No. 02-845

In the Supreme Court of the United States

PATRICIA W. SILVEY, PETITIONER

v.

ELAINE L. CHAO, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals properly held that petitioner's lateral transfers did not constitute adverse employment actions under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, in the absence of any decrease in her salary and benefits or a change in her employment status.

2. Whether the court of appeals properly held that petitioner's conclusory allegations of harassment are insufficient to avoid summary judgment on her claim of hostile work environment.

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OPINIONS BELOW

The per curiam opinion of the court of appeals (Pet. App. 1a-3a) is unpublished, but the judgment is noted at 38 Fed. Appx. 991. The memorandum and order of the district court (Pet. App. 4a-10a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 2002. A petition for rehearing was denied on September 4, 2002 (Pet. App. 11a). The petition for a writ of certiorari was filed on December 2, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was an employee of the Mine Safety and Health Administration (MSHA), a component of the Department of Labor. The MSHA is headed by an Assistant Secretary of Labor and organized around two primary components: the Office of Coal Mine Safety and Health, and the Office of Metal and Nonmetal Mine Safety and Health. There are, in addition, six "directorates" that provide support for the two central components. See <http://www.msha.gov/programs/programs.htm> (Mine Safety and Health Administration organizational chart). In 1978, petitioner was appointed Deputy Director of the Office of Standards, Regulations, and Variances, one of the six directorates. Pet. 4. In 1983, she became a career appointee within the federal government's Senior Executive Service (SES), 5 U.S.C. 3131, and was promoted to Director. *Ibid.*; Pet. App. 5a. Petitioner served in that position for approximately 15 years.

In 1994, J. Davitt McAteer became the Assistant Secretary of Labor responsible for the MSHA. In October 1998, McAteer reassigned petitioner to the position of Director of the Office of Administration and Management, another of the agency's six directorates. Shortly thereafter, McAteer sent petitioner a "Memorandum of Concern" noting certain errors she had made in her previous position. Pet. App. 5a-6a. McAteer remained dissatisfied with petitioner's performance as Director of the Office of Administration and Management, and he met with her in March 1999 to discuss his concerns. *Id.* at 6a. In July 1999, Deputy Assistant Secretary Marvin Nichols sent petitioner a "Memorandum of Admonishment" detailing petitioner's poor performance on an assignment. *Ibid.* That same month,

McAteer sent petitioner a list of requirements for improving her job performance.

In December 1999, McAteer announced the reassignment of four SES managers, including petitioner. Petitioner was transferred to the Office of Metal and Nonmetal Safety and Health. Pet. App. 6a. That Office—one of the two central components of the MSHA—previously had one Deputy Administrator. McAteer created a second Deputy position and gave it to petitioner. As a result, each of the central components had one Administrator and two Deputy Administrators, one of whom was a GS-15 employee and one of whom was a member of the SES. *Id.* at 7a.

Petitioner was at all times a senior executive within the agency. Pet. App. 9a. She began as the head of one directorate, was reassigned as the head of another directorate, and again reassigned to share the position of second-in-command of one of the MSHA's primary components. Her reassignments had no effect on her compensation. *Id.* at 6a-7a, 9a. In fact, petitioner received a bonus of $10,212 in 1999, shortly after her second reassignment. *Id.* at 7a.

2. In March 2001, petitioner filed a complaint in the district court alleging that the Department of Labor had discriminated against her on the basis of race and sex, and retaliated against her for pursuing an equal employment opportunity complaint, both in violation of Title VII of the Civil Rights Act of 1964, codified as amended at 42 U.S.C. 2000e *et seq.* Pet. 3. Following discovery, the district court entered summary judgment for the Department of Labor. The court concluded that petitioner failed to present any evidence that she had suffered an adverse employment action, an essential element of a prima facie case under Title VII. Pet. App. 9a. It observed that petitioner maintained an

upper-level management position at MSHA even after the challenged reassignments. *Ibid.* Moreover, the reassignments had no effect on petitioner's SES status, salary, or benefits. *Ibid.* Finally, the court explained, "[t]he multitude of occurrences and impressions that [petitioner] cites in her brief simply do not add up to adverse action under Title VII." *Ibid.*

The court of appeals affirmed in a brief, unpublished per curiam opinion. Pet. App. 1a-3a. With respect to petitioner's claims of disparate treatment, the court determined, based on its review of "the parties' briefs, the joint appendix, and the district court's orders," that "the district court properly concluded [that petitioner] failed to establish a prima facie case of race and sex discrimination and retaliation because she failed to demonstrate that her reassignments within the Department of Labor constituted an adverse employment action." *Id.* at 2a. It further held that petitioner failed to make out a hostile work environment claim. Assuming *arguendo* that petitioner's "reference to a hostile environment claim in the opening paragraph of her complaint was sufficient to raise a hostile environment claim," the court concluded that she had not demonstrated that she was harassed on the basis of sex or race or that any such harassment was sufficiently severe or pervasive to alter the terms and conditions of her employment. *Id.* at 2a-3a.

ARGUMENT

The court of appeals' judgment is correct and its unpublished opinion does not conflict with any decision of this Court or other courts of appeals. Therefore, review by this Court is not warranted.

1. In order to establish a prima facie case of employment discrimination under *McDonnell Douglas*

Corp. v. *Green*, 411 U.S. 792 (1973), a plaintiff must produce evidence that she suffered some adverse employment action. See *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 506-507 (1993). Petitioner argues that her two job transfers were adverse actions. However, neither transfer affected petitioner's salary, benefits, or her status as an SES employee. Indeed, petitioner received a bonus shortly after her second reassignment. At all times, she retained an upper management, SES-level position in the MSHA.

Every court of appeals to consider the question has held that lateral transfers such as those at issue here can constitute adverse employment actions under Title VII only if they entail some significant detrimental change in the terms and conditions of the plaintiff's employment. See *White* v. *Burlington N. & Santa Fe Ry.*, 310 F.3d 443, 450 (6th Cir. 2002); *Patrolmen's Benevolent Ass'n* v. *City of New York*, 310 F.3d 43, 51 (2d Cir. 2002); *Vasquez* v. *County of Los Angeles*, 307 F.3d 884, 890-891 (9th Cir. 2002); *Soledad* v. *United States Dep't of Treasury*, 304 F.3d 500, 507 (5th Cir. 2002); *Marrero* v. *Goya of Puerto Rico, Inc.*, 304 F.3d 7, 23 (1st Cir. 2002); *Stutler* v. *Illinois Dep't of Corrs.*, 263 F.3d 698, 702 (7th Cir. 2001); *Hinson* v. *Clinch County, Ga. Bd. of Educ.*, 231 F.3d 821, 829 (11th Cir. 2000); *Brown* v. *Brody*, 199 F.3d 446, 455-456 (D.C. Cir. 1999); *Boone* v. *Goldin*, 178 F.3d 253, 256 (4th Cir. 1999); *Sanchez* v. *Denver Pub. Schs.*, 164 F.3d 527, 532 n.6 (10th Cir. 1998); *Ledergerber* v. *Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997); cf. *DiIenno* v. *Goodwill Indus.*, 162 F.3d 235, 236 (3d Cir. 1998) (holding that "a transfer to a job that an employer knows an employee cannot do may constitute adverse employment action"). The judgment below rests on the application of that settled legal princi-

ple to the facts of this case and does not warrant further review.

a. Petitioner argues (Pet. 9) that the court of appeals "has opened a huge loophole" in Title VII's protections for SES employees subject to discretionary reassignment under 5 U.S.C. 3131 (providing that the head of an agency may "reassign senior executives to best accomplish the agency's mission"). That is incorrect. The court of appeals did not so much as mention Section 3131 in its brief opinion. And, while the district court observed that petitioner's reassignments were consistent with Section 3131, it did not hold that such reassignments *never* can constitute an adverse employment action. To the contrary, the district court's holding rested on its conclusion that "none of the reassignments or curtailments [petitioner] experienced constituted a demotion" either in form or substance because petitioner "retained an upper level management position" with no change in salary or benefits, and because the various other factors of which she complained were insufficient to render her reassignments materially adverse. Pet. App. 9a.

b. Petitioner contends that her reassignments entailed significant negative changes to her employment because the new positions were less visible or involved fewer supervisory responsibilities. Pet. 11-12. The courts below rejected that fact-bound claim, concluding that "[t]he multitude of occurrences and impressions" cited by petitioner were insufficient to render the lateral transfers materially adverse. Pet. App. 9a. Contrary to petitioner's assertions (Pet. 12-13), that judg-

ment does not conflict with decisions from other courts of appeals concerning lateral transfers.[1]

Petitioner relies, for example, on *Durham Life Insurance Co.* v. *Evans*, 166 F.3d 139 (1999), in which the court of appeals for the Third Circuit affirmed the district court's finding of an adverse employment action where the plaintiff was denied "specific, negotiated conditions" of her position and was stripped of many of her confidential files, making it impossible for her to do her work. *Id.* at 153. Here, in contrast, there is no evidence that petitioner's superiors set her up to fail by depriving her of the necessary tools of her position or

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[1] Petitioner cites (Pet. 14) *Wideman* v. *Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998), as evidence of a circuit split on the question whether a purely lateral transfer can constitute an adverse employment action. That is incorrect. The split identified in *Wideman* concerns the independent question whether actions by private employers that do not rise to the level of "ultimate employment decision[s]" are actionable as unlawful retaliation under Title VII, 42 U.S.C. 2000e-3. The Eleventh Circuit's affirmative answer to that question is not "contrary to [the judgment of] the Fourth Circuit here." Pet. 14. Like the Eleventh Circuit, the Fourth Circuit has held that discriminatory changes in the terms, conditions, and benefits of employment that fall short of ultimate employment decisions can give rise to liability under Section 2000e-3. *Von Gunten* v. *Maryland*, 243 F.3d 858, 865 (4th Cir. 2001) ("[C]onduct short of 'ultimate employment decisions' can constitute adverse employment action for purposes of § 2000e-3.") (cited at Pet. App. 2a). The Fourth Circuit has not had cause to delineate the precise bounds of Section 2000e-16—which prohibits discriminatory "personnel actions" by federal employers—but the court has made clear that its proscription extends beyond actions such as "hiring, granting leave, discharging, promoting, and compensating." *Von Gunten*, 243 F.3d at 866 n.3 (quoting *Mattern* v. *Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir.), cert. denied, 522 U.S. 932 (1997)).

transferring her to a job that they knew she could not do. Cf. *DiIenno*, 162 F.3d at 236.

Petitioner's reliance on cases such as *Collins* v. *Illinois*, 830 F.2d 692 (7th Cir. 1987), and *Passantino* v. *Johnson & Johnson Consumer Products, Inc.*, 212 F.3d 493 (9th Cir. 2000), is similarly unavailing. The Seventh Circuit in *Collins* concluded that a purportedly lateral transfer constituted an adverse employment action when the plaintiff was placed in a new department where her supervisors "seemed unsure of what [her] responsibility and authority would be," was "relegated to doing [library] reference work instead of consulting," was moved from a private office to a receptionist's station where she no longer had use of a telephone to "conduct her business responsibilities," "was not allowed to have business cards printed and * * * was no longer listed in professional publications as a library consultant." 830 F.2d at 704. And in *Passantino*, the Ninth Circuit found that the plaintiff suffered an adverse employment action when, *inter alia*, her supervisors transferred accounts out of her portfolio, prevented her from receiving information she needed in order to do her job, and denied her promotions. 212 F.3d at 506. In contrast to those cases, there is no evidence here that petitioner was denied any opportunity for advancement. Nor was she transferred to what was, in effect, a lesser position within the MSHA. Cf., *e.g.*, *Sharp* v. *City of Houston*, 164 F.3d 923, 934 (5th Cir. 1999) (affirming, on plain error review, jury's finding of First Amendment retaliation where plaintiff's transfer "was a constructive demotion"); *Jeffries* v. *Kansas*, 147 F.3d 1220, 1233 (10th Cir. 1998) (finding retaliatory adverse employment action where plaintiff's mentor refused to continue supervising her as a student, therefore "depriv[ing her] of the educational

benefit she contracted to receive with all of the attendant consequences"). Throughout the relevant period, petitioner maintained all the accoutrements of an upper-level management position.

Petitioner also relies on *Fortier* v. *Ameritech Mobile Communications, Inc.*, 161 F.3d 1106 (1998), in which the court of appeals for the Seventh Circuit affirmed the district court's finding that the plaintiff suffered an adverse employment action when his employment was terminated. *Id.* at 1111. The court stated explicitly that the plaintiff did *not* contend that certain prior changes in his responsibilities constituted an adverse employment action. *Id.* at 1112 n.7. Nevertheless, it observed that "adverse job actions can include changes that do not involve quantifiable losses in pay or benefits." *Ibid.* Contrary to petitioner's contention (Pet. 13), that dicta does not "directly conflict[]" with the judgment below. Nothing in the court of appeals' opinion here suggests that a lateral transfer never can constitute an adverse employment action. Indeed, the Fourth Circuit has recognized elsewhere that a seemingly lateral transfer that results in a "decrease[d] * * * level of responsibility, or opportunity for promotion" may rise to the level of an adverse action even "absent any decrease in compensation [or] job title." *Boone*, 178 F.3d at 256-257. Notwithstanding minor variations in wording, the same standard applies in every circuit that has considered the question. This case involves a fact-bound application of that standard. The court of appeals' determination in an unpublished opinion that petitioner's lateral transfer and the surrounding circumstances did not amount to a constructive demotion or other adverse employment action is

correct, and in any event does not merit further review by this Court.[2]

2. Petitioner argues that by affirming the district court's grant of summary judgment to the Department of Labor on her hostile work environment claim, the court of appeals commandeered the jury's role as fact-finder, thereby implicating a circuit split on the question "whether a court, or a jury, should decide initially whether there existed conditions 'severe and pervasive' enough that they created a hostile work environment under Title VII." Pet. 15. Both of those contentions are incorrect. The court of appeals simply held that petitioner failed to demonstrate a genuine issue of material fact concerning harassment or discriminatory motive. Pet. App. 2a. And the circuit split that petitioner purports to identify is illusory.

To establish a case of hostile work environment, petitioner had to show that she was subjected to harassment because of her race and/or sex, and that such harassment was so "severe or pervasive" that it altered the terms and conditions of her employment, creating a work environment that was both objectively hostile and perceived as hostile by petitioner herself. *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 786 (1998); *Harris* v. *Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Meritor Sav.*

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[2] Petitioner also failed to provide any nonconclusory evidence of discriminatory intent, and so failed to satisfy her burden of establishing a prima facie case of discrimination. See *Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 253 (1981) (stating that, to establish a prima facie case, a "plaintiff must prove by a preponderance of the evidence that she [suffered an adverse employment action] under circumstances which give rise to an inference of unlawful discrimination"). Therefore, the judgment below is correct even if petitioner's reassignments were adverse employment actions.

Bank, FSB v. *Vinson*, 477 U.S. 57, 67 (1986). Petitioner argues that the circuits disagree about whether "judges should decide whether the alleged harassing acts created an objectively hostile environment" or whether, instead, "summary judgment can be granted in a harassment case only if *no reasonable jury* could find that the harassment involved created an objectively hostile environment." Pet. 15, 19. There is no such split. The courts of appeals agree that a district court should grant summary judgment (or judgment as a matter of law[3]) on a hostile work environment claim only if no reasonable jury could conclude that discriminatory harassment created a hostile work environment. See *Hatley* v. *Hilton Hotels Corp.*, 308 F.3d 473, 477 (5th Cir. 2002); *Vasquez*, 307 F.3d at 893; *Peters* v. *Renaissance Hotel Operating Co.*, 307 F.3d 535, 552 (7th Cir. 2002); *Beard* v. *Flying J, Inc.*, 266 F.3d 792, 797-798 (8th Cir. 2001); *Rivera-Rodriguez* v. *Frito Lay Snacks Caribbean*, 265 F.3d 15, 24 (1st Cir. 2001); *Abramson* v. *William Paterson Coll.*, 260 F.3d 265, 277 (3d Cir. 2001); *Fitzgerald* v. *Henderson*, 251 F.3d 345, 360 (2d Cir. 2001), cert. denied, 122 S. Ct. 2586 (2002); *Spriggs* v. *Diamond Auto Glass*, 242 F.3d 179, 183 (4th Cir. 2001); *Holbrook* v. *Reno*, 196 F.3d 255, 263 (D.C. Cir. 1999); *Mendoza* v. *Borden, Inc.*, 195 F.3d 1238, 1244 (11th Cir. 1999) (en banc), cert. denied, 529 U.S. 1068 (2000); *Jackson* v. *Quanex Corp.*, 191 F.3d 647, 659 (6th Cir. 1999); *Penry* v. *Federal Home Loan Bank of Topeka*, 155 F.3d 1257, 1261 (10th Cir. 1998), cert. denied, 526 U.S. 1039 (1999).

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[3] This Court has held that the standard for granting summary judgment "mirrors" the standard for a judgment as a matter of law under Federal Rule of Civil Procedure 50(a). *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

The court of appeals' judgment is consistent with that standard. No reasonable jury could find in favor of a party that relies only upon conclusory allegations. See, *e.g.*, *Byrnie* v. *Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 101 (2d Cir. 2001); *Ridgewood Bd. of Educ.* v. *N.E. ex rel. M.E.*, 172 F.3d 238, 252, 253 (3d Cir. 1999). Thus, a party cannot avoid summary judgment on the basis of such allegations alone, but must produce supporting evidence. See *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-323 (1986). Petitioner did not satisfy that requirement here. The court of appeals stated that petitioner "has failed to demonstrate that she was harassed on the basis of her sex or race, or that the harassment was sufficiently severe or pervasive to alter the terms and conditions of her employment." Pet. App. 2a-3a. It then cited *Causey* v. *Balog*, 162 F.3d 795, 801-802 (4th Cir. 1998), which affirmed the district court's grant of summary judgment to a defendant employer on the ground that the Title VII plaintiff's "conclusory statements, without specific evidentiary support, [could] not support an actionable claim for harassment." Pet. App. 3a. The court of appeals' application of that uncontroversial legal principle to the facts of this case does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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