges of employment, as the D.C. Circuit held in *Chambers*.[20]

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Disclosure: Wheeler co-authored amicus briefs on behalf of the National Employment Lawyers Association, the NAACP Legal Defense and Educational Fund Inc., and the National Women's Law Center in support of the petitioner in *Muldrow v. City of St. Louis, State of Missouri*. She also co-authored an amicus brief for the NWLC and ACLU in *Hamilton v. Dallas County*, and for the Metropolitan Washington Employment Lawyers Association in *Chambers v. District of Columbia*.

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[1] *Banks v. General Motors*, ---F.4th---, 2023 WL 5761361 (2d Cir. Sept. 7, 2023).

[2] *Chambers v. District of Columbia*, 35 F.4th 870 (D.C. Cir. 2022).

[3] *Hamilton v. Dallas County*, 79 F.4th 494 (5th Cir. 2023).

[4] Threat v. City of Cleveland, 6 F.4th 672, 676 (6th Cir. 2021).

[5] Muldrow v. City of St. Louis, No. 22-193. The Eighth Circuit in Muldrow applied a standard of material adversity to a plaintiff's forced transfer claim, and held Muldrow's involuntary transfer did not meet that standard because the pay and benefits were the same as in her original position. 30 F.4th 680 (8th Cir. 2022). The Supreme Court granted review of the question "Does Title VII prohibit discrimination in transfer decisions absent a separate court determination that the transfer decision caused a significant disadvantage?" 143 S. Ct. 2686 (June 30, 2023).

[6] Banks, 2023 WL 5761361 at *11-15.

[7] Id. at *15-16.

[8] Id. at *17-18.

[9] Id. at *19.

[10] Id. at *20 (citing Burlington Northern & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006)).

[11] Id. at *14.

[12] Chambers, 35 F.4th at 878.

[13] Banks, 2023 WL 5761361, at *16, *18.

[14] Threat, 6 F.4th at 678-79.

[15] Id. at 879.

[16] Id. at *19.

[17] Id. at *20-23.

[18] Id. at *12-15.

[19] Id. at *15-16.

[20] Chambers, 35 F.4th 870 (D.C. Cir. 2022).