Legal Update Article

Circuit Panel Invites Full Court to Reconsider Title VII 'Ultimate Employment Decisions' Rule

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Employment Litigation

Holding a gender-based scheduling policy giving only male detention service officers full weekends off was not unlawful discrimination under Title VII of the Civil Rights Act, a three-judge panel of the U.S. Court of Appeals for the Fifth Circuit has invited the full circuit court to revisit its standard for proving workplace discrimination. ***Hamilton et al. v. Dallas County***, No. 21-10133 (5th Cir. Aug. 3, 2022).

The panel said it was "bound by this circuit's precedent" to dismiss the case. However, it reasoned, the scheduling policy "[s]urely … constitutes discrimination with respect to the terms or conditions of [the female officers'] employment," even though it was not an "ultimate employment decision." Therefore, the panel deemed the case the "ideal vehicle" for rehearing by the full Fifth Circuit to revisit its long-standing Title VII precedent.

The Fifth Circuit has jurisdiction over Louisiana, Mississippi, and Texas.

Circuit Precedent

As one of its fundamental precepts, Title VII prohibits disparate treatment of employees by statutorily defined employers, based upon certain employee protected traits. Section 703(a)(1) of Title VII makes it unlawful for an employer:

> to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to [their] compensation, *terms, conditions, or privileges of employment*, because of such individual's race, color, religion, sex, or national origin;

42 U.S.C. § 2000e-2(a)(1) (emphasis added).

Setting aside hostile environment claims (which have their own standard), a Title VII plaintiff alleging discrimination under a disparate treatment theory must demonstrate that they "suffered some adverse employment action by the employer." *McCoy v. City of Shreveport*, 492 F.3d 551, 556 (5th Cir. 2007). The Fifth Circuit also has held that "[a]dverse employment actions include only *ultimate employment decisions* such as hiring, granting leave, discharging, promoting, or compensating." *Welsh v. Fort Bend Independent School District*, 941 F.3d 818, 824 (5th Cir. 2019),*cert. denied*, 141 S. Ct. 160 (2020) (emphasis added).

While some circuits have interpreted Section 703(a)(1)'s reference to "terms, conditions, or privileges of employment" similarly, others have made clear that conduct short of some ultimate employment decision can violate Title VII. There continues to be varying standards among the circuits on the issue.

In the Fifth Circuit, a discharge, denial of promotion, or pay reduction, for example, would meet the ultimate-employment-decision threshold to state a claim. Some trait-

based differential treatment (for example, in shift scheduling), however, would not qualify.

The Case

In *Hamilton*, the court considered discrimination claims brought by nine female detention service officers working at the Dallas County Jail.

The officers challenged a gender-based scheduling policy whereby only male officers were given full weekends off, but female officers were allowed two weekdays off or one weekday and one weekend day off. The policy was purportedly safety related (the opinion does not elaborate on the claimed rationale).

Decision Bound by Precedent

The Fifth Circuit panel affirmed the District Court's dismissal on the pleadings, explaining it was "bound by this circuit's precedent" and "our rule of orderliness" precluding the overruling of a prior panel short of an intervening change in the law "such as a statutory amendment or a decision from either the Supreme Court or our en banc court." Citing, *Thompson v. Dall. City Att'y's Off.*, 913 F.3d 464, 467 (5th Cir. 2019).

"Proverbial Circuit Split"

The panel presented a brief survey of the law in the Fifth Circuit and other circuits, concluding, "[O]ur circuit's deviation from the text of Title VII leaves us with the proverbial circuit split." The panel noted, "Unshackled by our precedent … Plaintiffs-Appellants would still have to satisfy their attendant burdens for a Title VII claim [but] … would remain in court with the opportunity to do so."

The opinion asserted that the allegations presented and precedential authority "make this case an ideal vehicle for the en banc court to reexamine our ultimate-employment-decision requirement and harmonize our case law with our sister circuits' to achieve fidelity to the text of Title VII."

The issue was previously raised, but not resolved, in*Peterson v. Linear Controls*, 757 Fed. Appx. 370 (5th Cir. 2019), *petition for cert. dismissed*(2020). An oil platform worker alleged racially disparate treatment in the allowance of water breaks. Among other grounds for dismissal, the Fifth Circuit held that the ultimate-employment-decision requirement had not been met. The worker sought review by the U.S. Supreme Court, claiming "an intractable split" in the circuits over which employment practices can form the basis of a Section 703(a) claim. The Supreme Court requested briefing and invited the Solicitor General to file a brief expressing the views of the United States on the issue. However, before the Court ruled on the petition, the parties apparently resolved the case and requested dismissal.

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To be sure, the Fifth Circuit's ultimate-employment-decision standard lends certainty to the disposition of Title VII cases. But, at least in the view of some Fifth Circuit judges, and perhaps an en banc majority, application of the standard improperly results in dismissal of otherwise offensive and actionable conduct under the text of Title VII.

Please contact a Jackson Lewis attorney with any questions about this case.