

No. 05-1267

In the Supreme Court of the United States

MICHAEL A. THOMAS, PETITIONER

v.

JOHN E. POTTER, POSTMASTER GENERAL

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

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether transferring an employee from the day shift to the night shift constitutes an adverse employment action sufficient to establish actionable retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

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The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the *Federal Reporter* but is *reprinted* in 145 Fed. Appx. 182. The decision of the district court (Pet. App. 5a-7a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 2005. A petition for rehearing was denied on October 24, 2005 (Pet. App. 8a-9a). The petition for a writ of certiorari was filed on January 21, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1988, petitioner Michael Thomas began working for the United States Postal Service as a custodian

in the maintenance craft department. Pet. App. 2a. Thereafter, petitioner filed an EEO complaint based on his failure to receive a promotion or transfer. *Ibid.* In 1994, petitioner and the Postal Service settled the complaint, agreeing that petitioner would be promoted to a maintenance support clerk. *Ibid.* Between 1988 and 1997, petitioner worked on the day shift. *Ibid.* In 1997, petitioner's department was relocated to a new facility, and petitioner was transferred to the night shift. *Ibid.* Five women and four men were allowed to remain on the day shift. *Ibid.* Those co-workers had less seniority in the maintenance craft department, but more seniority as maintenance support clerks. *Ibid.*

2. Petitioner filed suit under Title VII alleging that the Postal Service discriminated against him on the basis of gender by transferring him to the night shift while allowing female employees with less seniority to remain on the day shift. Pet. App. 2a. Petitioner also alleged that the Postal Service transferred him to the night shift as retaliation for his having filed the EEO complaint that resulted in the 1994 settlement. *Id.* at 2a-3a.

The district court granted summary judgment in favor of the government. Pet. App. 6a-8a. The court held that in order to establish a prima facie case of discrimination, a plaintiff "must show that he [s]uffered an adverse employment action." *Id.* at 6a. The court further held that "a decision to change an employee's work shift, without a change in the employee's title, pay or responsibilities, does not rise to the level of an adverse employment action." *Id.* at 7a.

3. The court of appeals affirmed. Pet. App. 1a-4a. The court rejected petitioner's contention "that his shift change was an adverse employment action because it caused him to suffer severe depression that necessitated

medical treatment and counseling.” *Id.* at 3a. The court “assume[d] for the purposes of summary judgment that [petitioner] actually suffered emotional distress from his shift change.” *Ibid.* The court concluded, however, that “Title VII does not provide a remedy for actions like those here that do not affect an employee’s terms of employment.” *Id.* at 3a-4a.

DISCUSSION

Petitioner contends (Pet. 4-5) that review is warranted to clarify the showing that an employee must make to demonstrate an adverse employment action for purposes of a Title VII retaliation claim. In *Burlington Northern & Santa Fe Railway v. White*, No. 05-259 (argued April 17, 2006), the Court granted a writ of certiorari to resolve that issue.

This case involves Title VII’s application to a federal employer, rather than a private employer, as in *Burlington Northern*. Because of differences in the language between Title VII’s federal employer and private employer provisions, compare 42 U.S.C. 2000e-16(a) (federal employer), with 42 U.S.C. 2000e-3(a) (private employer), the decision in *Burlington Northern* will not necessarily affect the proper disposition of the petition in this case. See Gov’t Amicus Br. at 19 n.5, *Burlington Northern, supra* (No. 05-259). Nonetheless, because of the overlap in the basic issues presented, it would be appropriate to hold the present petition pending the Court’s decision in *Burlington Northern*.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court’s decision in *Burlington Northern & Santa Fe Railway v. White*, No. 05-259, and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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MAY 2006

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