

# Full Fifth Circuit to Rehear Case Challenging Its ‘Ultimate Employment Decisions’ Rule

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The full U.S. Court of Appeals for the Fifth Circuit will rehear a case to decide whether its standard for proving workplace discrimination under Title VII of the Civil Rights Act improperly screens out legitimate discrimination Title VII complaints.

### The Case

In *Hamilton et al. v. Dallas County*, No. 21-10133 (5th Cir. Aug. 3, 2022), a Fifth Circuit panel held that a gender-based scheduling policy giving only male detention officers full weekends off was not *unlawful* discrimination under [Circuit precedent](#). The scheduling policy, which was purportedly based on safety concerns, allowed female officers equal time off, but only during weekdays or by combination of one weekday and one weekend day.

The three-judge panel upheld the trial court’s dismissal of the officers’ complaint, finding the scheduling policy did not amount to an “ultimate employment decision.” Thus, it explained, the policy did not fall within the types of adverse employment actions prohibited by Title VII under the Fifth Circuit’s well-established interpretive rule. The rule limits disparate treatment claims to 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). Further, the rule does not govern other distinct categories of discrimination claims falling under the rubric of “disparate impact” or “hostile environment.”

While the three-judge panel noted that it was constrained by prior Circuit decisions, the factual circumstances and legal issues presented prompted the panel to add that the case was the “ideal vehicle” for the full Court to reconsider its rule.

At issue in the case is whether the Fifth Circuit’s long-standing test for what constitutes actionable disparate treatment runs contrary to the text of Title VII — which prohibits discrimination in the “terms or conditions” of employment — and, in doing so, improperly screens out legitimate discrimination Title VII complaints.

Arguing before the three-judge panel, Dallas County contended that the rule comports with the language of Title VII and prior governing judicial interpretations of the statute. It advocated that the types of actionable claims under a Title VII disparate treatment theory are *necessarily* limited to those causing cognizable harm, beyond those that are inconsequential, insignificant, or mere trivialities. Hence, it argued that, without the strictures of the standard, federal courts would essentially serve as human resources managers and adherence to the law and an efficient enforcement of it would become “unworkable.”

### Next

Oral argument is set before the full court on January 23, 2023. Rehearing the case *en*

*banc*, the Fifth Circuit judges likely will balance different policy considerations. These include whether to broaden the rule to encompass circumstances such as presented in *Hamilton* that may be offensive, but do not bear on the ultimate terms of employment (in the manner discerned by the Fifth Circuit) or to maintain its well-established, more predictable standard of what constitutes an ultimate employment decision. Broadening the scope while maintaining certainty for employers and efficient administration by the courts may prove challenging.

There is variation among the circuit courts on the threshold for a disparate treatment claim, but no clear split among the courts. To be sure, the Fifth Circuit's rule is narrower in scope than certain other circuits. The U.S. Supreme Court has not directly addressed the divergent standards in this context, but it has at least expressed interest in the issue in one case. See *Peterson v. Linear Controls*, 757 Fed.Appx. 370 (5th Cir. 2019), *pet. dism'd*, 140 S.Ct. 2841 (2020). Thus, depending on how the full Fifth Circuit Court rules, the issue may end up reaching the Supreme Court, which could seek to align and establish a brighter line test for future Title VII disparate treatment cases.

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

We will continue to monitor developments. Please contact a Jackson Lewis attorney with any questions.

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