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Where Employers Stand After 5th Circ. Overturns Title VII Test

By Holly Williamson and Steven DiBeneditto
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The U.S. Court of Appeals for the Fifth Circuit recently overturned almost 30 years of Title VII precedent in Hamilton v. Dallas County.

In short, the Fifth Circuit held that Title VII of the Civil Rights Act does not require plaintiffs to allege an ultimate employment decision to state a claim under Title VII.

Thus, employees are no longer required to show that they were fired, denied a promotion and the like to bring and maintain a Title VII lawsuit. Rather, employees can now maintain lawsuits against employers for "less than" employment actions, like scheduling changes, so long as the actions affect the terms, conditions or privileges of employment.

Of course, the impact of the court's holding is substantial — employers in the Fifth Circuit can now be liable under Title VII for a whole range of conduct not previously covered under the ultimate employment decision doctrine.

But, as explained in more detail below, the court did set limits on the type of conduct that qualifies as an adverse employment action, noting that de minimis conduct does not give rise to a Title VII claim.

We expect that this is the next frontier to be litigated. That is, outside of ultimate employment decisions like hiring, firing, compensation, leave and the like, what type of conduct will be considered actionable under Title VII?

The procedural history, the Fifth Circuit's ultimate holding and analysis, and considerations for employers residing within the Fifth Circuit are further discussed below.

Background

Hamilton involved nine female detention service officers who sued Dallas County under Title VII. They alleged that the Dallas County Sheriff's Department discriminated against them in violation of Title VII when it allowed men to select full weekends off, but women could only pick either two weekdays off or one weekend day plus a weekday.

After the detention service officers filed suit, the U.S. District Court for the Northern District of Texas ruled that they failed to state a claim for relief because, under Fifth Circuit precedent, only ultimate employment decisions were considered an adverse action giving rise to a Title VII claim. And unlike hiring, granting leave, discharging, promoting and compensating, changes to an employee's work schedule were not an ultimate employment decision.

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The district court thus dismissed the officers' complaint in 2020, and the officers appealed. On appeal, the initial three-judge panel for the Fifth Circuit reluctantly affirmed the district court's ruling to dismiss the complaint.

The panel reasoned that it was "bound by this circuit's precedent, which requires a Title VII plaintiff [to have] ... 'suffered some adverse employment action by the employer.'" And since Fifth Circuit precedent had long held that "'adverse employment actions include only ultimate employment decisions such as hiring, granting leave, discharging, promoting, or compensating," the denial of weekends off for the officers was not an ultimate employment decision.

Even so, the panel urged the full court to reexamine its ultimate employment decision requirement for Title VII claims.

The En Banc Opinion

Based on the panel's plea, the Fifth Circuit granted a rehearing en banc to reconsider its long-standing ultimate employment decision requirement. And in its recent opinion, the court overturned that precedent.

The court reasoned that the ultimate employment action requirement had no basis in the text of Title VII.

Indeed, the court noted that Title VII not only protected employees against ultimate employment decisions like hiring, discharging and compensation, but it also "makes it unlawful for an employer 'otherwise to discriminate against' an employee 'with respect to [her] terms, conditions, or privileges of employment.'"

This language protects employees from all discrimination in employment affecting the terms, conditions or privileges of employment, not just mere "economic" or "tangible discrimination."

As applied to the officers' case, the Fifth Circuit held that officers stated a claim under Title VII because the county did not dispute that the scheduling actions were discriminatory, and that the days and hours an employee works "are quintessential 'terms or conditions'" of employment.

As a fallback position, the county suggested that the court adopt a materiality requirement for adverse employment actions. To support this position, the county pointed to other circuit courts that require plaintiffs to show discrimination in the terms, conditions or privileges of employment and "a 'materially adverse employment action,' a 'tangible employment action,' or an 'objective material harm requirement.'"

Although the court was sympathetic to this argument, it found that adopting a materiality standard was unnecessary to deciding the issues in the case. That said, the court did acknowledge that Title VII "does not permit liability for de minimis workplace trifles."

The court concluded with its holding that

> [t]o adequately plead an adverse employment action, plaintiffs need not allege discrimination with respect to an "ultimate employment decision." Instead, 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" — just as the statute says.

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Unfortunately, the phrase "other terms, conditions, or privileges of employment" is exceedingly broad and does not provide employers with much guidance.

Under the court's new standard, employers should avoid disparate treatment in all actions that affect employee opportunities. This could include actions like scheduling and assigning employees to particular work duties or hours of work.

Employers should also be aware that performance evaluations unrelated to bonuses or raises could be the subject of discrimination claims if employees claim that they have been assessed more critically or harshly than those outside of their protected category. Employers thus need to make certain that they can support any negative or critical comments in performance reviews with facts and evidence.

On the other hand, de minimis actions might include a supervisor providing oral feedback or criticism of an employee's performance or a brief and temporary assignment or schedule. That is, lesser employment actions that don't materially affect the terms, conditions or privileges of employment would seem to fall outside the Fifth Circuit's ruling.

This was the fallback position of the county in Hamilton. And while the Fifth Circuit seemed to endorse that position, the court ultimately declined to adopt a materiality standard because it was unnecessary to deciding the issues before the court.

So a review of decisions and opinions from other circuit courts that require material actions to support a Title VII claim or that expound upon what actions are considered de minimis will likely provide some guidance on what are actionable claims of discrimination in the Fifth Circuit.

Next Steps

At the outset, it is noted that the Hamilton decision opens employers in the Fifth Circuit to a wider range of liability than previously possible under the ultimate employment decision requirement. That's true and undeniable. But employers can take tangible steps to help protect themselves against future lawsuits.

The uncertain limits of the court's decision will make it more important than ever for employers to train their human resources professionals, supervisors and managers. That training should include discussions about how any employment decisions must be based on articulable, legitimate, nondiscriminatory reasons, and that such decisions cannot be based on protected categories.

Moreover, if the decisions relate to, for example, transfers, shifts and schedules, the employer should make sure there is not an imbalance when it comes to protected categories.

Lastly, it is important to have set employment policies and procedures in place to address discrimination in the workplace when such discrimination is brought to the employer's attention.

So while there is significant uncertainty about the breadth of the court's decision, employers can and should take concrete steps to help mitigate the risk of taking discriminatory actions prohibited by Title VII.

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Holly Williamson *is a partner in the firm's Labor & Employment group in the firm's Houston office. Holly represents clients before administrative agencies, such as the Department of Labor, the Department of Justice, the EEOC, the Texas Commissions on Human Rights and the Texas Workforce Commission. She can be reached at +1 (713) 229-5717 or hwilliamson@HuntonAK.com.*

Steven DiBeneditto *is an associate in the firm's Labor & Employment group in the firm's Washington D.C. office. Steven's practice focuses on advice and counseling matters, litigation, and workplace safety in the labor, employment, pandemic preparedness and compliance space. He can be reached at +1 (202) 955-1619 or sdibeneditto@HuntonAK.com.*