No. 05-1456

In the Supreme Court of the United States

IRA MALMED, PETITIONER

v.

JOHN E. POTTER, POSTMASTER GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below correctly awarded summary judgment against petitioner on his claims that he was subjected to actionable discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1) is not published in the *Federal Reporter* but is *reprinted in* 167 Fed. Appx. 994. The opinion of the district court (Pet. App. 2-24) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 2006. The petition for a writ of certiorari was filed on May 12, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Postal Service hired petitioner as a truck driver at a postal facility in Houston, Texas. Pet. App. 2. In 1998, a co-worker, Kenneth Whittaker, allegedly called petitioner a "Jew" and "assaulted" him by grabbing a

piece of cake from his hand at an employee-sponsored dinner. *Id.* at 3. Petitioner reported those incidents to Chester Cassel, the transportation Manager. *Ibid.* After an investigation, Cassell determined that petitioner and Malmed were each partially to blame for the cake incident, and that petitioner's name-calling claim could not be substantiated. *Id.* at 3-4. Cassel did not discipline either employee. *Id.* at 4. When petitioner requested a transfer, Cassel referred him to the human resources department. *Ibid.* Cassel also told Whittaker to stay away from petitioner. *Ibid.*

On September 8, 1998, petitioner filed an Equal Employment Opportunity (EEO) complaint with the Postal Service, alleging that Cassel's handling of the cake incident and his failure to discipline Whittaker were based on race and religion. Pet. App. 4. The Postal Service dismissed the complaint for failure to state a claim, and the Postal Service's Office of Federal Operations affirmed that dismissal. *Ibid.*

In January 1999, petitioner filed another EEO complaint alleging that in retaliation for his earlier complaint, Whittaker was promoted to temporary supervisor, petitioner's plant manager refused to speak with him, and petitioner was denied a transfer. Pet. App. 5, 14. The first two actions were dismissed for failure to state a claim, and the transfer claim was denied on the merits. *Id.* at 14. The EEOC affirmed the Postal Service's decisions, and petitioner's requests for reconsideration were denied. *Ibid.*

On August 18, 1999, Charles Wiseman, a transportation supervisor, asked petitioner to make an additional run in his truck. Pet. App. 6. Petitioner refused to do so, and asserted that he should not be driving because the Postal Service had denied his EEO complaint and he

had not slept. *Ibid.* Wiseman expressed concern about petitioner's behavior to Cassel, and questioned whether petitioner was fit for duty. *Ibid.* Supervisor Rudolfo Perez expressed similar concerns to Cassel. *Ibid.*

On August 29, 1999, Kenneth Brown, another supervisor, asked petitioner to load mail onto the delivery dock. Pet. App. 6. Petitioner objected, stating that it was not his job, but petitioner claims that he did not refuse to load mail onto the dock. *Ibid.* Petitioner told Brown that he was going to file an EEO complaint against him and against Cassel for promoting Brown. *Id.* at 6-7. According to Brown, petitioner was screaming loudly. *Id.* at 7. Brown reported the incident to Cassel, and called a Postal Service manager and the security officer on duty. *Ibid.* According to Cassel, petitioner's tone was "very aggressive," and petitioner was "yelling at the supervisor" and "saying that he couldn't drive." *Ibid.* The manager calmed petitioner down, and petitioner loaded the truck. *Ibid.* Petitioner told Cassel that he was under stress because of the denial of his EEO complaint, that he had not slept, and that he was not fit to drive his truck. *Ibid.*

Cassel scheduled Malmed for a fitness-for-duty exam, and removed him from his driving duties pending the exam. Pet. App. 7-8. Petitioner's pay, hours, and benefits remained the same. *Id.* at 8. On September 14, 1999, Dr. Gail Blakely, a Postal Service contract physician, performed the exam. *Ibid.* Dr. Blakely found that petitioner was qualified only for non-driving positions. *Ibid.* Dr. Blakely also referred petitioner for a psychiatric evaluation, which the Postal Service originally scheduled for September 20, 1999, a Jewish holiday. *Id.* at 8-9. Petitioner complained, and the Postal Service changed the evaluation to September 22, 1999. *Id.* at 9.

Petitioner also complained that he asked for the schedule change to accommodate his religion, but the form used to reschedule the examination indicated that the change was for "personal convenience." *Ibid.* Although petitioner noted that employees were not entitled to premium pay when a schedule change was for personal convenience, he did not allege that he was entitled to such a premium. *Ibid.*

After examining petitioner, Dr. Theodore Pearlman, a Postal Service contract psychiatrist, stated that petitioner should not drive until he could control his insomnia and impaired concentration. Pet. App. 9. Dr. Pearlman also concluded that before petitioner could be considered fit for duty, he should receive psychiatric treatment and medication. *Id.* at 9-10. On September 30, 1999, the Postal Service placed petitioner on sick leave until the end of October 1999. *Id.* at 10.

On October 25, 1999, Dr. Donald Hauser, a private psychiatrist, examined petitioner, prescribed medication, and expressed his opinion that petitioner could return to work. Pet. App. 10. The Postal Service requested that Dr. Hauser fill out a risk evaluation form, but Dr. Hauser simply reiterated his opinion that petitioner was capable of returning to his regular duties, and stated that the medication he prescribed would not affect petitioner's driving. *Ibid.*

Petitioner returned to work on November 1, 1999. Pet. App. 10. His access badge, which had been deactivated, was not reactivated for two weeks. *Ibid.* Although the Postal Service cleared petitioner for regular work duty, it did not immediately restore his commercial driving duties. *Ibid.* Cassel continued to be concerned about petitioner's ability to drive because of the side effects of his medication, and because Dr. Hauser had

not provided the clarification that the Postal Service sought. *Ibid.* Because the private psychiatrist and the Postal Service's psychiatrist disagreed on petitioner's fitness to drive, the Postal Service sent petitioner a letter requesting that he choose one of five listed psychiatrists to examine him. *Id.* at 11. Although petitioner alleges that he was told he would be sent home if he could not find work to do, he was not sent home that day or any other day before he resumed his driving duties. *Ibid.*

Petitioner filed EEO complaints in November 1999 and in January 2000, alleging that the Postal Service discriminated and retaliated against him through a series of actions. Pet. App. 14. Petitioner identified the following actions as discriminatory or retaliatory: (1) calling security when he refused to load mail on the delivery dock, (2) requiring him to sign a schedule change in order to avoid having his fitness-for-duty exam on a Jewish holiday, (3) failing to activate his badge immediately when he returned to work, (4) keeping him on non-driving status when he returned to work, (5) telling him that he would be sent home from work if he could not find anything to do, and (6) requiring him to undergo another fitness-for-duty exam prior to restoring driving duties. *Id.* at 14-15.

On January 12, 2000, Cassel, petitioner, a union representative, and a labor relations specialist agreed that petitioner would submit to a fitness-for-duty exam before he could resume his driving duties. Pet. App. 11. On January 20, 2000, the doctor who conducted the exam notified the Postal Service that he had found that petitioner was fit for duty. *Ibid.* Accordingly, the Postal Service restored petitioner's driving duties. *Ibid.*

2. On January 21, 2003, petitioner filed suit in federal district court. Pet. App. 12. The Postal Service moved to dismiss as time-barred petitioner's claims relating to his first two EEO complaints *Id.* at 12-14. The Postal Service moved for summary judgment on petitioner's remaining claims. *Id.* at 12. The district court granted both the Postal Service's motion to dismiss and its motion for summary judgment. *Id.* at 12-25.

The court dismissed the claims in petitioner's first two EEO complaints as time-barred because petitioner filed suit more than two years after the administrative dismissal of such claims became final. Pet. App. 15. The court further ruled that the Postal Service was entitled to summary judgment on petitioner's remaining claims. The court determined that most of the challenged actions were not adverse employment actions because they had no effect on his employment conditions or employment status. *Id.* at 19-20. In particular, the court held that the delay in reactivating petitioner's badge, the warning that he would be sent home if he did not find work, and the notation that petitioner's medical appointment was rescheduled for petitioner's "personal convenience" fell into that category. *Id.* at 20.

The court assumed without deciding that petitioner's suspension from driving duties together with the requirement that he undergo an additional fitness-for-duty exam prior to resuming such duties constituted an adverse employment action. Pet. App. 20-21. The court nonetheless granted summary judgment on that issue, because the evidence established that the Postal Service had a legitimate nondiscriminatory reason for its actions—that petitioner admitted he was not fit to drive and that the Postal Service's psychiatrist had determined that petitioner was unfit to drive. *Id.* at 21-22. In

addition, the court ruled that petitioner failed to "allege or present evidence that he was treated less favorably than other nonwhite, nonJewish employees." *Id.* at 22

3. In an unpublished, per curiam opinion, the court of appeals affirmed. Pet. App. 1.

ARGUMENT

Petitioner contends (Pet. 6-14) that review is warranted because the Fifth Circuit has adopted an ultimate employment decision standard that conflicts with the standard adopted by other circuits for determining whether conduct violates Title VII's discrimination and anti-retaliation prohibitions. That contention should be rejected; the court of appeals' unpublished summary affirmance does not merit further review in this Court.

The court of appeals' unpublished decision in this case did not turn on the application of the ultimate employment decision test. Rather, the court of appeals merely affirmed without any explanation a district court judgment in favor of the Postal Service on petitioner's claims. The district court did refer to the ultimate employment decision standard. See Pet. App. 19. But the district court did not dispose of this case based on that standard.

The district court dismissed some of petitioner's claims on grounds that do not implicate the standard for determining what constitutes an adverse employment action. The district court dismissed petitioner's claims stemming from his first two EEO complaints on statute of limitations grounds. Pet. App. 15. Among the claims dismissed on statute of limitations grounds was petitioner's claim that the Postal Service retaliated against him by denying his transfer request. The question whether the denial of such a request constitutes an ad-

verse employment action is therefore not presented here.

The district court dismissed petitioner's claims relating to the temporary suspension of his driving duties and the requirement of an additional fitness-for-duty exam because the record established that the Postal Service took those actions for legitimate, nondiscriminatory reasons, not because they did not constitute adverse employment actions. Pet. App. 21-22. This case therefore does not present the question whether those actions are sufficiently adverse to constitute actionable discrimination or retaliation under Title VII.

That leaves only petitioner's claims relating to the threat to have security remove him from the building, the delay in reactivating his badge, the warning that he would be sent home early from work, and the notation that his medical appointment was rescheduled for petitioner's personal convenience. In analyzing those claims, the district court referred to the ultimate employment decision standard, but it did not rest its analysis on that standard. Rather, it concluded that those actions did not constitute adverse actions for Title VII purposes because they had no effect on petitioner's "employment conditions or status." Pet. App. 19-20.

Insofar as the court disposed of petitioner's outright *discrimination* (as opposed to retaliation) claims on that basis, the district court's action was entirely appropriate. To establish actionable discrimination, a plaintiff must demonstrate a change in compensation, or in the terms, conditions, or privileges of employment. 42 U.S.C. 2000e-2(a)(1). A plaintiff who fails to demonstrate an effect on "employment conditions or status" fails to make that showing. No circuit has taken a contrary view on that threshold issue.

In *Burlington Northern & Sante Fe Railway* v. *White*, 126 S. Ct. 2405, 2412-2413 (2006), the Court held that Title VII's anti-retaliation prohibition is not limited to employment actions that affect the terms and conditions of employment. Rather, the anti-retaliation prohibition extends to any action that a "reasonable employee would have found" to be "materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 2415 (internal quotation marks and citation omitted).

This case, however, need not be vacated and remanded for reconsideration in light of *Burlington Northern*. Petitioner has not argued that the decisions below improperly limited consideration of his *retaliation* claim to employment actions that affect the terms or conditions of employment. Rather, petitioner's claim is that the actions about which he complained all involved employment actions that affected the terms and conditions of his employment. See Pet. 12-13. The courts below correctly rejected that claim, and nothing in *Burlington Northern* calls that fact-bound determination into question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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