No. 03-310

In the Supreme Court of the United States

JAMES B. TWISDALE, PETITIONER

v.

JOHN W. SNOW, SECRETARY OF THE TREASURY

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Title VII's prohibition of discrimination against an employee "because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]," 42 U.S.C. 2000e-3(a), applies to an employee who participates in a Title VII proceeding on the side of the employer.

2. Whether petitioner was subject to a hostile work environment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is reported at 325 F.3d 950. The opinion of the district court (Pet. Supp. App. A1-A21) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B1) was entered on April 10, 2003. The petition for a writ of certiorari was filed on July 3, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner James B. Twisdale, a white male, is an employee of the Internal Revenue Service (IRS). In his position as Chief, Quality Measurement Branch in Indianapolis, petitioner indirectly supervised Barry Madi-

son, a black female, GS-11 disclosure specialist. In an annual performance review, Madison's immediate supervisor, Mary Lou Graham, rated Madison's performance at a "3" ("fully satisfactory") instead of a "4." Petitioner signed this review. Madison contacted an Equal Employment Opportunity (EEO) counselor to allege that Graham had discriminated against her based on her sex and race. Pet. Supp. App. A2-A5.

On January 27, 1998, petitioner met with the EEO counselor to discuss Madison's claims and negotiate a settlement. Petitioner did not reach a settlement agreement with Madison. District Director James Rogers, on the advice of the Acting Examination Chief, reached an agreement granting Madison all the relief she requested. Pet. Supp. App. A4-A5.

Thereafter, petitioner was asked by his immediate supervisor to initiate an administrative investigation into whether Madison violated time and attendance policies, had an improper social relationship with Rogers, or engaged in other misconduct. Pet. Supp. App. A6. Petitioner concluded that Madison had improperly used her husband's parking space and issued her a counseling memorandum. *Id.* at A8. Madison filed a grievance with the IRS seeking $25,000 and removal of the memorandum from her file. Mary Murphy, the new Chief of the Examination Division, instructed petitioner to remove the memorandum from the file. *Ibid.*

A few months later, petitioner submitted a memorandum to Murphy entitled "Continued Acts of Retaliation." Pet. Supp. App. A14. He alleged that during a meeting IRS employees made "gestures of 'disbelief' after [petitioner] asked a question" and stated that this was part of a "concerted effort by Mr. Rogers, you, and select others as continued acts of retaliation for my

involvement in the EEO process." *Id.* at A14-A15. Throughout this period, petitioner received favorable performance reviews and performance-based bonuses, and he was later promoted to the position of Field Compliance Territory Manager for Small Business/Self Employment, GS-15, a second level management position in Western Virginia. This position gave petitioner increased pay and responsibilities. *Id.* at A16.

2. After exhausting administrative procedures, petitioner filed a complaint in federal district court alleging retaliation and a hostile work environment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Pet. Supp. App. A1. The acts of retaliation complained of by petitioner included the handling of the Madison investigation, internal audits of some of the programs that he administered (and possible reassignment of employees), a delay in giving him "acting supervisor" assignments, and the removal of the Disclosure Office from his supervision. *Id.* at A17; see Pet. App. A2.

The district court held that the "actions of which [petitioner] complains do not amount to an adverse employment action." Pet. Supp. App. A18. The court found that the events petitioner complained of "did not have a cumulative effect on his career that was adverse." *Id.* at A19. For example, the court concluded that "removal of the Disclosure Office does not constitute an adverse employment action in and of itself because supervision of the Disclosure Office was merely one facet of Twisdale's employment." *Ibid.* The court further found that during the relevant time period, petitioner "received the most generous performance awards of his career, served on five national task forces, and was promoted to this current GS-15 level management position." *Ibid.* Thus, the district court granted

summary judgment in favor of the government on petitioner's retaliation claim. *Ibid.*

The district court also rejected petitioner's hostile work environment claim. "The acts of which [petitioner] complains include (1) being subjected to an audit; (2) being threatened with the removal of the Disclosure Office; (3) undercutting his authority to address Madison's performance problems and misconduct; and (4) the denial of acting assignments." Pet. Supp. App. A19-A20. The district court held that "[t]hese acts simply do not rise to the level of an actionable hostile work environment claim." *Id.* at A20. The court also held that petitioner's "claim is further flawed by his failure to link these acts to his race," and that "the record is devoid of any facts suggesting that any of the specific conduct identified by [petitioner] is because of his race." *Ibid.*

3. The court of appeals affirmed. Pet. App. A1-A6. On the retaliation claim, the court concluded that petitioner's participation in the EEO counseling session did not constitute "protected activity," because he participated on the side of the employer. The court characterized the legal question as "novel" and as "a pure issue of law [that] we can with propriety decide * * * despite its not having been briefed." *Id.* at A3. The court acknowledged that, "[r]ead literally, the provision protects even an employee who like [petitioner] participates in an investigation on the side of the employer rather than on the side of the employee who made the charge of discrimination." *Ibid.* But, the court reasoned, the retaliation provision is "for the protection of the discriminated against, and not their opponents." *Id.* at A4-A5. Thus, although petitioner's claim "comes within the literal terms of section 2000e-3(a),"

the court concluded that this "merely show[s] the limitations of literalism as a mode of interpretation." *Ibid.*

As to the hostile work environment claim, the court found that "the performance bonuses, the task force appointments, and the promotion to a more responsible and better-paying job go quite far enough to cancel, in any objective assessment, any unpleasantness that [petitioner] might have experienced." Pet. App. A6. "In any event," the court continued, "that unpleasantness, even if not balanced by rewards both tangible and intangible, falls short of the level of severity required to trigger judicial intervention under Title VII." *Ibid.* That is so, the court held, because Title VII "does not protect the hypersensitive employee who is not deliberately targeted by the employer from the irritations endemic to the employment relation." *Ibid.*

ARGUMENT

Petitioner contends that there is a conflict in the circuits warranting further review on the question whether an individual who supervises an employee accused of discrimination and discusses the accusations with an EEO official engages in activity protected from retaliation under Title VII. Although the Seventh Circuit's holding that such activity is not protected by Title VII is inconsistent with the text of the statute, established Equal Employment Opportunity Commission (EEOC) guidance, and the decisions of other courts of appeals, further review of the issue is not warranted in this case for two reasons. First, resolution of the question by this Court would be premature. The Seventh Circuit decided the issue without the benefit of briefing by the parties, and it mistakenly believed that it was deciding a "novel" issue, rather than creating a conflict with decisions of other courts of appeals and

disregarding a settled interpretation of Title VII by the EEOC. Pet. App. A3. Accordingly, there is reason to believe that the Seventh Circuit may revisit the issue once it recognizes the mistaken assumptions on which it based its decision. Second, this case does not present an appropriate vehicle to resolve the question in any event because the answer to the question would not affect the outcome of this case. As the district court correctly held, petitioner failed to establish a retaliation claim even assuming his participation in the EEOC investigation was protected by Title VII.

Petitioner also argues that the court of appeals incorrectly analyzed his hostile work environment claim. The fact-bound decision of the court of appeals rejecting petitioner's hostile work environment claim is correct and does not conflict with any decision of this Court or of any court of appeals. Accordingly, further review of that question is also unwarranted.

1. a. The participation clause of Title VII's prohibition on retaliation provides that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees * * * because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. 2000e-3(a). As several courts of appeals have noted, that prohibition is "straight-forward and expansively written." *Merritt* v. *Dillard Paper Co.*, 120 F.3d 1181, 1186 (11th Cir. 1997); accord *Deravin* v. *Kerik*, 335 F.3d 195, 203 (2d Cir. 2003) ("the explicit language of § 704(a)'s participation clause is expansive and seemingly contains no limitations"); *Glover* v. *South Carolina Law Enforcement Div.*, 170 F.3d 411, 414 (4th Cir. 1999) ("A straightforward reading of the statute's unrestrictive language leads inexorably to the conclusion that all testimony in

a Title VII proceeding is protected against punitive employer action."). The term "testified" in Section 2000e-3(a) "is not preceded or followed by any restrictive language that limits its reach." *Merritt*, 120 F.3d at 1186. So too, the phrase "participated in any manner" is without limitation and appears deliberately designed to be inclusive. See *ibid.*; *Glover*, 170 F.3d at 414. Cf. *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'").

There are sound policy reasons why Congress enacted a broad participation clause. To begin with, Congress was concerned about protecting processes designed to identify and remedy meritorious discrimination claims. Providing protection to all who participate in the Title VII investigation serves to protect individuals who help separate the meritorious from the non-meritorious claims. Moreover, a "Title VII claimant can be assisted as much or more by the testimony of a hostile co-employee from whom the truth must be wrenched as by an employee who earnestly desires to help (but may not be in the position to do so)." *Merritt*, 120 F.3d at 1186-1187. "Congress could well have decided that encouraging truthful testimony by even [discriminators] themselves was important enough to vindication of Title VII claims to justify whatever deleterious effect it might have on the vigor with which employers discipline guilty employees." *Id.* at 1188-1189. See *Deravin*, 335 F.3d at 204 ("it may well advance the remedial purpose of Title VII to shield all participation, including participation by an employee accused of illegal discrimination, to ensure the overall integrity of the administrative process and encourage truthful testimony").

None of this means that participation in the Title VII process will immunize a discriminator for the underlying discriminatory conduct. Although an employer may not discipline a discriminating individual based on the individual's participation in a Title VII proceeding, the employer remains free to discipline the discriminating individual for his discrimination. *Merritt*, 120 F.3d at 1188. See *Deravin*, 335 F.3d at 205 ("We emphasize that Title VII only protects the specific act of *participating* in administrative proceedings—not the *underlying conduct* which is being investigated.").

For the above reasons, the EEOC has endorsed the Eleventh Circuit's construction of Title VII's participation clause in *Merritt* v. *Dillard Paper Co.*, *supra*, as encompassing *all* testimony in connection with a Title VII charge, and it has explained that the "participation clause protects those who testify in an employment discrimination case about their own discriminatory conduct, even if such testimony is involuntary." EEOC Compliance Manual § 8-II(C)(1) & n. 24 (1998).

b. In this case, petitioner supervised an employee accused by another employee of discrimination and discussed the accusations with an EEO official. Title VII "participation" begins once the EEO is contacted. See EEOC Compliance Manual, *supra*, § 8-II(C)(1) n.25 (citing *Hashimoto* v. *Dalton*, 118 F.3d 671, 680 (9th Cir. 1997), cert. denied, 523 U.S. 1122 (1998)). Because pettioner discussed with an EEO official an employee's discrimination charges, petitioner "has * * * participated in any manner in an investigation" under Title VII. Accord *Merritt*, 120 F.3d at 1186 (involuntary deposition testimony in Title VII suit is protected activity); *Deravin*, 335 F.3d at 204 ("defending oneself against charges of discrimination" in EEO proceedings is protected activity).

The court of appeals held that Title VII's participation clause does not protect petitioner because he participated "on the side of the employer." Pet. App. A3. It acknowledged that, "[r]ead literally, the provision protects even an employee who like [petitioner] participates in an investigation on the side of the employer rather than on the side of the employee who made the charge of discrimination." *Ibid.*; see *id.* at A4 ("[Petitioner] did participate in an investigation of a discrimination charge, and so comes within the literal terms of section 2000e-3(a)."). But it rejected a "literal" reading of the statute because it believed that such a reading would not "promote the policy of Title VII," which it narrowly defined as "the protection of the discriminated against, and not their opponents." *Id.* at A5.

As the Fourth Circuit explained in *Glover* v. *South Carolina Law Enforcement Div.*, *supra*, however, Title VII's anti-retaliation protections "ensure not only that employers cannot intimidate their employees into foregoing the Title VII grievance process, but also that investigators will have access to the unchilled testimony of witnesses." 170 F.3d at 414. The broadly-worded participation clause reflects a judgment that ensuring that all participants in the Title VII process are unchilled will best protect "the discriminated against" in the long run. The Seventh Circuit's reasoning in this case improperly assumes that Madison (and the claimant in the run of cases) was, in fact, discriminated against. By "opposing" Madison's claims, petitioner was not necessarily opposing an individual who was the victim of unlawful discrimination. Instead, petitioner may have assisted the EEO Official in determining that her claim lacked merit, and thereby served Title VII's broader purposes. Moreover, the court failed to consider that, as explained above, protection of

the discriminated against may require protection of their opponents. See *Merritt*, 120 F.3d at 1186 ("Title VII claimant can be assisted * * * by the testimony of a hostile co-employee."); *Deravin*, 335 F.3d at 204 ("participation by an employee accused of illegal discrimination" necessary to "encourage truthful testimony").[1]

In addition, many cases will involve individuals who cannot be readily classified as one who was "discriminated against" or as "opponent." An employee who advances a truthful account that may absolve the employer of responsibility, but refuses to follow a supervisor's pretextual account lies squarely within the retaliation provision's concern, but is not readily classified under the Seventh Circuit's opinion. Likewise, the Fourth Circuit in *Glover* confronted an employee who was retaliated against by her then-current employer for testimony in an employment dispute involving a previous employer. See 170 F.3d at 412-413. The variety of retaliation scenarios underscores the need for an

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[1] The court of appeals below was concerned that if, "hypothetically," petitioner "had opposed Barry Madison's charge of race and sex discrimination because he is a racist and a sexist," then his employer should be permitted to fire him "for having opposed her * * * charge." Pet. App. A3. But, as the Eleventh Circuit explained in *Merritt*, *supra*, "Congress could well have decided that encouraging truthful testimony by even [discriminators] themselves was important enough to vindication of Title VII claims to justify whatever deleterious effect it might have on the vigor with which employers discipline guilty employees." 120 F.3d at 1188; accord *Deravin*, 335 F.3d at 204-205 (finding *Merritt*'s reasoning and the EEOC's guidance endorsing it "persuasive," and noting that "it may well advance the remedial purpose of Title VII to shield all participation, including participation by an employee accused of illegal discrimination, to ensure the overall integrity of the administrative process and encourage truthful testimony").

inclusive protection and highlights the limits of the Seventh Circuit's textually unmoored restriction of protection to those who claim discrimination.

c. The court of appeals may have reached its narrow construction of Title VII's participation clause because it did not have the benefit of briefing on the issue. The court indicated that it thought the issue was "novel," but that because it was a purely legal question that was "ventilated" at oral argument, the court could "with propriety decide it despite its not having been briefed." Pet. App. A3.[2] Moreover, the court of appeals emphasized that it could find no court decision or other authority addressing the issue:

> We cannot find any hints in the *case law*, the legislative history, *interpretations by government agencies*, or scholarly commentary of any purpose of protecting employees whose resistance to charges of discrimination made by their coworkers provokes the employer's ire. Until this case, so far as we can determine, everyone concerned in the administration of Title VII and cognate federal antidiscrimination statutes had assumed that the retaliation provision was for the protection of the discriminated against, and not their opponents.

Id. at A4 (emphasis added). But, as demonstrated above, it is simply wrong to say that there is no case

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[2] In the district court, the government argued that petitioner's conduct was not within Title VII's anti-retaliation provision. In the court of appeals, however, the government elected not to brief that issue because it was not the basis of the district court's favorable decision. When asked about the issue at oral argument in the court of appeals, the government stated only that the issue was raised in the district court. The government did not seek affirmance on that basis.

law or agency interpretations explaining why it is necessary to protect employees who resist charges of discrimination. Had the parties briefed the issue or otherwise brought the relevant authorities to the court's attention, the court would have learned of the Eleventh Circuit's oft-cited *Merritt* decision, as well as the EEOC's endorsement of that decision in its Compliance Manual. The court's opinion emphasizing the absence of such authority suggests that it might have reached a different result had the court known of the applicable case law and agency views.

Moreover, the decision below was reached before the Second Circuit's *Deravin* decision, which found the "reasoning and analysis of *Merritt* persuasive" and noted the EEOC's endorsement of that reasoning in its Compliance Manual. 335 F.3d at 204. In these circumstances, where a single court of appeals believes it is deciding a "novel" issue but where in fact applicable case law and agency interpretation exists, further review by this Court may be premature. The Seventh Circuit may itself revisit the issue once it recognizes the mistaken assumptions upon which its decision rests and that its decision in this case has unwittingly created a conflict not only with the Eleventh Circuit's decision in *Merritt*, but now with the Second Circuit's decision in *Deravin* as well. See 7th Cir. R. 40(e) (permitting a panel of the court to overrule a prior panel decision without rehearing en banc if a majority of the active judges agree). Should the circuit split remain or deepen, the Court may review the issue at that time.

d. In any event, as the district court correctly recognized, petitioner's retaliation claim fails even assuming his discussions with an EEO official are protected by Title VII. A Title VII plaintiff makes out a prima facie case of retaliation by showing that he engaged in a

protected activity, that he suffered an adverse employment action (*i.e.*, a change to compensation, terms, conditions, or privileges) and that the two were causally related. See 42 U.S.C. 2000e-3(a). The acts of retaliation complained of by petitioner include the handling of the Madison investigation, internal audits (and possible reassignment of employees) of some of the programs that he administered, a delay in giving him "acting supervisor" assignments, and the removal from his purview of the Disclosure Office, which had three employees and is responsible for protecting taxpayer's privacy. See Pet. Supp. App. A17; Pet. App. A2. The district court, however, correctly held that the "actions of which [petitioner] complains do not amount to an adverse employment action." Pet. Supp. App. A18. Petitioner's brief to this Court makes no effort to dispute the district court's conclusions.[3]

2. Petitioner's claim that "the acts of harassment caused against him substantially exceed the High Court's standard for a hostile work environment," Pet. 20, also is undeserving of this Court's review. Title VII prohibits discrimination on the basis of race or sex "with respect to [the employee's] compensation, terms, conditions, or privileges of employment." 42 U.S.C. 2000e-2(a)(1). Harassment so "severe or pervasive" as "to alter the conditions of [the victim's] employment

[3] To the extent the absence of any adverse employment action to support a retaliation claim does not lead the Court to deny the petition, the proper course would be to grant, vacate, and remand the decision below in light of this brief and the appellate precedents and EEOC guidance that the court below failed to acknowledge. The United States would not object to that course. However, because the court below did not address or acknowledge those authorities, plenary review by this court at this juncture would be premature.

and create an abusive working environment" violates Title VII. *Meritor Sav. Bank* v. *Vinson*, 477 U.S. 57, 67 (1986) (citation omitted); see *Harris* v. *Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (relevant factors include: "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"). As both the district court and court of appeals recognized, petitioner's complaints are garden-variety personnel gripes and do not amount to a change in the "terms" or "conditions" of employment. See Pet. App. A6 (citing *Pryor* v. *Seyfarth, Shaw, Fairweather & Geraldson*, 212 F.3d 976, 978 (7th Cir. 2000) (collecting cases), and *Andrews* v. *City of Philadelphia*, 895 F.2d 1469, 1483 (3d Cir. 1990)); see also *Oncale* v. *Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 81-82 (1998).

Petitioner also suggests that the court of appeals placed too much weight on his bonuses and promotion. Pet. 16, 26. But, as the court of appeals explained, any "unpleasantness, even if not balanced by rewards both tangible and intangible, falls short of the level of severity required to trigger judicial intervention under Title VII." Pet. App. A6. In any event, such fact-bound determinations do not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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