

Fifth Circuit Overturns Ultimate Employer Decision Requirement, Expanding Anti-Bias Rights

On Friday, August 18, 2023, the Fifth Circuit Court of Appeals reversed its long-standing precedent that limited adverse employment actions to ultimate employment decisions, such as hiring, firing, and promotions. This decision follows similar recent rulings from the Sixth and D.C. Circuit Courts, which overturned comparable ultimate employment decision requirements.

In the case, nine female correctional officers working at the Dallas County Jail filed a lawsuit in response to a 2019 sex-based scheduling policy, which only allowed male correctional officers to have full weekends off. Female correctional officers were allowed only partial weekends off, but were unable to take full weekends off. Both male and female correctional officers performed the same tasks.

The case was initially dismissed by the lower court based on Circuit precedent limiting lawsuits under Title VII to actionable behavior that rises to the level of an ultimate employment decision.¹ Under the precedent, ultimate employment decisions are generally limited to hiring, firing, promoting, granting leave, and compensation. Indeed, even earlier this year, the Fifth Circuit had noted, "Title VII was only 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."² Accordingly, the lower court found that employee scheduling under the Dallas County Jail's policy did not rise to the level of an ultimate employment decision, and therefore, the case was dismissed. On appeal, a three-judge panel of the Fifth Circuit initially affirmed the district court's dismissal based on the precedent but later vacated the decision and granted a rehearing before the full appeals court (*en banc*).³

Upon rehearing, the Fifth Circuit overturned its decades-old precedent finding that the female correctional officers had plausibly alleged a disparate-treatment claim under Title VII. Looking to the text of Title VII, the Fifth Circuit concluded that the officers do not need to show an ultimate employment decision, "a phrase that appears nowhere in the statute and that thwarts legitimate claims of workplace bias." The Fifth Circuit clarified that to plead an adverse employment action, "a plaintiff need only allege facts plausibly showing discrimination in hiring, firing, compensation, or in the terms, conditions, or privileges of his or her employment." The Fifth Circuit determined that under this new standard, the female officers plausibly alleged discrimination.

This historic decision changes the landscape of all employment discrimination claims brought in the Fifth Circuit. By expanding the definition of adverse employment actions beyond ultimate employment decisions to include all actions which impact the terms, conditions, or privileges of employment, employees will have a significantly easier time bringing claims of discrimination. While there is still no bright-line test for what actions fall within the ambit of actionable adverse actions, it likely now includes poor performance evaluations, negative warnings or reprimands, changes in job duties, and placement on paid leave (all previously not considered actionable adverse actions under the law). In light of this decision, employers in the Fifth Circuit should be mindful that all employment actions – not just those relating to hiring and firing – can give rise to a discrimination claim.

¹ See *Hamilton v. Dallas Cnty.*, 2020 WL 7047055, at *2 (N.D. Tex. Dec. 1, 2020).

² *Terry v. Fed. Bureau of Prisons*, No. 23-50130, 2023 WL 4196865, at *4 (5th Cir. June 27, 2023).

³ *Hamilton v. Dallas Cnty.*, 42 F.4th 550, 557 (5th Cir.), reh'g en banc granted, opinion vacated, 50 F.4th 1216 (5th Cir. 2022).



Nandini Sane

Member

nsane@cozen.com
Phone: (832) 214-3962
Fax: (832) 214-3905



Nicole Su

Associate

nsu@cozen.com
Phone: (713) 750-3131
Fax: (832) 214-3905

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