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# Trend of Nixing Employer-Friendly "Ultimate Employment Decision" Standard for Title VII Claims Continues

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Recently, the Fifth Circuit overturned decades-old precedent requiring that plaintiffs suffer an "ultimate employment decision" (such as actions relating to hiring, firing, leave, or pay) in order to plead a claim under Title VII of the Civil Rights Act. In *Hamilton v. Dallas County*, the Fifth Circuit joins the Sixth and D.C. Circuits which abandoned similar ultimate-employment decision requirements and expanded the scope of federal anti-discrimination law. *Threat v. City of Cleveland*, 6 F.4th 672 (6th Cir. 2021); Chambers v. D.C., 35 F.4th 870 (D.C. Cir. 2022).

The Fifth Circuit's decision in *Hamilton* undoes the "ultimate employment decision" test, which has been a staple of employment law in that circuit since the early 1980s. In reaching its decision, the circuit court found that despite Title VII's broad language, "we have long limited the universe of actionable adverse employment actions to so-called 'ultimate employment decisions.' We end that interpretive incongruity today." Under that standard, a plaintiff must show that they experienced an employment action pertaining to hiring/promotion, discharge, leave, or pay. Employers defending against Title VII claims have relied on this test for decades in making employment decisions and assessing claims. Now, however, at least in the Fifth, Sixth and D.C. Circuits, Title VII plaintiffs have expanded grounds to bring Title VII claims. The Fifth Circuit covers Louisiana, Mississippi and Texas. The Sixth Circuit covers Kentucky, Michigan, Ohio and Tennessee, and the D.C. Circuit covers the District of Columbia.

The Fifth Circuit's decision lacks clarity regarding what exact "terms, conditions, or privileges of employment" can be the basis for a claim. For now, the only guideposts come from the facts of these decisions. In *Hamilton*, the female plaintiffs challenged an admittedly gender-based scheduling policy that

allowed only male officers to have full weekends off. Similarly, in *Threat*, the Sixth Circuit found that shift changes and scheduling decisions based on a protected characteristic are actionable. Finally, the D.C. Circuit agreed that discriminatory job transfers can violate Title VII as well. *Chambers v. District of Columbia*.

It is unclear how broadly the new pro-employee standard may be applied. However, next term, the U.S. Supreme Court is scheduled to examine the issue. In *Muldrow v. City of Louis*, the High Court will review an appeal from the Eighth Circuit and decide whether job transfers and denials of requests to move that do not impose "materially significant disadvantages" on an employee can form the basis of a Title VII claim. The Eighth Circuit denied a plaintiff's Title VII claim in which she was denied a transfer but her rank, pay, and responsibilities remained the same. *Muldrow v. City of St. Louis*, 30 F.4th 680 (8th Cir. 2022). The Eighth Circuit covers Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota.

Practically, *Hamilton* and *Threat* increase potential claims and litigation challenging personnel decisions that have historically been considered less risky. Depending on the Supreme Court's decision in *Muldrow*, employers across the country may face additional claims for more incidental personnel decisions. For now, employers in the Fifth, Sixth and D.C. Circuits, must be cognizant of the heightened risk in transferring employees (or refusing to grant requests for transfer) as well as setting work schedules and shifts.

For more information on the new Title VII standard, please contact Sharon Beck, Any Conway, Tracey Donesky, Molly Keppler, Sharon Ng, Reiley Pankratz, Hailey Perkins, April Petrosino, Greta Reyes, Kevin Robinowitz, Bernadette Sargeant, Benjamin Woodard or the Stinson LLP contact with whom you regularly work.

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