

SEPTEMBER 1, 2023 | DISCRIMINATION, HARASSMENT & RETALIATION

Fifth Circuit Articulates New Employee-Friendly Test for Title VII Claims

Title VII plaintiffs in the Fifth Circuit are no longer required plead disparate treatment in an ultimate employment decision.

In [Hamilton v. Dallas County](#), the en banc court overturned decades of precedent and articulated a new employee-friendly rule for Title VII disparate treatment claims—"a plaintiff plausibly alleges a disparate treatment claim under Title VII if she pleads discrimination in hiring, firing, compensation, or the 'terms, conditions, or privileges' of her employment."

The Standard Articulated by the *Hamilton* Court

- "To 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."
- "The days and hours that one works are quintessential 'terms and conditions' of one's employment"
- "We thus leave for another day the precise level of minimum workplace harm a plaintiff must allege on top of showing discrimination in one's 'terms, conditions, or privileges of employment.'"

Background

The Dallas County Sheriff's Department ("Department") gives its detention officers two days off each week. Prior to 2019, detention officers' days off were determined by seniority. In 2019, the Department eliminated the seniority system and days off were determined by sex—only men were allowed to take off Saturday and Sunday. Women could not elect to have both of their days off on the weekend.

Nine female detention officers sued the Department, alleging that the sex-based scheduling policy violated Title VII's prohibition against sex discrimination. The trial court granted the County's motion to dismiss, reasoning that the scheduling policy was not an "ultimate employment decision." Under Fifth Circuit precedent, alleged conduct violated Title VII if it was an "ultimate employment decision" such as hiring, granting leave, discharging, promoting, and compensating. The Fifth Circuit panel affirmed the trial court's dismissal, noting that this case was the "ideal vehicle" for an en banc court to align the Circuit's precedent with the meaning of Title VII's text. The Fifth Circuit panel explained that "[s]urely allowing men to have full weekends off, but not women, on the

basis of sex rather than a neutral factor like merit or seniority, constitutes discrimination with respect to the terms or conditions of those women's employment."

En Banc Decision

The issue considered by the en banc court was whether the female detention officers had plausibly alleged facts that constituted an actionable adverse employment action under Title VII. The Court reversed the dismissal of *Hamilton*, and decades of Fifth Circuit precedent. In doing so, the Court reasoned that the "ultimate employment decisions" test was too narrow of a reading of Title VII, Section 703(a)(1)'s anti-discrimination provision, which provides that:

**It shall be an unlawful employment practice for an employer—
to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any
individual with respect to his compensation, terms, conditions, or privileges of employment,
because of such individual's race, color, religion, sex, or national origin.**

The court reasoned that the "ultimate employment decisions" test made the "terms, conditions, or privileges of employment" language in the statute superfluous. Citing to Supreme Court precedent, the Fifth Circuit concluded that Title VII plaintiffs could recover damages for "discrimination in the 'terms, conditions, or privileges of employment'" that were not "ultimate employment decisions" such as termination or loss of pay.

Applying the "terms, conditions, or privileges of employment" language to the facts in *Hamilton*, the Court reasoned that "[t]he days and hours that one works are quintessential 'terms or conditions' of one's employment." Therefore, the female detention officers did state a plausible claim of discrimination in violation of Title VII.

The Fifth Circuit acknowledged the Supreme Court's warning not to "transform Title VII into a general civility code for the American workplace." But the Court declined to articulate a rule for lower courts to determine what constitutes more than de minimis discrimination, stating, "[w]e thus leave for another day the precise level of minimum workplace harm a plaintiff must allege on top of showing discrimination in one's 'terms, conditions, or privileges of employment.'"

Key Take Aways

In sum, in the Fifth Circuit, an employer's conduct could violate Title VII's prohibition on discrimination even if the alleged conduct is not an ultimate employment decision. As this new standard articulated by the Fifth Circuit is more employee-friendly, employers would be well-advised to review existing policies and ensure that there is not disparate treatment based on a protected category such as sex, race, or gender.

Conn Maciel Carey's Labor and Employment team will be watching as the Fifth Circuit develops a rule for determining what is more than a de minimis harm.

