

Fifth Circuit Expands Legal Standard for Employment Discrimination Cases

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On August 18, 2023, the Fifth Circuit overturned its longstanding precedent established in *Dollis v. Rubin*, 77 F.3d 777 (5th Cir. 1995). The new standard created in *Hamilton v. Dallas County*, case number 21-10133, allows for a broad range of employer actions to serve as the basis for employment discrimination claims.

The *Dollis* standard limited the scope of Title VII of the Civil Rights Act within the Fifth Circuit, providing that employment discrimination lawsuits could only be brought if they were based on “ultimate employment decisions” related to hiring, granting leave, terminations, promotions, or pay.

In Friday’s decision, a group of female detention officers filed suit against Dallas County, alleging the Sheriff’s Department implemented sex-based scheduling policies in violation of Title VII’s prohibition against sex discrimination. The County adopted a sex-based scheduling policy where only male officers were given full weekends off, while female officers could only receive weekdays and/or partial weekends off. The female officers filed suit, but the district court granted the County’s motion to dismiss, citing the *Dollis* limitation to discrimination claims involving “ultimate employment decisions.”

On appeal, the Fifth Circuit vacated the *Dollis* standard, instead holding that 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.” The court found requiring a plaintiff to show an “ultimate employment decision” serves only to thwart legitimate workplace discrimination claims because the phrase appears nowhere in Title VII. Moreover, the court noted that the “ultimate employment decision” standard is unique to the Fifth Circuit and in conflict with the U.S. Supreme Court’s interpretation of Title VII, as no other appellate court applies the narrow rule.

The new standard established by the Fifth Circuit more closely tracks the language and purpose of Title VII, which prohibits discrimination in “ultimate employment decisions” such as hiring, refusing to hire, and discharging. Important to this holding, Title VII also makes it unlawful for an employer to “otherwise discriminate against” an employee “with respect to [her] terms, condition, or privileges of employment.” The court found the *Dollis* holding ignored this key language. “We end that interpretive incongruity today.”

The Fifth Circuit remanded the female officers’ case, noting “we have little difficulty concluding that they have plausibly alleged discrimination ‘with respect to [their] . . . terms, conditions, or privileges of employment.’ The days and hours that one works are quintessential ‘terms or conditions’ of one’s employment.”

Though the decision did not include any dissenting opinions, several judges took issue with the scope of the holding, including the Fifth Circuit’s failure to establish “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.’”

While no other circuit court applies a standard similar to the “ultimate employment decision” standard, there does remain a split as to the level of workplace harm that must be alleged under Title VII, which the Fifth Circuit declined to address. The D.C. Circuit Court has held that a worker is not required to prove “some additional harm over and above” an employer’s discriminatory conduct to establish a Title VII claim. However, the U.S. Supreme Court is set to hear a case next term to determine whether Title VII’s prohibition against discrimination in the “terms, conditions, or privileges of employment” is limited to employer actions that cause a worker to experience a “materially significant disadvantage,” as held by the Eighth Circuit. We will continue to keep you advised as this issue progresses through the courts.

For more information, contact a member of Benesch’s [Labor & Employment Practice Group](#).

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