Everybody’s Working on the Weekend (Well, Not Everybody) — Fifth Circuit Holds Differing Weekend Attendance Policy Not a Final Adverse Employment Action

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An employer establishes a weekend work policy where only male employees can take both days off, and female employees can only take one weekend day off. Sounds like gender discrimination maybe? Well, in Hamilton, et al. v. Dallas County, dba Dallas County Sheriff’s Department, the Fifth Circuit recently declined to go that far — yet. The judges pointed to circuit precedent and “the rule of orderliness” to uphold the dismissal of the plaintiffs’ claims. However, the opinion also hints that this may
not be the end of the story.

**Two Sets of Scheduling Guidelines**

In 2019, the Dallas County Sheriff’s Department changed its scheduling procedure from being based on seniority to being based on gender. Under the new procedure, only male officers could take full weekends off, while female officers were only allowed to take off either two weekdays or one weekend day and one weekday. When female officers asked why there was a difference, the sergeant stated that it was based on gender and that it would be safer for the male officers to be off during the weekends as opposed to during the week. Not surprisingly, women officers filed an EEOC charge and later a lawsuit against the department for gender discrimination under Title VII.

**Failure to Allege an Adverse Employment Action**

The Sheriff’s Department moved to dismiss the complaint stating that the plaintiffs had failed to meet their burden of showing a final, adverse employment action. The district court acknowledged that the policy is facially discriminatory based on gender but held that Fifth Circuit precedent required that the case be dismissed. The women appealed stating that the scheduling policy harmed their work conditions and made their jobs objectively worse than those of the men.

On appeal, the Fifth Circuit also recognized that the Sheriff’s Department did not dispute the policy's discriminatory intent and that the plaintiffs had direct evidence of a discriminatory motive. The court stated that the conduct clearly fell under Title VII’s prohibitions. However, the court said that Fifth Circuit precedent required the plaintiffs to show that they suffered adverse employment actions concerning “ultimate employment decisions such as hiring, granting leave, discharging, promoting, or compensating.” The court held that precedent and “the rule of orderliness” (that the court cannot overrule a prior panel decision absent an intervening change in the law) meant that denial of weekends off is not an ultimate employment decision and, thus, not an adverse employment action in the Fifth Circuit. As such, the dismissal was proper.

**But Stay Tuned...**

At the end of the opinion, the Fifth Circuit cited several other circuit decisions that went the other way and held that shift changes or scheduling policies could be the basis for a valid Title VII claim of discrimination. The court recognized that under those decisions, and based on the facts in this case, the women officers could have proceeded with their lawsuit. The court also observed that the Fifth Circuit precedent set up a “proverbial circuit split” (which could be taken up by the Supreme Court). In the end, the court noted that the strength of the women’s allegations, coupled with the persuasiveness of the reasoning in the other circuits made this case ideal for an *en banc* review (review by the entire court) to fix the problem. We shall see if the Fifth Circuit grants such an *en banc* review.

**What Does This Mean to Employers?**
Employers in the Fifth Circuit should not take this decision as permission to implement gender-based scheduling policies. The panel in this case was clearly troubled by having to follow past precedent and affirm the dismissal. This case reminds us all that there are many touch points for a possible discrimination scenario—it is not just about hiring and firing. It also shows that supervisors who readily admit they are doing something discriminatory may need some additional training.

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