



Courts continue to explore whether the threshold for actionable "adverse employment actions" under Title VII of the Civil Rights Act of 1964 has been construed too narrowly.

Upending several decades of precedent, in 2023, the U.S. Court of Appeals for the Fifth Circuit broadened the scope to permit claims of discrimination that would have been rejected in the past for failure to constitute an "ultimate" employment decision. Now, the U.S. Supreme Court is poised to decide on a federal level whether a lateral job transfer is an adverse employment action under Title VII. In the case *Muldrow v. City of St. Louis*, the Supreme Court could decide that a showing of significant disadvantage resulting from the transfer is not required to make a claim of discrimination.

Federal courts have held that for discriminatory conduct to be actionable, a plaintiff must show that he or she suffered an "adverse employment action," resulting in material harm or disadvantage. Title VII provides that it is unlawful 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 Fifth Circuit has long construed this provision to require a plaintiff to show an "ultimate employment decision" to sustain a disparate treatment claim. "Ultimate" employment decisions generally encompass hiring, firing, promotions, demotions, and compensation decisions, but not necessarily "lateral" moves, like transfers or schedule changes.

In 2023, however, the Fifth Circuit pared the longstanding "ultimate employment decision" test in *Hamilton v. Dallas County*, holding that a plaintiff properly pleads a disparate treatment claim by alleging discrimination in terms, conditions, or privileges of his or her employment, irrespective of whether an "ultimate" decision was at issue. In *Hamilton*, the court reviewed a sex-based policy of the Dallas County Sheriff's Department that allowed only male officers to take both weekend days off. The question was whether this disparity was actionable as an adverse employment action.

In revisiting the "ultimate employment decision" standard, the court explained that the plain text of Title VII does not require that an employment decision be "ultimate." Instead, it held that days and hours of work are quintessential "terms or conditions" of employment, and thus the plaintiffs properly pled disparate treatment claims under Title VII, notwithstanding the lack of an "ultimate employment decision." The Fifth Circuit thereby aligned its interpretation with similar rulings in the Sixth Circuit and the D.C. Circuit.

Following *Hamilton*, the Fifth Circuit addressed adverse employment actions again in *Katz v. Wormuth*. In *Katz*, the plaintiff, a civilian surgeon employed by the U.S. Army, complained that he was subject to a hostile work environment after the Army demoted him from the position of chief of surgery and replaced him with a younger surgeon. After he submitted his complaint, the Army placed him on paid leave pending an investigation into alleged inappropriate conduct at work. Ultimately, the plaintiff resigned after five months of an extended investigation. He alleged his employer retaliated against him under Title VII and the Age Discrimination in Employment Act by placing him on prolonged paid leave. The Fifth Circuit noted that, while placing an employee on paid leave is not an adverse employment action on its own, subsequent acts by an employer that prolong an employee's paid leave may be an adverse employment action.

Finally, in December 2023, the Supreme Court heard arguments in *Muldrow* addressing whether Title VII prohibits discrimination in transfer decisions where there is no finding of a significant disadvantage to the employee as a result of the transfer. In *Muldrow*, the plaintiff complained that she was discriminatorily transferred to a position with the same pay and title but with a different schedule, overtime potential, and responsibilities. The trial court rejected the claim, finding the plaintiff suffered no harm or disadvantage from the transfer and thus did not suffer an adverse employment action. A decision is expected later this year.

## **Takeaways**

As the bar for "adverse employment actions" is reconsidered and may potentially be lowered on a national basis, employers should continue to review and refresh their employment policies and training programs to ensure ongoing compliance with the evolving interpretations of Title VII and other statutes prohibiting discrimination and harassment in the workplace.

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