

Insights: Alerts

The Fifth Circuit Broadens its Definition of “Adverse Employment Action” Under Title VII

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Last week, the full U.S. Court of Appeals for the Fifth Circuit rejected nearly thirty years of unique precedent that limited the scope of disparate-treatment liability under Title VII of the Civil Rights Act of 1964 to “ultimate employment decisions.” Before the decision, the Fifth Circuit was the only circuit to adopt this narrow definition of an “adverse employment action.”

In *Hamilton v. Dallas County*, female detention officers challenged Dallas County's scheduling policy. The scheduling policy entitled all officers to two days off each week. However, male officers were permitted to take both days on the weekend while female officers were required to either take two weekdays off or one weekday and one weekend day. Last year, a three-judge panel for the Fifth Circuit affirmed dismissal of the suit because schedule changes, such as the denial of full weekends off, were not “ultimate employment decisions” under existing Fifth Circuit precedent from *Dollis v. Rubin*, 77 F.3d 777 (5th Cir. 1995). In *Dollis*, the Fifth Circuit held that “Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions.”

In light of the policy's blatant discriminatory intent, the three-judge panel flagged the case as an “ideal vehicle” for the full Fifth Circuit to revisit its narrow definition of “adverse employment action.” The Fifth Circuit agreed and reheard the matter *en banc*. In denouncing *Dollis*, the Court of Appeals opined its “ultimate employment decision” definition was based on “fatally flawed foundations.” It acknowledged that the plain language of Title VII, which prohibits discrimination against an individual with respect to their “terms, conditions, or privileges of employment,” is much broader than the “ultimate employment decision” definition used. The Court also conceded that its authority for the definition in *Dollis* was “based on a misinterpretation” of *dicta* from the Fourth Circuit Court of Appeals' decision in *Page v. Bolger*, 645 F.2d 227 (4th Cir. 1981). The Fifth Circuit then acknowledged that its narrow definition had yielded “some remarkable conclusions.” For example, in one case, a plaintiff alleged “he and his black team members had to work outside without access to water while his white team members worked inside with air conditioning.” Under *Dollis*, the Fifth Circuit held those conditions were not adverse employment actions because they did “not concern ultimate employment decisions.”

In rejecting *Dollis* and its progeny, the Fifth Circuit ruled:

To adequately plead an adverse employment action...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.”

Under this flattened approach, the Fifth Circuit had little difficulty concluding the plaintiffs in *Hamilton* plausibly alleged discrimination with respect to their terms, conditions, or privileges of employment. It reasoned that the days and hours employees work are “quintessential ‘terms or conditions’ of one’s employment” and at the “very heart of the work-for-pay arrangement.”

This decision carries significant implications for employers in Texas, Louisiana, and Mississippi because the phrase “terms, conditions, or privileges of employment” is quite broad. The new, broader standard will result in an increased number of viable disparate treatment claims under Title VII.

Notably, and despite acknowledging that there is some merit in doing so, the Fifth Circuit declined to set a bright-line rule establishing a minimum level of workplace harm required to plead a discrimination claim under Title VII. It likely punted on the issue because the Supreme Court is poised to address it in *Muldrow v. City of St. Louis*, a case for which certiorari was recently granted. Until the issue is addressed in *Muldrow*, employers in the Fifth Circuit should more closely scrutinize their actions, policies, and practices that have the potential to disadvantage certain employees, whether explicitly or implicitly.

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