

INSIGHTS

## Fifth Circuit Expands Title VII Exposure for Employers

August 24, 2023

By: [Kelly Robreno Koster](#) and [Caroline Melo](#)

On August 18, 2023, in [Hamilton v. Dallas County](#), the US Court of Appeals for the Fifth Circuit, sitting *en banc*, expanded the circumstances under which an employer can be held liable for disparate treatment under Title VII of the Civil Rights Act (“Title VII”). Prior to *Hamilton*, employers could only be held liable for disparate treatment under Title VII in the commission of hiring, granting leave, discharging, promoting and compensating an employee – so-called “Ultimate Employment Decisions.” Now, the Fifth Circuit held, a plaintiff can plausibly allege disparate treatment under Title VII if he or she pleads discrimination in an Ultimate Employment Decision, or the terms, conditions, or privileges of employment.

In *Hamilton*, nine female detention officers sued Dallas County (the “County”), claiming sex-based discrimination stemming from the County’s scheduling policy. Specifically, the County used a sex-based scheduling policy to determine each officer’s two days off each week – men could select full weekends off; women could only pick two weekdays or one weekend day plus one weekday off. Women were never eligible to take off a full weekend.

The Fifth Circuit noted that the plain language of Title VII does not limit disparate treatment liability to Ultimate Employment Decisions. To the contrary, while Title VII clearly prohibits discrimination in Ultimate Employment Decisions, the statute also explicitly states that it is unlawful to “otherwise discriminate against” an employee “with respect to [his or her] compensation, terms, conditions, or privileges of employment.” 42 U.S.C. Code § 2000e-2(a)(1).

The Fifth Circuit also noted that the US Supreme Court previously held that “any ‘benefits that comprise the incidents of employment, or that form an aspect of the relationship between the employer and employees’ ... falls within Title VII’s ban on discrimination” and that Title VII’s test “is not limited to ‘economic’ or ‘tangible’ discrimination,” which is inconsistent with limiting disparate treatment liability to Ultimate Employment Decisions.

In examining the detention officers’ claim, the Fifth Circuit held that “by switching from a seniority-based scheduling system to one based on sex, ... [the County] plausibly denied the

[o]fficers the ‘privilege’ of seniority because of their sex[.]” Such a system is the exact type of discrimination covered by Title VII’s catchall provision: “terms, conditions, or privileges of employment.” In its expansion of Title VII liability, however, the Fifth Circuit clarified that Title VII neither “permit[s] liability for *de minimis* workplace trifles” nor is a “general civility code for the American workplace.” However, the “precise level of minimum workplace harm a plaintiff must allege” was “le[ft] for another day.”

Employers are cautioned that *Hamilton* broadens the types of discrimination claims employees can assert. Employers should continue to ensure their policies and procedures are compliant with Title VII. Anti-discrimination training is also recommended – particularly at the managerial level – as we wait for the new scope of Title VII to become settled.