BLOGS
Discrimination

Employers with Employees in the Fifth Circuit Should Take Note of a Change in the "Ultimate Employment Decision Requirement" for Title VII Claims

Employers with employees located in the states falling within the jurisdiction of Fifth Circuit federal courts (e.g. Louisiana, Mississippi and Texas) should take note of an important federal appellate ruling impacting Title VII discrimination claims. On August 18, 2023, the U.S. Court of Appeals for the Fifth Circuit, issued a ruling in *Hamilton v. Dallas County (Hamilton)* that reversed decades of case precedent within the Circuit and changed the requirements for the "adverse employment action" element of a Title VII discrimination claim to be in line with other federal Circuits and the U.S. Supreme Court.

Previously, the Fifth Circuit had held that plaintiffs alleging Title VII claims in the Circuit must allege an ultimate employment decision, such as discrimination in hiring, granting leave, discharging, promoting or compensation, to satisfy the element of having suffered an actionable "adverse-employment action." In *Hamilton*, the Fifth Circuit reversed the lower district court's dismissal of a Title VII discrimination claim based on sex-based scheduling that allegedly deprived female employees of weekends off, finding the plaintiffs had sufficiently alleged an adverse-employment action. Rejecting its own prior holdings, the appellate Court held that a discrimination claimant under Title VII need only plead discrimination in hiring, firing, compensation or the "*terms, conditions, or privileges*" of employment, not an ultimate employment action. Applying this standard, the Court ruled that the days and hours that one works are quintessential terms or conditions of one's employment, and thus the plaintiffs had plausibly alleged discrimination with respect to their terms, conditions, or privileges of employment.

The Court acknowledged the employer's concern that this interpretation of what constitutes an adverse employment action could result in a flood of Title VII litigation over run-of the-mill workplace squabbles and the employer's argument that other federal appellate courts (including the Fifth Circuit previously through the "ultimate employment decision" standard) had adopted limits to establish a minimum level of actionable harm. However, the Court left the determination of the minimum harm required for Title VII claims for future cases in the Circuit, offering only the following clarification: "Title VII does not permit liability for de minimis workplace trifles."

Now, six months later, the future cases anticipated by the Court's ruling have been filed, and the federal courts located in the Fifth Circuit are still working to apply

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the nebulous Fifth Circuit standard as new litigation seeks to test the boundaries of *Hamilton*. Thirty case opinions within the Fifth Circuit have already cited the lowered standard of *Hamilton*.

Since the *Hamilton* ruling, courts in the Fifth Circuit have held that the following may constitute actionable adverse employment actions under Title VII:

1. Failure to pay training program fees;
2. Assigning less desirable shifts with lower pay rates; and
3. Refusal to provide religious accommodation.

Courts in the Fifth Circuit have also held that the following do not constitute actionable adverse employment actions:

1. Temporary limited-light duty assignments;
2. Short delay in returning employee to full duty while employer reviewed doctor's clearance;
3. Claims of playing favorites;
4. Less than "outstanding" performance reviews;
5. The employer not certifying the employee's hours worked;
6. Requiring employees to eat in designated areas, wear FDA-approved masks, and submit COVID-19 test results.

As these decisions reflect, in the aftermath of *Hamilton*, Fifth Circuit courts have largely employed a case-by-case analysis for employer actions that fall short of the prior "ultimate employment decision." Until the Fifth Circuit addresses the missing limitation for a minimum level of actionable harm, employers can expect this to be the new norm going forward.