Does Patience Pay Off?

By Allison A. Jones, Downer, Jones, Marino & Wilhite, Shreveport, LA

There have been times in my practice of plaintiff-side employment law that I have just had to exercise patience. Patience with a client who does not understand the process. Patience with a court that does not always fully understand all facets of a claim. Patience with the law as it continues to develop and evolve. The character trait of patience is not a natural strength of mine. However, my self-enforced patience recently was rewarded when the United States Fifth Circuit Court of Appeal ("Fifth Circuit") reversed a confounding precedent of almost 30 years and returned to the plain language of the text of Title VII of the Civil Rights Act of 1964, as amended in 1991, the nation's primary employment discrimination statute.

In 1995, four short years after Title VII was amended, the Fifth Circuit in *Dollis v. Rubin*, 77 F.3d 777 (5th Cir. 1995) (*per curiam*) held without reference to the statutory text, that "Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions." Id. at 781-782. The Fifth Circuit then established a jurisprudential standard of "ultimate employment decisions" based on another court of appeals' observation "that Title VII discrimination cases have focused upon ultimate employment decisions such as hiring, granting leave, discharging, promoting, and compensating." Id. at 782 (citing *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir.) (*en banc*), *cert. denied*, 454 U.S. 892 (1981)).

For the last twenty-eight years, the Fifth Circuit has analyzed employment discrimination cases using this stringent jurisprudentially created rule of "ultimate employment decision." The result, more often than not, has been that summary judgments were granted for the defendant due to a plaintiff's inability to satisfy the "ultimate employment decision" standard.

On August 18, 2023, the *en banc* Fifth Circuit upended that law, holding in *Hamilton v. Dall. Cnty.*, 2023 U.S. App. LEXIS 21780 (5th Cir. August 18, 2023) that a plaintiff need not show an "ultimate employment decision" – a phrase that appears nowhere in the statute and, when applied, stymied legitimate claims. In *Hamilton*, the Court reasoned that the ultimate-employment-decision requirement rendered the "catchall provision" of Title VII's anti-discrimination provision—the "terms, conditions, or privileges of employment" text—meaningless.

Nowhere does Title VII say, explicitly or even implicitly, that employment discrimination is lawful if limited to non-ultimate employment decisions. To be sure, the statute prohibits discrimination in ultimate employment decisions—"hir[ing]," "refus[ing] to hire," "discharge[ing]," and "compensation"—*but it also* makes it unlawful for an employer "otherwise to discriminate against" an employee "with respect to [her] terms, conditions, or privileges of employment."

I was not in the room where *Hamilton* was decided, but the inescapable conclusion to be drawn is that textualism won out in the Fifth Circuit. One wonders where this textualism may take employment law. For example, where do the words "similarly situated" appear in any statute?

Lest we plaintiff lawyers get ahead of ourselves, however, we must be reminded that the Supreme

Court, in the upcoming 2023-2024 term, will consider the case of *Muldrow v City of St. Louis*, a case involving a police sergeant's transfer from one division to another, allegedly due to her gender. The sergeant claimed that the transfer amounted to discrimination in the "terms, conditions and privileges of employment." The District Court and Eighth Circuit Court of Appeals disagreed and allowed summary judgment.

So, the stage is set for the Supreme Court to answer definitively the decisive question: "Does Title VII prohibit discrimination in transfer decisions absent a separate court determination that the transfer decision caused a significant disadvantage?" *Muldrow* is scheduled for oral argument in the next term – meaning that it may be June 2024 before there is clear guidance as to which types of discriminatory employment practice are actionable.

Once again, we must exercise patience while we read and understand the text of the statute and hope for a fair and equitable result. As in the musical *Hamilton*, we must "Wait for It."