



Aug 28, 2023

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Fifth Circuit Eliminates the ‘Ultimate–Employment–Decisions’ Test for Title VII Discrimination Claims

For decades, federal courts in Texas, Louisiana, and Mississippi have restricted liability for employment discrimination under Title VII of the Civil Rights Act of 1964 to “ultimate employment decisions,” such as unlawful hiring, firing, or compensation. But the U.S. Court of Appeals for the Fifth Circuit recently held, in an *en banc* ruling, that Title VII “is not so limited.” In *Hamilton v. Dallas County*, No. 21–10133, 2023 WL 5316716 (5th Cir. Aug. 18, 2023), the Fifth Circuit clarified that under the statute’s plain language, a Title VII plaintiff need only allege facts plausibly showing discrimination in hiring, firing, compensation, or in the “terms, conditions, or privileges of employment.” *Hamilton* is nothing less than a landmark ruling in the area of employment discrimination.

Background

Hamilton arose from a sex-based scheduling policy adopted in 2019 by the Dallas County Sheriff’s Department, which provided its detention officers at Dallas County jails two days off each week. Despite performing the same tasks, only male detention officers could select full weekends off (which all officers tend to prefer), while female officers could not. As the Fifth Circuit put it, “Bottom line: Female officers never get a full weekend off.” Nine female officers sued Dallas County, alleging that this policy resulted in unlawful “disparate treatment” because of their sex, in violation of Section 703(a)(1) of Title VII.

The district court dismissed the officers’ suit, however, based on longstanding Fifth Circuit precedent, which limited “disparate treatment” claims to “ultimate employment decisions” like hiring, termination, promotion, and compensation. A three-judge panel of the Fifth Circuit affirmed the dismissal for the same reason—while also observing that Dallas County’s weekend policy “fits squarely within the ambit of Title VII’s proscribed conduct.” The panel

pressed the full court to reexamine the ultimate-employment-decisions requirement, and the Fifth Circuit granted rehearing *en banc* to do so.

Fifth Circuit's Ruling

In an opinion authored by Judge Willet, the Fifth Circuit held that the plaintiffs' challenge to Dallas County's sex-based scheduling system—giving men full weekends off while denying the same opportunity to women—stated a plausible claim of discrimination under Title VII. In so doing, the Fifth Circuit expressly overruled its “decades-old, atextual precedent,” *Dollis v. Rubin*, which had ushered in the ultimate-employment-decisions test in 1995 based on a “misinterpretation” of a ruling by another federal circuit court. The *Hamilton en banc* court rejected *Dollis*'s reasoning because the phrase “ultimate employment decisions” “appears nowhere in the statute” and “thwarts legitimate claims of workplace bias.” The text of Section 703(a)(1) of Title VII prohibits discrimination in ultimate employment decisions, “*but it also*” prohibits discrimination with respect to the “terms, conditions, or privileges of employment.”

Applying “this key language” to the detention officers' suit, the Fifth Circuit had “little difficulty concluding that they ha[d] plausibly alleged discrimination” under Title VII. “The days and hours that one works are quintessential ‘terms or conditions’” of employment, while “switching from a seniority-based scheduling system” (in which the coveted weekends off were determined based on seniority) to a system “based on sex” plausibly alleged the denial of “privileges” of employment.

Takeaways

So, what kinds of “terms, conditions, or privileges” of employment should employers expect possibly to create an actionable claim under Title VII? While the Fifth Circuit left the details of that question for another day, *Hamilton* still provides important guidance. Title VII does not impose liability for “petty trivialities or insubstantial annoyances.” But it is also “not limited” to “economic” or “tangible discrimination.” Presumably, any discriminatory conduct related to an employee's schedule, job duties, performance

evaluations, or warnings—or even unofficial perks of employment—could be subject to a Title VII discrimination lawsuit. Employers should therefore be prepared to defend themselves under this new, arguably more employee-friendly standard. At a minimum, employers should be mindful of and eliminate any disparate treatment among employees that could arguably be based on an employee’s protected classification, such as sex or race, rather than on neutral factors like job performance or seniority.

For more information regarding the Fifth Circuit’s decision in *Hamilton* and its likely impact on future discrimination cases, please contact the authors or any attorney with Frost Brown Todd’s [Labor & Employment](#) practice group.

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