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Fifth Circuit Signals Possible Change in Title VII Analysis: Loss of Job Responsibilities Alone May Constitute a Demotion

By Chris McFadden

A recent case reminds employers that a demotion does not necessarily require a formal change in title or position. In some circumstances, employees may rely on diminished responsibilities or increased restrictions to form the basis of an employment discrimination claim.

In [Thompson v. City of Waco](#), Case No. 13-50718 (5th Cir. Sept. 3, 2014), the Waco, Texas Police Department suspended three detectives - Allen Thompson, who is African-American, and two white detectives - for falsifying time sheets. On their return, according to Thompson, only he faced ongoing restrictions. While his title and salary did not change, the police department no longer allowed him to, among other things, search for evidence without supervision, work undercover, or lead an investigation - all tasks Thompson previously had performed.

As many employers are aware, under Title VII, employers may not discriminate on the basis of race against employees with respect to the terms, conditions, or privileges of employment (often referred to as adverse employment actions). The United States Court of Appeals for the Fifth Circuit (which covers Louisiana, Mississippi, and Texas) traditionally has had one of the most difficult standards for an

employee to meet with regard to showing that he or she suffered such an action. In the Fifth Circuit, an adverse employment action must consist of an "ultimate" employment decision, which includes hiring, firing, failing to promote, demoting, granting leave, compensating, or transferring an employee to an objectively worse position.

In line with Fifth Circuit precedent, the district court ruled that Thompson's allegations regarding his loss of job responsibilities, absent a change in title, pay, or benefits, did not amount to an adverse employment action and dismissed the case at the pleadings stage. However, on appeal a split Fifth Circuit reversed, finding that in certain instances the loss of job responsibilities alone may be significant enough to rise to the level of an adverse employment action. In overturning the decision and remanding the case for further proceedings, the appellate court noted that, in this case, Thompson had argued that his new, severely limited duties effectively transformed him into an assistant detective, which clearly would have been categorized as a demotion if the police department had instead formally carried out the change in position. That plain loss of the ability to perform the essential job functions of the detective position meant that Thompson had stated a plausible claim for suffering an adverse employment action under Title VII.

This ruling is of particular importance to employers in Louisiana, Mississippi, and Texas because it signals a potential loosening of the Fifth Circuit's "ultimate" employment action requirement that may bring the Fifth Circuit in line with most other circuits' long-standing, more liberal interpretation of what constitutes an adverse employment action. However, the decision was not unanimous. In a strongly worded dissent, Judge Jerry E. Smith noted that the Fifth Circuit (along with the Eleventh Circuit, which covers Alabama, Florida, and Georgia), had the most stringent standard with respect to establishing the existence of an adverse employment action, and the majority had failed to recognize that the mere loss of job responsibilities with nothing more failed to approach that exacting standard.

Judge Smith stated that "[t]he distinction may seem formulistic, but its purpose is significant: We do not want to get involved in every dispute between employer and employee." The dissenting judge also noted that a more difficult standard did not preclude an individual from finding an avenue to pursue a discrimination claim: An employee who believed that his or her job had been changed for the worse was free to leave his or her employment and pursue a claim of discrimination under a constructive discharge theory. Further, by accepting that a loss in job responsibility could constitute an adverse employment action in some instances, the court would now have to shoulder the burden of analyzing whether any alleged employment action could constitute a demotion.

It is important not to lose sight of the fact that Thompson did not prevail on his claim at this stage; rather, the Court simply ruled that his allegations, if accepted as true, formed a plausible claim that should go forward. Nonetheless, employers in Louisiana, Mississippi, and Texas, along with employers in all other states, should remember that a change in employment functions, whether through a redesigned job description, a supervisor's informal direction, or otherwise, could form the basis of a discrimination claim under Title VII. As a result, employers should extend their attention beyond formal employment actions like transfers, title changes, and pay reductions, and be aware, when appropriate, of modifications within the day-to-day tasks and responsibilities of their employees.

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