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; 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

REPLY BRIEF OF PLAINTIFFS-APPELLANTS FELESIA HAMILTON ET AL.

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July 6, 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

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Brenda Johnson

Arrisha Knight

Jamesina Robinson

Debbie Stoxstell

Felicia Smith

Tameka Anderson-Jackson

Tammy Island

Defendant-Appellee

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Atlanta Women for Equality

Autistic Self Advocacy Network

Black Women's Roundtable

Bold Futures NM

California Women Lawyers

Champion Women; Legal Advocacy For Girls And Women in Sport

Clearinghouse on Women's Issues

Coalition of Labor Union Women, AFL-CIO

Desiree Alliance

Equality California

Feminist Majority Foundation

GLBTQ Legal Advocates & Defenders

HOPE for All: Helping Others Prosper Economically

Impact Fund

In Our Own Voice: National Black Women's Reproductive Justice Agenda

International Action Network for Gender Equity & Law (IANGEL)

KWH Law Center for Social Justice and Change

LatinoJustice PRLDEF

League of Women Voters

Legal Aid at Work

Legal Momentum, the Women's Legal Defense and Education Fund

Legal Voice

Lift Louisiana

National Association of Social Workers (NASW)

National Association of Women Lawyers

National Council of Jewish Women

National Crittenton

National Employment Lawyers Association

National Organization for Women Foundation

National Women's Political Caucus

National Workrights Institute

New Voices for Reproductive Justice

Religious Coalition for Reproductive Choice

Service Employees International Union (SEIU)

Sikh Coalition

The Women's Law Center of Maryland

Women Employed

Women Lawyers On Guard Inc.

Women's Bar Association of the District of Columbia

Women's Law Project

July 6, 2021

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Argument

The County's sex-based shift-assignment policy violates Title VII and the Texas Employment Discrimination Act.

The County adopted a sex-based policy requiring female detention officers, but not male officers, to invariably work weekends. Rather than engage with Plaintiffs' arguments that this discriminatory policy violated federal and state law, the County searches for procedural escape hatches. It argues that Plaintiffs failed to preserve the simple issue presented on appeal: whether its discrimination violated Title VII of the Civil Rights Act of 1964 and the Texas Employment Discrimination Act. But that is the very issue litigated before and resolved by the district court. The district court agreed with Plaintiffs that, as pleaded, the County's women-work-weekends policy "demonstrates unfair treatment," yet concluded that Plaintiffs' factual allegations fail to state a claim under Title VII or Texas law. ROA.104; RE.14. Because that conclusion cannot be reconciled with the statutory text and controlling precedent, this Court should reverse.

A. Plaintiffs' argument about the meaning of Title VII and the Texas Employment Discrimination Act is properly before this Court.

1. Title VII of the Civil Rights Act of 1964 and the Texas Employment Discrimination Act make it unlawful for an employer to "discriminate against any individual with respect to his 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). Based on the ordinary meaning of these words, it's plain that the County's

expressly sex-based policy violated the statutes' sweeping prohibitions against workplace sex discrimination.

The County does not even try to confront the statutory text. Instead, it asserts that Plaintiffs forfeited their argument about the text's meaning because they did not argue to the district court that the adverse-employment-action requirement is a "'judicial gloss at odds with, and incompatible with, Title VII" and Texas law. County Br. 7-11. But the meaning of "terms, conditions, or privileges of employment"—that is, which employment practices are actionable under Title VII and Texas law—was the only issue presented to the district court. The County's forfeiture argument is therefore frivolous and should be rejected.

Indeed, it would have been impossible for the district court to avoid confronting Title VII's meaning when it addressed the County's motion to dismiss, which asserted that Plaintiffs failed to state discrimination claims because they "did not suffer an 'adverse employment action,' *as that term is understood*." Dist. Ct. Dkt. 8, Mot. to Dismiss at 5 (June 4, 2020) (emphasis added). Plaintiffs responded by challenging the County's narrow understanding of the judicially-devised phrase "adverse employment action." Plaintiffs argued below that, based on "plain common sense," the County's discriminatory policy qualified as a prohibited employment practice under Title VII and the Texas Employment Discrimination Act. Dist. Ct. Dkt. 12, Resp. to Mot. to Dismiss at 4 (June 25, 2020). The district court rejected Plaintiffs' view and sided with the County. ROA.107; RE.17. Put differently, Plaintiffs' claims cannot be forfeited because the parties' "essential position[s] in the litigation [are] reflected in the [district court's] decision." *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 470 (2000).

Issue preservation "does not demand the incantation of particular words; rather, it requires that the lower court," as here, "be fairly put on notice as to the substance of the issue." *Nelson*, 529 U.S. at 469. Nor are parties required to cite particular legal authorities to preserve arguments. *See Elder v. Holloway*, 510 U.S. 510, 512 (1994). And it should go without saying that in cases involving statutory interpretation, courts must "start with the specific statutory language in dispute," *Murphy v. Smith*, 138 S. Ct. 784, 787 (2018), which is precisely what Plaintiffs ask this Court to do. *See also Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1013 (2020) (looking to the "particular statute's text and history"); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (beginning by analyzing "the language of" Title VII).

To be clear, then, the County is asking this Court to ignore this basic premise of statutory construction and not address the meaning of the statute at issue in this appeal. That request should be rejected.

2. The County's argument (at 11-14) that this Court must affirm the district court's decision under the "rule of orderliness" fares no better. Contrary to the County's characterization, Plaintiffs have not asked a panel of this Court to declare circuit precedent void or to overrule any binding decision.

Plaintiffs do not dispute that "hundreds if not thousands of decisions" have reflexively held "that an 'adverse employment action' is essential to the plaintiff's prima facie case," even though the Supreme Court "has never adopted it as a legal requirement" or analyzed its scope, and the requirement lacks a foothold in the statutory text. *Minor v. Centocor, Inc.*, 457 F.3d 632, 634 (7th Cir. 2006) (Easterbrook, J.). But that still leaves the question presented by this appeal: whether the County's discriminatory

shift-assignment policy constitutes an "adverse employment action" under this Court's binding precedents. As the County recognizes, Plaintiffs seek "to show that the County's scheduling policy fit[s] into the adverse employment action analysis used by this circuit." County Br. 8.[1]

B. The County violated Title VII and the Texas Employment Discrimination Act by altering Plaintiffs' terms, conditions, or privileges of employment based on sex.

1. When the County does turn to the merits, it just repeats the district court's error. As set out in our opening brief (at 6-7), Title VII and Texas's analogue make it unlawful, without exception, for an employer 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" on the basis of sex. 42 U.S.C. § 2000e-2(a)(1); *see* Tex. Lab. Code Ann. § 21.051(1). The County's sex-based

[1] Plaintiffs contend that the sex-based scheduling policy at issue here is actionable under this Court's controlling precedent, but the County is correct that Plaintiffs, in their petition for initial hearing en banc, encouraged this Court to revisit more broadly its atextual ultimate-employment-decision requirement. Pet. for Initial Hearing En Banc at iii. The United States, too, believes that this "[t]his Court's 'ultimate employment decision' standard is irreconcilable with the statutory text of Section 703(a)(1) and should be reconsidered." U.S. Br. 8. If the panel agrees with the County that, under this Court's binding precedent, an employer may subject female employees to objectively worse workplace treatment without legal consequence that would underscore the need for the en banc Court's intervention. *Id.* As the United States notes (at 9 n.3), the D.C. Circuit recently granted rehearing en banc on its own motion to reconsider its atextual adverse-employment-action precedents. *See Chambers v. District of Columbia*, 988 F.3d 497, 506 (D.C. Cir. 2021) (Tatel & Ginsburg, J.J., concurring), *reh'g en banc granted, judgment vacated*, No. 19-7098, 2021 WL 1784792 (D.C. Cir. May 5, 2021) (explaining that limiting Title VII to decisions that cause objectively tangible harm cannot be reconciled with the "statutory text, Supreme Court precedent, and Title VII's objectives"). The County does not maintain that en banc review here would be inappropriate.

shift-assignment policy violated federal and Texas law by discriminating against Plaintiffs as to the terms, conditions, or privileges of their employment. Ask any employee to describe the "terms, conditions, or privileges" of her workplace today, and she will point not just to her salary and benefits, but to various requirements prescribed by her employer, including when, where, and with whom she is required to work, and the title, tasks, and other circumstances of her job. *See* Opening Br. 6-10; U.S. Br. 8.

Plaintiffs do not suggest, as the County implies (at 9), that Title VII covers every decision made by employers. Instead, Plaintiffs recognize that employment practices that alter "terms, conditions, or privileges of employment" are actionable only when the plaintiff can prove that the employer intentionally discriminated on the basis of race, color, religion, sex, or national origin—that is, the employer's actions must have been taken "because of" one of the Act's protected characteristics. 42 U.S.C. § 2000e-2(a)(1); *see Tex. Dep't Cmty. Affs. v. Burdine*, 450 U.S. 248, 253 (1981); *cf.* AFSCME Amicus 13 (explaining that prohibiting "all officers," rather than just female officers, from taking full weekends off would be "inadvisable but lawful"). Proving causation can be a substantial burden. *Tex. Dep't Cmty. Affs.,* 450 U.S. at 257-59; *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509-12 (1993). But as our opening brief explains (at 7), whenever an employee demonstrates that an employer's action is taken "because of the employee's [sex]" that action "plainly constitutes discrimination," and if the action is "with respect to an individual's terms, conditions, or privileges of employment," it violates Title VII. *Ortiz-Diaz v. U.S. Dep't of Hous. & Urban Dev.*, 867 F.3d 70, 81 (D.C. Cir. 2017) (Kavanaugh, J., concurring).

Decisions that treat the word "discriminate," as used in Title VII, as demanding proof of a so-called "adverse employment action," *see Connell v. Bank of Boston,* 924 F.2d 1169, 1179 (1st Cir. 1991), are wrong. No adverse-employment-action requirement can be derived from the word "discriminate" because that term connotes any differential treatment. *See* Opening Br. 6. That is true even though proof that an employee has suffered serious harm will often strengthen a plaintiff's case. Indeed, absent direct evidence of discrimination (like the statements demonstrating the County's discriminatory intent relied on by Plaintiffs here, ROA.14; RE.23), an employee frequently must rely on evidence that his employer treated him worse than colleagues outside of his protected class to demonstrate that the employer acted with discriminatory intent. Put the other way around, when an employer can show that a decision did not cause a plaintiff objectively tangible harm, the employer will argue that because most people would not find the employer's decision particularly harmful, it is unlikely that the employer took the action for discriminatory reasons. Ernest F. Lidge III, *The Meaning of Discrimination: Why Courts Have Erred in Requiring Employment Discrimination Plaintiffs to Prove That the Employer's Action Was Materially Adverse or Ultimate*, 47 U. Kan. L. Rev. 333, 368 (1999). But litigants' reliance on evidence that they experienced harsh treatment does not mean that a disparate-treatment plaintiff must have suffered any particular level of harm to recover under Title VII.

2. Even under the district court's impermissibly narrow understanding of Title VII and the Texas Employment Discrimination Act, the County's sex-based scheduling policy constitutes an "adverse employment action." Shift reassignments are "adverse employment actions" when they make an employee's job "objectively worse," resulting

in a constructive demotion. *Pegram v. Honeywell, Inc.*, 361 F.3d 272, 283 (5th Cir. 2004). As our opening brief shows (at 13-14), by demanding that Plaintiffs work consecutive weekend days and forbidding female detention officers from working shifts without at least one male officer present, the County's policy made Plaintiffs' jobs objectively worse than their male counterparts. *See also* AFSCME Amicus 11. To conclude otherwise, the County ignores that its sex-based policy categorically treated female officers as unqualified to perform their material responsibilities without a male officer present, stripped Plaintiffs of the privilege to choose their days off under the seniority-based system that benefitted male officers, and required female officers to invariably work less desirable shifts. *See* County Br. 19.

Everyone agrees that Title VII covers employment decisions involving terms and conditions "*such as* hiring, granting leave, discharging, promoting, and compensating." *Dollis v. Rubin*, 77 F.3d 777, 782 (5th Cir. 1995) (emphasis added) (citing *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1980) (en banc)). When the County prohibited female detention officers—who, absent the discrimination at issue here, have the same tasks and titles as male officers—from working shifts without a male officer present, that decision promoted male officers into positions in which they functionally oversaw Plaintiffs' work, thus demoting Plaintiffs. ROA.14; RE.23. The male officers, moreover, could maintain control over their schedules while Plaintiffs lost that privilege simply because they are female. *Id.*; *see also* NWLC Amicus 19-20 (explaining that having input over work schedules tends to be particularly important to women who generally shoulder more caregiving responsibilities). And the male officers were granted full

weekends of leave—days off that are coveted in any industry but are especially important to detention officers. *See* AFSCME Amicus 11.

There is no meaningful way to distinguish the harm suffered by Plaintiffs here from the injury that a prospective employee would experience when confronted during the hiring process with the same sex-based policy. That prospective employee, too, would experience no diminution in pay or formal change in job responsibilities or title, when told that, if hired, she would be prohibited from requesting consecutive days off on weekends because she is female. Yet, there is no dispute that a sex-based hiring policy, which conditions employment on accepting discriminatory terms, constitutes unlawful discrimination under this Court's precedent. *See Bing v. Roadway Exp., Inc.*, 485 F.2d 441, 450 (5th Cir. 1973) (disparate-impact decision holding that a rule barring transfers operated like a discriminatory hiring policy and thus violated Title VII); *Nat'l Lab. Rels. Bd. v. Lummus Co.*, 210 F.2d 377, 378 (5th Cir. 1954) (hiring policy discouraging membership in one union and "conditioning employment on membership" in a different union was an unfair labor practice under the National Labor Relations Act, 29 U.S.C. § 158(a)(3), which bars "discrimination in regard to hire or tenure of employment or any term or condition of employment.").

Instead of grappling with the factual allegations here, the County engages in a lengthy effort to distinguish Plaintiffs' case from similar decisions involving reassignments that amounted to actionable "adverse employment actions." County Br. 17-19. That the parties have found no decision in which this Court struck down or upheld an across-the-board sex-based policy requiring women (but not men) to work weekends shows only that this Court has not been confronted by facts similar to those

alleged here, perhaps because Title VII is discouraging other employers from implementing openly discriminatory policies like the one here. *See* Opening Br. 13. After all, it's been "well recognized" for decades "that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females." *City of L.A., Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978).

The County asserts several times that the sex-based scheduling system was "temporary," County Br. 4, 15, 19, 21, 26, a detail not supported by the complaint's plausible factual allegations, ROA.14; RE.23. In any case, this apparent effort to downplay the policy's harmful impacts actually concedes the point. The policy was certainly ongoing when Plaintiffs filed their complaint, ROA.14; RE.23. So, it could only be "temporary" if the County has since revoked it, underscoring that the policy imposed (and now has purportedly revoked) "terms" and "conditions" of Plaintiffs' employment and strongly suggesting that the County agrees with Plaintiffs that the policy made Plaintiffs' jobs objectively worse. Any voluntary cessation by the County of unlawful conduct, coming on the heels of a lawsuit challenging that conduct, would simply emphasize the need for appropriate injunctive (as well as monetary) relief. *See Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000).

If this Court affirms the district court's flawed interpretation of Section 703(a)(1), the County—already comfortable with using sex to make employment decisions—will be further emboldened. The gist of the County's argument, after all, is that it is free to hang a sign in the workplace reinstating the very policy at issue here, with all of its resulting harms: Female detention officers may not work shifts without a male detention officer present; female detention officers are prohibited from taking consecutive days

off on weekends, but male officers may enjoy full weekends off; female detention officers do not have the benefit of choosing their days off based on their seniority while male officers do. Decades after Title VII was enacted to eliminate sex-based workplace discrimination that cannot be right, and this Court should say so.

Conclusion

This Court should reverse the district court's judgment and remand the case for further proceedings.

Respectfully submitted,

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Certificate of Compliance

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 2,682 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.

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Certificate of Service

I certify that, on July 6, 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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