Legal Update Article

Evolving Standards for Title VII Claims in Fifth Circuit and Other Federal Appellate Courts

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Plaintiffs need not allege discrimination with respect to an "ultimate employment decision" under Title VII of the Civil Rights Act to survive a motion to dismiss, the U.S. Court of Appeals for the Fifth Circuit held, overturning precedent. *Hamilton v. Dallas County,* No. 21-10133, 2023 U.S. App. LEXIS 21780 (Aug. 18, 2023).

The Fifth Circuit did not address "the precise level of minimum workplace harm a plaintiff must allege" to survive a motion to dismiss, but said that "a plaintiff need only show that she was discriminated against, because of a protected characteristic, with respect to hiring, firing, compensation, or the 'terms, conditions, or privileges of employment.'" Similarly, the U.S. Court of Appeals for the Second Circuit held that a job reassignment could constitute an adverse employment action for purposes of establishing a Title VII violation. *Banks v. GM, LLC,* No. 21-2640, 2023 U.S. App. LEXIS 23757 (Sept. 7, 2023).

Fifth Circuit Decision

In *Hamilton,* nine female corrections officers challenged the Dallas County Sheriff's Department's sex-based scheduling policy. In 2019, the Sheriff's Department shifted from a seniority-based scheduling policy to a sex-based one. Under the new policy, only male corrections officers could take off two consecutive weekend days. Female corrections officers, on the other hand, could take off either two consecutive weekdays or one weekday and one weekend day. In other words, "[f]emale officers never get a full weekend off." The Sheriff's Department did not dispute its discriminatory intent in implementing the new policy, claiming it was safer for male corrections officers to be off on weekends.

The lower court granted the County's motion to dismiss in accordance with prior Fifth Circuit precedent. The district court ruled that changes to an employee's work schedule, such as moving from a seniority-based to a sex-based scheduling policy, are not "ultimate employment decisions" and thus not actionable under Title VII. According to the district court, the plaintiffs therefore failed to make their *prima facie* case under Title VII.

A Fifth Circuit panel initially affirmed the lower court's decision based on established circuit precedent. Given the Sheriff's Department's admission of discriminatory intent, the panel urged the full court to reexamine the "ultimate employment decision" requirement against the plain language of Title VII and exercise its authority to overturn circuit precedent. It did so.

The Fifth Circuit granted an *en banc rehearing* and the full court overturned precedent. It held that "a plaintiff plausibly alleges a disparate-treatment claim under Title VII if she pleads discrimination in hiring, firing, compensation, or the

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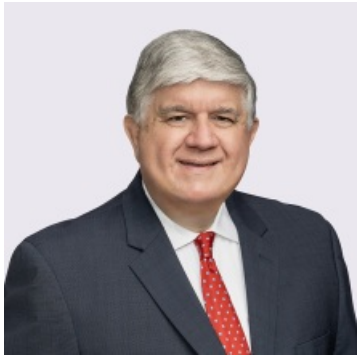

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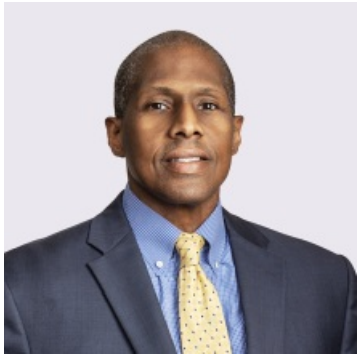

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'terms, conditions, or privileges' of her employment." Most importantly, the court decided a plaintiff need not show the employer made an "ultimate employment decision."

The Fifth Circuit began with the text of Section 703(a) of Title VII. That section states that an employer engages in an unlawful employment practice when it "fails or refuses to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." Giving this language its plain meaning and considering Congress' intent in enacting Title VII, the court concluded that "to plead an adverse employment action, a plaintiff need only allege facts plausibly showing discrimination in hiring, firing, compensation, or in the 'terms, conditions, or privileges' of his or her employment."

The court acknowledged that Title VII's plain language is broad, but it rejected the County's arguments that a plaintiff was required to show the employer engaged in a "tangible employment action" or caused "objective material harm." Citing the U.S. Supreme Court's admonition that courts not read Title VII as a "general civility code for the American workplace," and noting that "nearly every federal circuit" limits what constitutes terms, conditions, or privileges of employment, the court confirmed that Title VII "does not permit liability for de minimis workplace trifles."

The Fifth Circuit covers Louisiana, Mississippi, and Texas.

Second Circuit Decision

In *Banks,* a three-member panel of the Second Circuit followed the Fifth Circuit. While the panel's decision does not have the same authority as a full court to overturn precedent, the court expanded the Second Circuit's understanding of "adverse employment action" to include a job transfer with no accompanying claim of loss of salary or benefits. Applying a textual analysis like that applied by the Fifth Circuit, the Second Circuit examined the language of Title VII and concluded that "requiring economic harm to sustain a Title VII claim would render meaningless many of the words in the statutory phrase 'compensation, terms, conditions, or privileges of employment.'"

The Second Circuit covers Connecticut, New York, and Vermont.

U.S. Supreme Court to Clarify

The Fifth and Second Circuits join the Sixth Circuit and similarly concluded that a shift schedule is a term of employment that can form the basis of a Title VII claim. *Threat v. City of Cleveland,* 6 F.4th 672 (6th Cir. 2021) (asking "[h]ow could the *when* of employment not be a *term* of employment?"). (The Sixth Circuit covers Kentucky, Michigan, Ohio, and Tennessee.) The D.C. Circuit also similarly held in *Chambers v. District of Columbia,* 35 F.4th 870 (2022). There, it overturned D.C. Circuit precedent and held that discriminatory job transfers are actionable under Title VII. In that case, Justice Brett Kavanaugh, then sitting on the D.C. Circuit, wrote a concurring opinion in which he took the position that Title VII does not require a showing of harm.

Importantly, the U.S. Supreme Court on June 30, 2023, agreed to consider in

Muldrow v. City of St. Louis(No. 22-193) whether an employer's transfer decision that does not cause the employee a significant disadvantage constitutes an adverse employment action under Title VII.

Impact on Employers

Employers in the Second, Fifth, Sixth, and D.C. Circuits may see an increase in Title VII claims. If the Supreme Court relaxes or omits the standards for establishing an adverse employment action under Title VII, plaintiffs nationwide could file Title VII claims about a variety of employment actions they deem discriminatory. In the meantime, employers should consider reviewing processes for selection decisions involving all employment terms, including scheduling and other practices, to ensure legal compliance.

Jackson Lewis attorneys are available to answer questions about the potential impact of the Supreme Court decision and to provide advice and counsel relating to employment decisions, policies, and practices.

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