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Fifth Circuit Inches Adverse Employment Action Marker Closer to Title VII Goalpost, But Potentially Punts to Supreme Court for the Ultimate Decision

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Title VII prohibits discrimination against an individual with respect to their compensation, terms, conditions, or privileges of employment, based on certain protected characteristics, but how material must an adverse action or change in status be? Title VII does not define "privileges of employment," and courts across the country have adopted their own materiality standards for adversity in general. For decades, the Fifth Circuit Court of Appeals has been an outlier in its longstanding analysis requiring an employee to prove an "ultimate employment decision," meaning decisions specifically related to hiring, termination, promotions, demotions, or compensating. Other circuits have interpreted Title VII to apply more broadly in terms of what employment actions are unlawful. Although late to the game, the Fifth Circuit recently cast aside its "ultimate employment decision" test as "fatally flawed," and more closely aligned itself with other circuits in marking the reach of Title VII's prohibitions. Yet, while the Fifth Circuit may have inched the line on the threshold, it stopped short of deciding what specific employment actions would be sufficiently material to garner Title VII protection.

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The Fifth Circuit Case: *Hamilton v. Dallas County*

In *Hamilton v. Dallas County,* nine female detention service officers sued Dallas County, alleging that a sex-based scheduling policy violated Title VII's prohibition on sex discrimination. Under the County's policy, citing safety reasons, only male officers could select full weekends off, while female officers could pick either two weekdays off or one weekend day plus one weekday, reportedly to maintain sufficient staffing during the week. The result was that a female officer could never get a full weekend off, while male officers in the same position could. The plaintiffs argued that the policy resulted in sex-based schedules, even though male and female employees performed the same tasks. The County argued that a discriminatory scheduling policy was not an actionable adverse action under Title VII, as there was no "ultimate employment decision" at issue.

The Fifth Circuit rejected the County's argument and held that Title VII's prohibition on discrimination was not limited to ultimate employment decisions, noting that Title VII does not say, explicitly or implicitly, that employment discrimination is lawful if limited to non-ultimate employment decisions. The Fifth Circuit explained that the ultimate employment decision test, which has been applied time and time again by the Fifth Circuit for decades, renders superfluous the statute's catch-all language prohibiting discrimination based on the "terms, conditions, or privileges of employment." The Fifth Circuit noted that the U.S. Supreme Court explicitly held 25 years ago in *Oncale v. Sundowner Offshore Servs., Inc* that a Title VII plaintiff may recover damages for discrimination that did not involve a discharge, loss of pay, or other concrete effect on their employment status. The Fifth Circuit declared it was now time to end its "interpretive incongruity" and not so narrowly limit the universe of actionable adverse employment actions to "so-called 'ultimate employment decisions.'"

Dispensing with the issue at hand, the Fifth Circuit held that the officers plausibly alleged a claim under Title VII because the days and hours they worked were "quintessential terms or conditions of [their] employment" and that the County had denied the plaintiffs the privilege of having full weekends off of work based on their sex. In defining the potential boundaries of an adverse employment action, the Fifth Circuit reinforced the principle that Title VII does not extend to "de minimis" discrimination and observed that nearly every circuit has adopted such a limitation, following the Supreme Court's caution in *Oncale* that Title VII is not "a general civility code for the American workplace." Accordingly, a plaintiff must still establish a "material" instance of discrimination to state a claim under Title VII.

The Fifth Circuit did not explicitly decide whether the policy at issue — requiring female officers but not male officers to work weekends — was a tangible, objective, or material instance of sex discrimination sufficient to prove a claim under Title VII. It merely held that the officers adequately pled an adverse employment action for purposes of stating a claim, at the motion to dismiss stage, and remanded the case to the district court for further proceedings.

The *Hamilton* decision arguably changes the landscape for employers defending Title VII discrimination lawsuits in the Fifth Circuit, as the opinion paves the way for plaintiffs to assert a disparate treatment claim based on any term, condition, or privilege of employment — even if unrelated to an ultimate employment decision such as hiring or termination — so long as it is not de minimis. Texas district courts have immediately adopted the new standard articulated by the Fifth Circuit, explaining in cases over the last two months since *Hamilton* was decided that a plaintiff need not show an ultimate employment decision to plausibly allege a disparate treatment claim under Title VII. Nonetheless, whether any given employment action is materially adverse so as to prove a claim of

discrimination under Title VII remains a factual inquiry that will vary case by case, as the *Hamilton* court did not explicitly define what is "material" or what employment decisions are more than de minimis. In essence, we have a floor, but where is the ceiling?

Will SCOTUS Catch and Run With the Play?

The United States Supreme Court recently granted a petition for writ of certiorari in *Muldrow v. City of St. Louis, Missouri, a* Title VII case from the Eighth Circuit Court of Appeals. The Supreme Court will consider whether Title VII's prohibition of discrimination in the terms, conditions, and privileges of employment applies to discrimination in transfer decisions, absent a separate court determination that the transfer decision caused a significant disadvantage to the employee. The Supreme Court's decision in *Muldrow, e*xpected this current term, will likely provide guidance to employers across the country as to the materiality threshold in Title VII discrimination cases. In the meantime, while the exact standards articulated from circuit to circuit may vary, employers across the country should ensure that all policies affecting the terms, conditions, and privileges of employment — and not only those related to ultimate employment decisions such as hiring or termination — are implemented in a non-discriminatory manner to avoid potential liability under Title VII.

Employers uncertain about thresholds for adverse employment actions under Title VII or needing assistance in reviewing or updating their employment policies and procedures, should reach out to their Akerman Labor & Employment attorney for guidance.

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