No. 21-10133

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

FELESIA HAMILTON, TASHARA CALDWELL, BRENDA JOHNSON, ARRISHA KNIGHT, JAMESINA ROBINSON, DEBBIE STOXSTELL, FELICIA SMITH, TAMEKA ANDERSON-JACKSON and TAMMY ISLAND,

Plaintiffs-Appellants

v.

DALLAS COUNTY, doing business as DALLAS COUNTY SHERIFF'S DEPARTMENT,

Defendant-Appellee

On Appeal from a Final Judgment of the United States District Court for the Northern District of Texas
Case No. 3:20-CV-00313-N, Hon. David C. Godbey

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March 17, 2021

No. 21-10133

FELESIA HAMILTON, et al.,

Plaintiffs-Appellants

v.

DALLAS COUNTY, d/b/a DALLAS COUNTY SHERIFF'S DEPARTMENT

Defendant-Appellee

Certificate of Interested Persons

The undersigned counsel certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that the judges of this court may evaluate possible disqualification or recusal.

Plaintiffs-Appellants

Felesia Hamilton

Tashara Caldwell

Brenda Johnson

Arrisha Knight

Jamesina Robinson

Debbie Stoxstell

Felicia Smith

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Rule 35(b)(1) Statement

Title VII of the Civil Rights Act of 1964 forbids discrimination by an employer "with respect to" an employee's "compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1). Rather than applying this statutory text as written, panel decisions of this Court hold that only *some* discriminatory conduct—what this Court terms an "adverse employment action"—is unlawful. *See, e.g.*, *McCoy v. City of Shreveport*, 492 F.3d 551, 559, 560 (5th Cir. 2007). This Court's additional gloss on the already atextual adverse-employment-action rule further limits what constitutes actionable discrimination to "ultimate employment decisions," such as those involving hiring, firing, or compensating employees. *Id.* (holding that a plaintiff alleging race and sex discrimination lacked an actionable Title VII claim because placing her on administrative leave was not an ultimate employment decision).

This precedent has so distorted the meaning of "terms, conditions, or privileges" that, for example, in this Circuit, an employer is free to demand that Black employees work outdoors in the Louisiana summer while white employees work indoors in air-conditioned comfort. *Peterson v. Linear Controls, Inc.*, 757 F. App'x 370, 373 (5th Cir. 2019), *pet. dismissed*, 140 S. Ct. 2841 (2020) (Mem.). Under the ultimate-employment-decision rule, the district court here felt powerless to enjoin an employer's admittedly sex-based scheduling policy, which required female officers to invariably work on weekends while male officers could request full weekends off. *See* D. Ct. Op. at 5 (reproduced in addendum (Add.) to this petition at 5a).

This Court's adverse-employment-action precedent flouts Title VII's text, undermines Congress's purposes, and conflicts with other circuits' authoritative

decisions. *See* Fed. R. App. P. 35(b)(1)(B) (noting that circuit conflict is a basis for en banc review). The United States agrees with Plaintiffs-Appellants that this Court's precedent is wrong. Br. for United States as Amicus Curiae at 6, *Peterson v. Linear Controls, Inc.*, No. 18-1401, 2020 WL 1433451 (Mar. 20, 2020), *pet. dismissed*, 140 S. Ct. 2841 (2020) (Mem.). But because only the en banc Court can reconsider binding circuit precedent, a panel cannot properly resolve the exceptionally important issue presented by this appeal: whether "terms, conditions, or privileges of employment" encompass only ultimate employment decisions, or whether, as Plaintiffs-Appellants maintain, Title VII prohibits discrimination with respect to all "terms, conditions, or privileges of employment."

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Issue Presented

Title VII of the Civil Rights Act of 1964 and the Texas Employment Discrimination Act make it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual" with respect to "compensation, terms, conditions, or privileges of employment" on the basis of sex. 42 U.S.C. § 2000e-2(a)(1); *see* Tex. Lab. Code Ann. § 21.051(1). The issue presented is whether "terms, conditions, or privileges of employment" are limited to only hiring, firing, promotions, compensation, or other practices that this Court terms "ultimate employment decisions."

Course of Proceedings and Case Disposition

Plaintiffs-Appellants Felesia Hamilton, Tashara Caldwell, Brenda Johnson, Arrisha Knight, Jamesina Robinson, Debbie Stoxstell, Felicia Smith, Tameka Anderson-Jackson, and Tammy Island sued Defendant Dallas County for violations of Title VII and the Texas Employment Discrimination Act. The district court had subject-matter jurisdiction under 28 U.S.C. § 1331, 42 U.S.C. § 2000e-5(f)(3), and 28 U.S.C. § 1367(a). That court's January 14, 2021 order dismissed Plaintiffs' complaint, disposing of all claims of all parties. ECF 23. Plaintiffs filed a timely notice of appeal on February 16, 2021. ECF 24. This Court has jurisdiction under 28 U.S.C. § 1291.

Statement of the Case

This appeal arises from a grant of a motion to dismiss, and, as the district court observed, the complaint's plausible factual allegations must be taken as true and viewed in the light most favorable to Plaintiffs. Add. 2a.

Plaintiffs are female Detention Services Officers at the Dallas County jail. ECF 1 at 4.[1] Absent the sex discrimination alleged here, Defendant-Appellee Dallas County uses a seniority-based system to assign officer work schedules. *Id.* at 4-5. Officers are entitled to two days off per week, and they prefer to schedule this leave on weekend days. *Id.* at 5.

In April 2019, the County began denying female employees consecutive days off on coveted weekends while granting male employees full weekends off. ECF 1 at 5. When Plaintiffs asked the Sergeant about the new policy, he admitted that it was "based on gender." *Id.* In his view, "it would be unsafe for all the men to be off during the week" and "safer" for some "men to be off on weekends." *Id.* It is unclear how the sex-based system is consistent with the Sergeant's purported interest in safety because male and female officers have the same job descriptions and weekday and weekend work at the jail is the same—the tasks are the same, and there is no difference between the number of people present at the jail. *Id.*

When Plaintiffs reported the Sergeant's discriminatory policy to the County's Human Resources department, management refused to revoke it. ECF 1 at 5. Plaintiffs then filed discrimination charges with the Equal Opportunity Employment Commission (EEOC), and, after receiving notice of their right to sue, sued the County. ECF 1 at 4. The County moved to dismiss Plaintiffs' complaint on one ground: that Plaintiffs failed to state a claim under Title VII and the Texas Employment Discrimination Act by not alleging an adverse employment action. ECF 8 at 9.

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[1] Pin cites are to page numbers assigned by the CM/ECF system in the district court.

According to the district court, the County's "facially discriminatory work scheduling policy demonstrates unfair treatment," but Plaintiffs failed to plead an "adverse employment action" because the women-work-weekends policy "does not affect job duties, compensation, or benefits" or otherwise involve "ultimate employment decisions such as hiring, granting leave, discharging, promoting, and compensating." Add. 3a-4a (quoting this Court's precedential decisions). The district court therefore concluded that, under this Court's binding precedent, it had no choice but to grant the County's motion to dismiss. *Id.* at 5a.

Reasons for Granting En Banc Review

I. This Court's adverse-employment-action rule authorizes discrimination prohibited by Title VII and Texas law, necessitating en banc review.

The phrase "adverse employment action" appears nowhere in Title VII's text. Yet, for decades, this Court and other courts of appeals have required all Title VII disparate-treatment plaintiffs to allege that he or she suffered one. *See, e.g.*, *Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir. 1995); *McCoy v. City of Shreveport*, 492 F.3d 551, 559, 560 (5th Cir. 2007). This Court's version of the adverse-employment-action rule stands out as especially incongruous: Only an "ultimate employment decision"—a refusal to hire, a firing, a demotion, or the like—constitutes impermissible discrimination. *McCoy*, 492 F.3d at 559, 560. The United States has labeled this standard "atextual and mistaken." Br. for United States as Amicus Curiae at 6, *Peterson v. Linear Controls, Inc.*, No. 18-1401, 2020 WL 1433451 (Mar. 20, 2020), *pet. dismissed*, 140 S. Ct. 2841 (2020) (Mem.). Indeed, this Court's interpretation is at war with Title VII's text, the Supreme Court's understanding of the statute, and authoritative decisions of sister circuits.

Under Title VII and Texas's nearly identical antidiscrimination law, an employer may not "discriminate" with respect to an individual's "compensation, terms, conditions, or privileges of employment" on the basis of sex. 42 U.S.C. § 2000e-2(a)(1); *see* Tex. Lab. Code Ann. § 21.051(1).

This provision contains ordinary English words—language that demands no judicial gloss. First, "discriminate" means "to make a difference in treatment or favor on a class or categorical basis in disregard of individual merit." *Discriminate*, Webster's Third Dictionary 647-48 (1961). That is, the "normal definition of discrimination" is any "differential treatment of similarly situated groups." *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 614 (1999) (Kennedy, J. concurring). Here, by assigning female officers' days off in a manner different (and less favorable) from how it assigned male officers' schedules, the County treated Plaintiffs differently based on sex, thus discriminating against them.

The statute prohibits discrimination in employee compensation. Beyond that, the statutory phrase "terms, conditions, or privileges" covers all other attributes of the employer-employee relationship with respect to which an employer may not discriminate. "Terms" are "propositions, limitations, or provisions stated or offered for the acceptance of another and determining (as in a contract) the nature and scope of the agreement." *Terms*, Webster's Third Dictionary 2358 (1961). A "condition," is "something established or agreed upon as a requisite to the doing or taking effect of something else." *Condition*, Webster's Third Dictionary 473 (1961). "Privilege" means to enjoy "a peculiar right, immunity, prerogative, or other benefit." *Privilege*, Webster's Third Dictionary 1805 (1961). Each of these words is defined broadly; taken together,

they refer to "the entire spectrum of disparate treatment"—the gamut of workplace requirements, obligations, customs, and benefits that an employer imposes on, or grants to, an employee. *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) (citation omitted). Title VII is thus not limited to "ultimate" employment actions or to conduct that employers or courts view as particularly harmful.

Quite the contrary, the statute establishes no minimum level of actionable harm. In using the phrase "terms, conditions, or privileges," "Congress intended to prohibit all practices *in whatever form* which create inequality in employment opportunity due to discrimination." *Franks v. Bowman Trans. Co.*, 424 U.S. 747, 763 (1976) (emphasis added). "The emphasis of both the language and the legislative history of the statute is on *eliminating* discrimination in employment." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 71 (1977) (emphasis added). "Title VII tolerates no racial [or sex] discrimination." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973).

In sum, the statutory phrase "terms, conditions, or privileges" is simply a catchall for all incidents of an employment relationship. This adherence to Title VII's text is why then-Judge Kavanaugh observed that "transferring an employee because of the employee's race (or denying an employee's requested transfer because of the employee's race) plainly constitutes discrimination with respect to 'compensation, terms, conditions, or privileges of employment' in violation of Title VII." *Ortiz-Diaz v. United States Dep't of Hous. & Urban Dev.*, 867 F.3d 70, 81 (D.C. Cir. 2017) (Kavanaugh, J., concurring). Contrary panel decisions of this Court have effectively "rewrit[ten] the statute that Congress has enacted," *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 629 (2018), and should be abrogated.

When **officers work is a "term" or "condition" of employment.** Under this straightforward understanding of Title VII's text, employers may not discriminate with respect "to hours of work, or attendance since they are terms, conditions, or privileges of employment." EEOC Compl. Man., § 613.3, 2006 WL 4672703 (2009). Put differently, "the particular hours of the day and the particular days of the week during which employees shall be required to work are subjects well within the realm of … terms and conditions of employment." *Local Union No. 189, Amalgamated Meat Cutters and Butcher Workmen of N. Am., AFL–CIO v. Jewel Tea Co.*, 381 U.S. 676, 691 (1965) (quotation marks omitted) (observing that when an employee works is a term or condition of employment governed by collective bargaining under the National Labor Relations Act). The Texas Employment Discrimination Act explicitly identifies "hours" as workplace "terms or conditions" and defines a labor organization as existing to, among other things, bargain with respect to "wages, rates of pay, hours, or *other* terms or conditions of employment." Tex. Lab. Code Ann. § 21.002(10) (emphasis added).

Seniority **is a term, condition, or privilege of Plaintiffs' employment.** "[B]enefits that are part of an employment contract" are terms, conditions, or privileges of employment. *Hishon v. King & Spalding*, 467 U.S. 69, 74 (1984). A benefit may also be a privilege of employment even if it is not expressed in an agreement, but simply accorded by custom. *Id.* at 75. Thus, an employment benefit "may not be doled out in a discriminatory fashion, even if the employer would be free under the employment contract simply not to provide the benefit at all." *Id.*

Here, detention officers' days off are customarily assigned based on seniority, and they prefer to take weekend days off. *See* ECF 1 at 4, 5, 7. Put differently, a privilege

exists entitling more-senior officers to receive their desired days off, that is, weekend days. The County's sex-based scheduling policy altered that privilege. To be sure, to ensure proper staffing, some detention officers must work some weekends. But the County may not, consistent with Title VII and the Texas Employment Discrimination Act, consign women to work weekends because they are women. Because the County's discriminatory policy altered a privilege of Plaintiffs' employment, it violated Title VII and Texas law, and the district court should be empowered to grant all appropriate relief. *See* ECF 1 at 7.

Job responsibilities are terms or conditions of employment. "Job assignments" are workplace "terms, conditions, or privileges of employment." EEOC Compl. Man., § 613.1(a), 2006 WL 4672701 (2009). Therefore, changing or restricting job responsibilities on the basis of sex violates Title VII. *See Judie v. Hamilton*, 872 F.2d 919, 921-22 (9th Cir. 1989); *Czekalski v. Peters*, 475 F.3d 360, 364 (D.C. Cir. 2007).

Male and female detention officers have the same titles and job descriptions, but beginning in April 2019, the County prohibited female officers from performing their jobs without a male officer on each shift to advance purported safety interests. *See* ECF 1 at 5. By categorically treating Plaintiffs as less competent than male officers, this sex-based policy essentially elevated male officers to positions overseeing Plaintiffs' work, effectively diminishing Plaintiffs' job responsibilities. According to the County, "it would be unsafe for all the men to be off during the week." *Id.* Put differently, the County believes female officers incapable of performing their job tasks without a male colleague present. Male officers, in contrast, may complete their job responsibilities without female colleagues' protection and therefore may enjoy the privilege of weekend

leave. This discrimination is indisputably based on sex and alters Plaintiffs' terms, conditions, or privileges of employment.

Defendants' sex-based shift-assignment policy violated Title VII. Here, the County admittedly decides when Plaintiffs must work based on sex. Officers are required to work five days a week and are entitled to two days off. ECF 1 at 5. Plaintiffs are not able to take their two days off on consecutive weekend days solely because they are female. *Id.* If an employer imposed this sex-based policy in another circuit, it would be viewed as violating Title VII. *See, e.g.*, *Hampton v. Borough of Tinton Falls Police Dep't*, 98 F.3d 107, 116 (3d Cir. 1996) (assigning employee to an undesirable schedule can violate Title VII); *Greer v. St. Louis Reg'l Med. Ctr.,* 258 F.3d 843, 845-46 (8th Cir. 2001) (giving female employee a worse on-call duty schedule violates Title VII). The EEOC agrees. *See Ralph J. Lehmann*, EEOC DOC 01860673, 1989 WL 1008741, at *4 (Feb. 22, 1989) (assigning employee to the night shift based on a protected characteristic violates Title VII).

The County's policy harmed Plaintiffs because working weekends causes "inconvenience resulting from a less favorable schedule," *Ginger v. District of Columbia*, 527 F.3d 1340, 1344 (D.C. Cir. 2008), by, for example, interfering with family obligations and social engagements. *See* ECF 1 at 5 (describing weekend days off as "preferred"); *see also Spees v. James Marine, Inc.*, 617 F.3d 380, 392 (6th Cir. 2010) (concluding that the employer violated Title VII when it required an employee to work the night shift because of her sex). Plaintiffs could not simply disregard the County's sex-based scheduling policy by not reporting for work on the weekends: Had Plaintiffs failed to work their assigned shifts, the County could have presumably disciplined them,

including by terminating their employment. Male officers, on the other hand, enjoy the benefit of taking full weekends off. The County's discriminatory, sex-based shift-assignment policy thus imposes terms or conditions on Plaintiffs' employment (or denies privileges) that would not exist absent the policy.

II. The issue presented is important, and a panel of this Court cannot properly resolve it.

Knowing which employment practices are prohibited by Title VII and other statutes banning workplace discrimination is important to both employers and employees. The Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), the Genetic Information Nondiscrimination Act, and Section 1981, like Title VII, all prohibit discrimination with respect to terms, conditions, or privileges of employment. *See* 42 U.S.C. § 12112(a); 29 U.S.C. § 623(a); 42 U.S.C. § 2000ff-1(a); 42 U.S.C. § 1981(b). And like Title VII, these statutes do not include the language "adverse employment action" (nor its offshoot in this Circuit, "ultimate employment decision"), yet current judicial doctrine requires a plaintiff alleging disparate treatment under these statutes to plead and prove one. The issue presented by this appeal thus affects many employees entitled to protection under a range of important federal laws aimed at eliminating workplace discrimination.

The United States acknowledges the importance of the issue presented and agrees with Plaintiffs. It has argued to the Supreme Court that the adverse-employment-action doctrine, and specifically this Court's ultimate-employment-decision rule, have "no foundation" in Title VII's text, Congress's purpose, or Supreme Court precedent. Br. for United States as Amicus Curiae at 6, *Peterson v. Linear Controls, Inc.*, No. 18-1401,

2020 WL 1433451 (Mar. 20, 2020), *pet. dismissed*, 140 S. Ct. 2841 (2020) (Mem.); *accord* Br. in Opp'n at 13, *Forgus v. Shanahan*, No. 18-942, 2019 WL 2006239 (May 6, 2019), *cert. denied*, 141 S. Ct. 234 (2020) (Mem.).

The United States is a frequent defendant in employment-discrimination litigation, *see* 42 U.S.C. § 2000e-16, and the EEOC rules on thousands of employment-discrimination charges annually.[2] In just the last year, the Government has reiterated its disagreement with the adverse-employment-action precedent before five circuits.[3] There can be no serious dispute, then, that the issue presented here is important and ripe for this Court's reevaluation.

This Court's adverse-employment-action rule imposes far-reaching consequences. As the facts here demonstrate, the precedent does more than fail to hold employers accountable for individual discriminatory acts after they have occurred. Here, the County essentially adopted the following policy: "Pay, titles, and job descriptions are

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[2] *See* EEOC, All Statutes (Charges filed with EEOC) FY 1997 - FY 2019, https://www.eeoc.gov/statistics/all-statutes-charges-filed-eeoc-fy-1997-fy-2019 (last visited Mar. 17, 2021).

[3] Br. for United States as Amicus Curiae at 4-5, *Lyons v. City of Alexandria*, No. 20-1656, Dkt. 22 (4th Cir. Sept. 22, 2020); Br. for United States as Amicus Curiae at 5-7, *Threat et al. v. City of Cleveland et al.*, No. 20-4165, Dkt. 23 (6th Cir. Jan. 4, 2021); Br. for United States as Amicus Curiae at 5-6, *Muldrow v. City of St. Louis, et al.*, No. 20-2975, Doc No. 4984015 (8th Cir. Dec. 14, 2020); Br. for United States as Amicus Curiae at 6-8, *Neri v. Bd. of Educ. for the Albuquerque Pub. Schs.*, No. 20-2088, Doc. No. 010110438908060 (10th Cir. Nov. 16, 2020); Br. for United States as Amicus Curiae at 9, *Chambers v. District of Columbia*, No. 19-7098, Doc. No. 1833276 (D.C. Cir. Mar. 12, 2020).

based on merit without regard to sex, but we require female employees to work at least one weekend day while male employees may enjoy weekends off."

Openly discriminatory practices are often viewed as a relic of the past, but this case and others show how the adverse-employment-action doctrine emboldens employers to discriminate with legal impunity. For instance, as noted, Black employees required to work outside in the heat because they are Black—while white counterparts work inside with air conditioning—have no recourse in this Circuit even when they allege direct evidence of discrimination. *Peterson v. Linear Controls, Inc.*, 757 F. App'x 370, 373 (5th Cir. 2019), *pet. dismissed*, 140 S. Ct. 2841 (2020) (Mem.). An admittedly "oppressive change of hours" is also viewed as perfectly lawful. *Mylett v. City of Corpus Christi*, 97 F. App'x 473, 476 (5th Cir. 2004).

This Court's adverse-employment-action rule extends well beyond discriminatory shift assignments to effectively authorize a range of discriminatory practices. Discriminatory negative performance evaluations, *Douglas v. DynMcDermott Petroleum Operations Co.*, 144 F.3d 364, 373 n.11 (5th Cir. 1998), or denials of training are not actionable, *see, e.g.*, *Shackelford v. Deloitte & Touche, LLP*, 190 F.3d 398, 406 (5th Cir. 1999) (affirming district court's conclusion that "denying training to an employee is not an adverse employment action covered by Title VII."). Indeed, an employer is free, on the basis of sex, to deny female employees the opportunity to compete for performance awards because "even being totally denied a performance award is not an ultimate employment decision." *Lopez v. Kempthorne*, 684 F. Supp. 2d 827, 885 (S.D. Tex. 2010). The same goes for discriminatory denials of a "telecommuting agreement" or office-space assignments. *Id.*

The ramifications of the adverse-employment-action doctrine are not fully reflected in the litigated decisions. Because in this Circuit discrimination is permissible so long as it does not involve an ultimate employment decision, an employer could, without legal consequence, require all of its Black employees to work under white supervisors, women to stand in every meeting while male counterparts sit comfortably around a table, people with disabilities to work in a "disabled-persons" annex, and older employees to write monthly reports about their retirement plans. Decades after Title VII, the ADA, and the ADEA were enacted to eliminate the workplace indignities of Jim Crow and sex-based stereotypes, to bring people with disabilities into the American mainstream, and to ensure that older Americans are judged on their merit, that cannot be right.

III. This case is an ideal vehicle for reconsidering the adverse-employment-action rule.

The district court dismissed Plaintiffs' complaint for one reason only: Plaintiffs failed to plead an adverse employment action because "[c]hanges to an employee's work schedule, such as the denial of weekends off, are not an ultimate employment decision." Add. 3a-4a. There is no alternative basis for affirming the district court's grant of the County's motion to dismiss. The failure to allege an adverse employment action is the sole ground the County raised in its motion to dismiss, ECF 8, and it is what doomed Plaintiffs' federal and state-law discrimination claims. Add. 1a-6a. Moreover, the County cannot (and did not) dispute that Plaintiffs sufficiently alleged facts showing Defendant discriminated against them because, as alleged, it admits to denying Plaintiffs' weekend leave based on sex. ECF 1 at 5.

In sum, this case presents an outcome-determinative opportunity for the Court to revisit its adverse-employment-action doctrine and "definitively establish" the "clear principle" that conduct, which "plainly constitutes discrimination" and alters an employee's "terms, conditions, or privileges of employment" violates Title VII and the Texas Employment Discrimination Act. *See Ortiz-Diaz v. United States Dep't of Hous. & Urban Dev.*, 867 F.3d 70, 81 (D.C. Cir. 2017) (Kavanaugh, J., concurring).

Conclusion

This petition for initial hearing en banc should be granted.

Respectfully submitted,

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March 17, 2021

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FELESIA HAMILTON, et al.	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Civil Action No. 3:20-CV-00313-N
	§	
DALLAS COUNTY,	§	
	§	
Defendant.	§	

MEMORANDUM OPINION AND ORDER

This Order addresses Defendant Dallas County's motion to dismiss pursuant to Rule 12(b)(6) [8]. Because Plaintiffs have failed to state a claim upon which relief can be granted, the Court grants Dallas County's motion. The Court grants Plaintiffs leave to amend their complaint.

I. ORIGINS OF THE DISPUTE

Plaintiffs are female Detention Service Officers at the Dallas County jail. Plaintiffs' complaint raises claims of discrimination in violation of Title VII of the Civil Rights Act of 1964 and the Texas Employment Discrimination Act, also referred to as the Texas Commission on Human Rights Act ("TCHRA"). Plaintiffs allege that Dallas County used a discriminatory work scheduling policy that gave only male employees full weekends off. Plaintiffs allege that they received less preferred days off, namely, weekdays or partial weekends. On June 4, 2020, Dallas County filed this motion to dismiss pursuant to Rule 12(b)(6).

II. RULE 12(B)(6) LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) provides for dismissal of a claim if the complaint fails to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6). When considering a Rule 12(b)(6) motion to dismiss, a court must determine whether the plaintiff has asserted a legally sufficient claim for relief. *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995). A viable complaint must include "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). To meet this "facial plausibility" standard, a plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A court generally accepts well-pleaded facts as true and construes the complaint in the light most favorable to the plaintiff. *Gines v. D.R. Horton, Inc.*, 699 F.3d 812, 816 (5th Cir. 2012). But a court does not accept as true "conclusory allegations, unwarranted factual inferences, or legal conclusions." *Ferrer v. Chevron Corp.*, 484 F.3d 776, 780 (5th Cir. 2007). A plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. "Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true." *Id.* (internal citations omitted).

III. THE COURT GRANTS DALLAS COUNTY'S MOTION

To establish a prima facie case of discrimination under Title VII, a plaintiff must show that, among other requirements, she was subject to an adverse employment action. *See Haire v. Bd. of Supervisors of La. State Univ.*, 719 F.3d 356, 363 (5th Cir. 2013).

Dallas County argues that Plaintiffs have not established that they suffered an "adverse employment action" because Dallas County's alleged work scheduling policy does not affect the job duties, compensation, or benefits of the Plaintiffs. *See Pegram v. Honeywell, Inc.*, 361 F.3d 272, 282 (5th Cir. 2004). Plaintiffs respond that the facially discriminatory work scheduling policy makes their jobs "objectively worse" and thus constitute an adverse employment action. Alternatively, Plaintiffs seek leave to amend their complaint.

A. Plaintiffs Have Not Pled an Adverse Employment Action

Although Dallas County's alleged facially discriminatory work scheduling policy demonstrates unfair treatment, the binding precedent of this Circuit compels the Court to grant Dallas County's motion. Under Title VII, "an employment action that 'does not affect job duties, compensation, or benefits' is not an adverse employment action." *Pegram v. Honeywell, Inc.*, 351 F.3d 272, 282 (5th Cir. 2004) (quoting *Banks v. E Baton Rough Parish Sch. Bd.*, 320 F.3d 570, 575 (5th Cir. 2003)). Instead, an adverse employment action for Title VII discrimination claims consists of "ultimate employment decisions such as hiring, granting leave, discharging, promoting, and compensating." *Felton v. Polles*, 315 F.3d 470, 486 (5th Cir. 2002).

Plaintiffs respond that the Fifth Circuit has held that employment actions that effectively change an employee's job such that it is "objectively worse" qualify as adverse employment actions. *See Pegram*, 351 F.3d at 283. Plaintiffs argue that the facially discriminatory policy of Dallas County changes their jobs to be "objectively worse." However, the Court notes that the Fifth Circuit has limited the use of the "objectively worse" standard to cases involving job transfers or reassignments. *See, e.g.*, *Alvarado v.*

Tex. Rangers, 492 F.3d 605, 612 (5th Cir. 2007) (holding that "a *transfer* . . . can be a demotion if the new position proves objectively worse") (emphasis added); *Pegram*, 361 F.3d at 283 ("An employment *transfer* may qualify as an adverse employment action if the change makes the job objectively worse.") (emphasis added). The Fifth Circuit utilized this standard to determine when "a transfer or reassignment can be the equivalent of a demotion, and thus constitute an adverse employment action." *Williams v. E.I. du Pont de Nemours and Co.*, 180 F.Supp.3d 451, 455 (M.D. La. 2016) (citing *Alvarado*, 492 F.3d at 612–15).

Changes to an employee's work schedule, such as the denial of weekends off, are not an ultimate employment decision. *See, e.g.*, *Benningfield v. City of Houston*, 157 F.3d 369 (5th Cir. 1998) (holding that transfer to undesirable night shift was not an adverse employment action in anti-retaliation context); *Lewis v. LSG Sky Chefs*, No. 3:14-cv-3107-M-BN, 2015 WL 935125 (N.D. Tex. 2015) (granting motion to dismiss when African-American truck driver was not permitted to "bid" for a shift schedule when white coworkers could); *Johnson v. Tune*, No. 4:10-cv-124, 2011 WL 3299927 (E.D. Tex. Apr. 29, 2011) (granting motion to dismiss when Plaintiff alleged race-based denial of weekends off). "It is well established that [Plaintiffs'] last three claimed injuries—oppressive change of hours, denial of particular shifts, and humiliation—are not adverse employment actions." *Mylett v. City of Corpus Christi*, 97 F. App'x 473 (5th Cir. 2004). Plaintiffs argue that the cases that Dallas County cites are inapposite to the case at hand because they only reference specific, one-off instances of work schedule denials as opposed to the present case of a continuing policy of gender discrimination. However, the cases cited by

both parties suggest that continuing discrimination in work schedule denials still do not constitute adverse employment actions. *See, e.g.*, *Johnson*, 2011 WL 3299927 (denying African American employee "*weekends* off from work to attend college").

While it is at least plausible that the denial of full weekends off for Plaintiffs is objectively worse than getting whole weekends off, the Fifth Circuit has not recognized a work schedule policy alone to be an adverse employment action.[1] *See, e.g.*, *Benningfield v. City of Houston*, 157 F.3d 369 (5th Cir. 1998) (holding that "changing [Plaintiff's] hours, without more, does not constitute an adverse employment action"). Plaintiffs have pled that "male and female employees perform the same tasks and the number of inmates during the week is the same as the number of inmates on the weekend." Pls.' Response 2 [12]. Thus, there is no evidence before the Court that Dallas County's practice affected the compensation, job duties, or prestige of the Plaintiffs' employment as required for a finding that an adverse employment action occurred, and the policy does not rise to the level of an adverse employment action under Title VII. Furthermore, Plaintiffs agree with Dallas County that the law under TCHRA should follow Title VII. *See Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 474 (Tex. 2001) (looking to Title VII for guidance in interpreting

[1] The Court notes the disagreement between Circuit Courts on this issue. *Compare Spees v. James Marine, Inc.*, 617 F.3d 380 (6th Cir. 2010) (holding that an "inconvenience resulting from a less favorable schedule can render an employment action 'adverse' even if the employee's responsibilities and wages are left unchanged") (quoting *Ginger v. District of Columbia*, 527 F.3d 1340, 1344 (D. C. Cir. 2008)) *with Thomas v. Potter*, 202 F. App'x 118, 119 (7th Cir. 2006) (undesirable or inconvenient shift change did not rise to the level of a materially adverse employment action).

TCHRA). The Court determines that no adverse employment action occurred for TCHRA or Title VII purposes. Accordingly, the Court grants Dallas County's motion to dismiss.

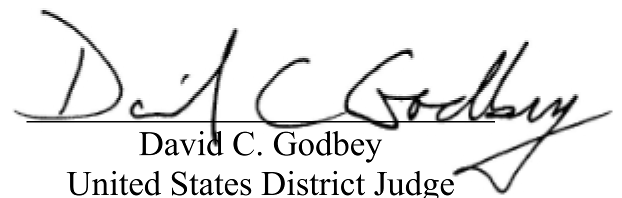
B. The Court Grants Plaintiffs Leave to Amend

Leave to amend should be freely given when justice so requires and should be granted absent some justification for refusal. *Foman v. Davis*, 371 U.S. 178 (1962). When a plaintiff's complaint fails to state a claim, courts generally give plaintiff the chance to amend the complaint before dismissing the action with prejudice. *See Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 329 (5th Cir. 2002). Thus, the Court grants Plaintiffs leave to amend their complaint. Plaintiffs should file their amended complaint within thirty (30) days of this Order.

CONCLUSION

Because the Court determines that denial of weekends off does not constitute an adverse employment decision under Fifth Circuit precedent, the Court grants Dallas County's motion to dismiss. The Court grants Plaintiffs leave to amend her pleadings within thirty (30) days of this Order. If Plaintiffs do not replead within that time, the Court will dismiss this action with prejudice without further notice.

Signed December 1, 2020.



David C. Godbey
United States District Judge

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A) because it contains 3,796 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Garamond.

/s/ Madeline Meth
Madeline Meth

Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I certify that, on March 17, 2021, this brief was filed using the Court's CM/ECF system. All attorney participants in the case are registered CM/ECF users and will be served electronically via that system.

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