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The Fifth Circuit Lowers its Required "Adverse Employment Action" Showing for Discrimination Claims

On Friday, August 18, the Fifth Circuit Court of Appeals issued the decision of *Hamilton v. Dallas County,* which overturned thirty years of Fifth Circuit precedent that limited disparate treatment lawsuits under Title VII to those litigants who suffered an "ultimate employment decision," such as hiring, granting leave, discharging, promoting, or granting compensation.

The *Hamilton* case dealt with a Dallas County policy, which allowed only male detention center officers to have full weekends off based upon the rationale that it would be unsafe for all the male detention officers to be off during the week, and it was safer for men detention officers to be off during the weekend. This rationale led to the result that female detention officers were not allowed weekends off.

With this background, the Fifth Circuit, in reversing precedent, held that to establish a cause of action under Title VII, 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, however, failed to identify any particular minimum standard for Title VII liability based upon the "terms, conditions, or privileges" of employment. The Court outlined that the minimum standard (whether it would be a "material" job action or more than "de minimus" action) would need to be set through future litigation, as they were leaving that question for "another day."

Along with the Title VII claim, the plaintiffs in *Hamilton* also brought a state law claim for gender discrimination which was also remanded. Since Texas state courts closely follow federal court interpretation of discrimination law, Texas courts will most likely follow this new standard. We will, however, observe state law opinions to determine if

this will indeed be the case.

Further, it is an open question as to whether this new expansive standard will remain. The U.S. Supreme Court is poised to hear a similar case next term – whether a lateral transfer, without any other action, is an adverse employment decision. The case is *Muldrow v. City of St. Louis Missouri* and expectations are that a decision will issue in June 2024.

In the interim, based upon this expansive new standard, employers should review their policies to make sure they are neutrally applied and, if there are any discrepancies, either correct those discrepancies or clearly outline a legitimate nondiscriminatory reason. For example, if there are some employees who are allowed to remotely work and some that are not, the reasoning for such decisions should be based upon a legitimate non-discriminatory reason.

Moreover, for any current filings, i.e., position statement responses, motions to dismiss or motions for summary judgment based upon the lack of an ultimate employment decision, employers should confer with counsel to determine if additional briefing is needed.

Key Takeaways

1. The Federal Fifth Circuit Court of Appeals, which covers Louisiana, Mississippi, and Texas, just overturned 30 years of precedent previously requiring a plaintiff to show an "ultimate employment decision" in order to pursue a claim of discrimination under Title VII. Now, plaintiffs can pursue such claims with some lesser showing, although it remains unclear what type of employment decision affecting a "term, condition, or privilege" of employment will be enough.

2. The U.S. Supreme Court may resolve a divide among federal courts on this same issue of what constitutes an "adverse employment action" under Title VII in its next term. If so, the Supreme Court's holding will apply nationwide.

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