

PUBLICATION

Back on the Case: Fifth Circuit Reexamines Detective's Race Suit

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Title VII of the Civil Rights Act of 1964 requires that an individual show that he or she was subjected to an "adverse employment action" in order to proceed on a claim of discrimination. Courts have defined "adverse employment action" to include employment actions that affect the terms and conditions of an individual's employment, and may include termination, failure to hire, failure to promote, demotion and unequal pay, among others.

The United States Fifth Circuit Court of Appeals has long taken one of the most conservative approaches in considering what constitutes an "adverse employment action." The Fifth Circuit's standard is one of "ultimate employment decisions" – in other words, typically only actions that have some sort of final consequences for an employee, including "hiring, firing, demoting, promoting, granting leave and compensating."

Recently, a panel of the Fifth Circuit shifted gears in the Court's approach to discrimination cases. In its 2-1 decision reversing the district court's grant of a motion to dismiss, the Court concluded that a change in duties alone could rise to the level of an ultimate employment action, even if there was no corresponding change in job title or pay.

In *Thompson v. City of Waco, Texas*, plaintiff Allen Thompson, an African-American male, had been suspended from his position as a detective, along with two other white detectives, for falsifying timesheets. No. 13-50718 (5th Cir. Sept. 3, 2014). When the three detectives were reinstated, only Thompson was placed on additional restrictions, including that he could not:

(1) search for evidence without supervision; (2) log evidence; (3) work in an undercover capacity; (4) be an affiant in a criminal case; (5) be the evidence officer at a crime scene; and (6) be a lead investigator on an investigation.

Thompson argued that these duties were "integral and material responsibilities of a detective" and that his new position was "less prestigious, will hinder his opportunities for advancement, and is less interesting." He further argued that "[h]e no longer uses the skills, education and experience that he had acquired and regularly used as a detective." Thompson complained that these restrictions were effectively a demotion.

Waco moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing that Thompson had failed to allege a critical element of his claim: that he had suffered an adverse employment action. Waco asserted that Thompson's change in duties was a mere "loss of some job responsibilities," which was not actionable under Title VII. The district court agreed and dismissed Thompson's suit.

Judge Higginson, writing for the majority of the Fifth Circuit panel, reversed the district court, finding that Thompson's allegations, if taken as true, stated a plausible adverse employment action. The Court noted that the facts suggested that:

...following his reinstatement, the Department rewrote and restricted his job description to such an extent that he no longer occupies the position of a detective; he now functions as an assistant to other detectives.

Although a detective in name, Thompson alleges that he can no longer "detect" – that is, search for evidence – without supervision.

The majority equated Thompson's changes in duties to a demotion, even though it was undisputed that Thompson's pay and other conditions of employment were unaffected.

In dissent, Judge Smith rejected the majority's conclusion, noting that it effectively adopted the lesser "materially adverse" standard from the other circuit courts of appeal. Judge Smith acknowledged the significant weight of the Fifth Circuit's authority in rejecting the loss of job responsibilities alone as sufficient to state a claim.

It is unclear whether the *Thompson* decision will stand, as Waco filed a petition for rehearing *en banc*. However, employers with operations in the Fifth Circuit should continue to watch this case closely. It could signal a shift to a more broad interpretation of the "adverse employment action" requirement of Title VII within the circuit.