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LAW REVIEW

"TITLE VII TEXTUALISTS REJOICE: FIFTH CIRCUIT TOSSES 'ULTIMATE EMPLOYMENT ACTION' STANDARD"

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I. INTRODUCTION

The interpretation of "adverse employment actions" in federal employment discrimination cases has been a point of contention among circuits for decades. Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits employers from taking "adverse actions" against applicants or employees based on race, color, religion, national origin, and sex including sexual orientation, gender identity, and

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pregnancy.[1] In addition, Title VII prohibits employers from retaliating against individuals for opposing or participating in an investigation or proceeding relating to an unlawful employment practice.[2] Yet for decades, federal courts have struggled to uniformly define what type of employment actions are considered qualifying adverse actions. As a result, some circuits—including the Fifth Circuit—have interpreted adverse actions to be narrowly limited to "ultimate employment actions."

This interpretation restricted employee relief in the Fifth Circuit to "ultimate employee actions," such as hiring, granting leave, firing, promoting, or compensating an employee.[3] Employees were thus restricted from asserting actionable discrimination claims for conduct deemed to fall outside this category. Discriminatory action such as paying leadership academy fees for white males but not Black females "would not have constituted an 'ultimate employment decision' under [prior Fifth Circuit] Title VII precedent."[4] And what most people do not know: the "ultimate employment action" standard was created to *exclusively* interpret actions taken by federal government employers only, not private employers.[5] This standard was not created to interpret adverse actions in retaliation claims. Yet, the Fifth Circuit used this standard to interpret adverse actions taken by private employers and relating to retaliation claims for years.

But in late summer 2023, the Fifth Circuit's *en banc* opinion in *Hamilton v. Dallas County* tossed out the "ultimate employment action" standard in Title VII cases, overturning decades-worth of stare decisis precedent.[6] Already, *Hamilton* is making waves in the Fifth Circuit, changing the outcome in employment discrimination cases like *Harrison v. Brookhaven School District*.[7]

This article reviews the importance of *Hamilton*, the textualist interpretation of Title VII's adverse action language, the origin of the "ultimate employment action" standard, and the interpretation of that and similar standards in various federal courts.

II. *HAMILTON V. DALLAS COUNTY* OVERTURNED FIFTH CIRCUIT'S "ULTIMATE EMPLOYMENT ACTION" STANDARD

The Fifth Circuit's road to textual interpretation of Title VII begins in Dallas County, Texas. In April 2019, the Dallas County Sheriff's Department implemented a gender-based scheduling policy for detention officers.[8] While male and female

[1] 42 U.S.C. § 2000e.
[2] *Id.* § 2000e–3(a).
[3] Hamilton v. Dallas Cnty., No. 3:20-CV-00313-N, 2020 WL 7047055, at *2 (N.D. Tex. Dec. 1, 2020), *aff'd*, 42 F.4th 550 (5th Cir. 2022), *reh'g en banc granted, opinion vacated*, 50 F.4th 1216 (5th Cir. 2022), *reh'g en banc*, 79 F.4th 494 (5th Cir. 2023), *rev'd and remanded*, 79 F.4th 494 (5th Cir. 2023) (quoting Felton v. Polles, 315 F.3d 470, 486 (5th Cir. 2002)).
[4] Harrison v. Brookhaven Sch. Dist., 82 F.4th 427, 429 (5th Cir. 2023).
[5] Page v. Bolger, 645 F.2d 227, 233 (4th Cir. 1981).
[6] Hamilton v. Dallas Cnty., 79 F.4th 494, 497 (5th Cir. 2023).
[7] *Harrison*, 82 F.4th at 428.
[8] *Hamilton*, 79 F.4th at 497.

officers performed the same job duties, only male officers were granted the opportunity to receive full weekends off from work.[9] Unlike their male counterparts, women could only request and receive partial weekends or weekdays off.[10] Prior to the implementation of this policy, the County followed a seniority system when scheduling detention officers that did not consider gender.[11] In response to the new policy, nine female officers sued Dallas County under Title VII for sex discrimination.[12] The suit was filed in the Northern District of Texas before Judge Godbey.[13]

In District Court, the County filed a swift Rule 12(b)(6) motion for failure to state a claim.[14] The County rooted its motion in extensive Fifth Circuit precedent, stating that an adverse action included only "ultimate employment actions" such as "hiring, granting leave, discharging, promoting, and compensating."[15] The District Court agreed.[16] Adhering to precedent, the District Court dismissed the plaintiffs' claim, concluding that changes to an employee's work schedule, including the denial of weekends off, did not constitute an ultimate employment action.[17] Thus, the District Court reasoned that the plaintiffs could not establish a prima facie case under Title VII without an actionable adverse action, and their claim was dismissed.[18]

Initial appellate review by the Fifth Circuit followed the District Court's reasoning. A panel comprised of Judge Higginbotham, Judge Stewart, and Judge Wilson affirmed the District Court's dismissal, agreeing that the plaintiffs did not effectively "plead an adverse employment action as required under th[e] circuit's Title VII precedent."[19] Yet the panel made a pointed effort to highlight the disagreement between the application of the Fifth Circuit definition of adverse action and the intent of Title VII as applied in this case. The panel notes the generally prescribed meaning of adverse action "within the ambit of Title VII's proscribed conduct: discrimination with respect to the terms, conditions or privileges of one's employment because of one's sex."[20] Explicitly, the panel emphasized the incongruency between the intent of Title VII and the definition employed by Fifth Circuit precedent: "[s]urely allowing men to have full weekends off, but not women, on the basis of sex rather than a neutral factor like merit or seniority, constitutes discrimination with respect to the terms or conditions of those women's employment."[21] And yet, as "sympathetic" as the panel may have been to

[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.* at 498.
[13] *Hamilton*, 2020 WL 7047055, at *1.
[14] *Id.*
[15] *Id.* at *2 (quoting Felton v. Polles, 315 F.3d 470, 486 (5th Cir. 2002)).
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] Hamilton v. Dallas Cnty., 42 F.4th 550, 552 (5th Cir.).
[20] *Id.* at 555.
[21] *Id.*

the "[p]laintiffs-[a]ppellants' position," its hands were tied.[22] The panel was "bound by [Fifth Circuit] precedent" and "the rule of orderliness" to affirm the District Court's dismissal.[23]

The panel's decision, however, was not without a call to action. The panel noted that the ability to overrule circuit precedent was not within the scope of its power.[24] Rather, "[the court] may not overrule a prior panel decision absent an intervening change in the law, such as a statutory amendment or a decision from either the Supreme Court or [the Fifth Circuit] *en banc* court."[25] The panel named *Hamilton* the "ideal vehicle" for the *en banc* court to "harmonize [] case law with [its] sister circuits' to achieve fidelity to the text of Title VII."[26]

On August 18, 2023, on rehearing *en banc,* the Fifth Circuit upended almost thirty years of precedent to "end [the] interpretive incongruity" that restricted Title VII adverse actions to "ultimate employment actions."[27] The opinion definitively applied a textualist approach by defining "adverse employment action" as the terms explicitly listed in Title VII. The *en banc* court interpreted Title VII, stating:

> Nowhere does Title VII say, explicitly or implicitly, that employment discrimination is lawful if limited to non-ultimate employment decisions. To be sure, the statute prohibits discrimination in ultimate employment decisions . . . *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.[28]

Now courts may consider discrimination impacting other areas of employment as an element in a prima facie employment discrimination case. By expanding the circuit's interpretation of "adverse employment action," the court changed the legal landscape. While reviewing *Hamilton*, the *en banc* court held that "[t]he days and hours that one works are quintessential 'terms or conditions' of one's employment," erring shy of creating a definitive definition of "adverse employment action."[29] The court noted that Title VII does not apply to "de minimis workplace trifles" but opted not to define the *de minimis* standard.[30] Indeed, the court left the door open for cases to follow to define the threshold minimum for an "adverse employment action."

III. CONGRESS ORIGINALLY DEFINED ADVERSE ACTIONS BROADLY

Title VII is a federal anti-discrimination statute that was enacted by Congress in 1964 and amended in 1972. As noted above, this law prohibits

[22] *Id.* at 557.
[23] *Id.* at 555, 557.
[24] *Id.* at 557.
[25] Thompson v. Dallas City Att'ys Office, 913 F.3d 464, 467 (5th Cir. 2019).
[26] *Hamilton*, 42 F.4th at 557.
[27] *Hamilton*, 79 F.4th at 497.
[28] *Id.* at 501.
[29] *Id.* at 503.
[30] *Id.* at 505.

employers from taking adverse employment actions against applicants and employees based on certain protected characteristics.[31] Congress espoused two distinct definitions of qualifying adverse actions when it enacted Title VII. The application of each definition depends on the type of employer involved.

The first definition applies when the employer is the federal government. For federal government employers, the statute defines adverse actions as "all personnel actions affecting employees or applicants for employment."[32] For example, this standard would apply to an employee of a federal agency like the Internal Revenue Service or the Department of Labor. Without much guidance, courts were left to interpret the broadness of "all personnel actions." For example, the U.S. District Court for the Northern District of Ohio defined "personnel actions" in 1974 as "some official act or procedure."[33]

The second definition applies when the employer is a private sector employer. For private employers, the statute defines adverse actions as actions affecting an individuals' "compensation, terms, conditions, or privileges of employment."[34] This standard would apply to an employee working for a company or business. This definition is more stringent when compared to the broader definition of adverse actions for federal government employers (i.e., "all personnel actions"). However, the plain language itself still broadly covers any actions affecting "terms, conditions, or privileges."

Further, within Title VII is an antiretaliation provision that prohibits employers from discriminating against employees and applicants because they opposed or participated in an investigation, proceeding, or hearing related to an unlawful employment practice.[35] However, the antiretaliation provision does not define or even broadly categorize adverse employment actions.

For almost a decade, courts considered different adverse actions on a case-by-case basis. Eventually, courts created bright-line tests used to define what actions were considered adverse. Notably, the distinction between federal and private employers remained intact and revered—that is, until it no longer was.

IV. FEDERAL COURTS REDEFINED ADVERSE ACTION TO "ULTIMATE EMPLOYMENT ACTION"

A new phrase was born: "ultimate employment decisions." The "ultimate employment" action language was first formulated in 1981 in the Fourth Circuit. In *Page v. Bolger*, the Fourth Circuit first tackled the concept of which employment decisions fell within the statute's definition of qualifying "personnel actions" for federal government employees.[36] In that case, the court contemplated a complicated

[31] 42 U.S.C. § 2000e-16.
[32] *Id.* § 2000e-16(a).
[33] Hockett v. Adm'r of Veterans Affs., 385 F. Supp. 1106, 1112 (N.D. Ohio 1974) (holding that a personnel action alleging a failure to hire required "the actual rejection of an application, not simply a verbal communication by a staff member that a person would be rejected if he applied").
[34] 42 U.S.C. § 2000e-2(a)(1).
[35] *Id.* § 2000e-3(a).
[36] Page v. Bolger, 645 F.2d 227, 233 (4th Cir. 1981).

employment action. Carl Page was a Black U.S. Postal Service worker who sought two different promotions but was ultimately selected for neither.[37] As part of the application process for these promotions, the postal service created hiring committees comprised of other employees.[38] For both of Page's attempted promotions, white employees made up the majority of the committees.[39] As a result, Page alleged he was subjected to two different types of adverse actions: (1) failure to promote and (2) improper selection of hiring committee members.[40] On appeal, the Fourth Circuit was charged with deciding whether the latter of the actions, improper selection of hiring committee members, constituted an adverse action.

As noted earlier, the statute's definition of personnel actions for federal government employees was far more broad and less defined than it was for private sector employees. Therefore, the Fourth Circuit interpreted "personnel actions" to only include "ultimate employment decisions."[41] In defining this phrase, the court noted there was no bright-line test; rather, it looked to a compilation of Supreme Court decisions that contemplated adverse actions.[42] Guided by these cases, the Fourth Circuit interpreted "personnel actions" to include decisions such as "hiring, granting leave, discharging, promoting, and compensating."[43] Ultimately, the Fourth Circuit determined improper selection of hiring committee members did not constitute an ultimate employment action.[44]

It took roughly nine years before another federal court caught wind of the Fourth Circuit's *Page* definition of "ultimate employment decisions." In 1990, the U.S. District Court for the District of Maryland expanded this definition to include disparate treatment and retaliation claims against private employers in *Raley v. Board of St. Mary's County Commissioners*. At the time, *Page's* definition exclusively applied to disparate treatment claims against the federal government.

In *Raley*, the District Court of Maryland considered a novel adverse action: "damaged psychological well-being."[45] Mary Raley was an assistant zoning administrator in the St. Mary's County Commissioner's office where she was subjected to ongoing sexual harassment by her supervisor.[46] After her first six months in this position, Raley's supervisor began to give her unsatisfactory evaluations and issued disciplinary action.[47] Raley felt her supervisor assigned her clerical work in response to her complaints.[48] She filed several grievances and sex

[37] *Id.* at 228–29.
[38] *Id.*
[39] *Id.*
[40] *Id.* at 231–32.
[41] *Id.* at 233.
[42] *Page*, 645 F.2d at 233 (citing Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 24–25 & nn.1 & 2 (1978) (failure to promote); Furnco Construction Corp. v. Waters, 438 U.S. 567, 576–77 & n.8 (1978) (failure to hire); and McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (also failure to hire)).
[43] *Id.*
[44] *Id.* at 233–34.
[45] Raley v. Bd. of St. Mary's Cnty. Comm'rs, 752 F. Supp. 1272, 1278 (D. Md. 1990).
[46] *Id.* at 1274–75.
[47] *Id.* at 1275.
[48] *Id.*

discrimination claims in response to a combination of the evaluations, disciplinary actions, and ongoing harassment.[49] The county commissioner's office ultimately decided to transfer Raley to another position.[50] In response, Raley quit and filed a charge of discrimination with the EEOC.[51] The investigation lasted six years, during which Raley's supervisor quit, and Raley applied for her supervisor's position on two different occasions.[52] Raley was not selected for the supervisor's position either time.[53]

Raley alleged she was subjected to several adverse actions including "damaged psychological wellbeing."[54] The court determined "psychological well-being" did not meet *Page's* standard for adverse actions.[55] It is unclear whether the court applied the *Page* definition in error or on purpose. However, the court may have been aware that it was expanding the use of the *Page* definition, poignantly noting the Fourth Circuit discussed this definition in the context of "a related Title VII section."[56]

The court further expanded *Page's* definition to include adverse actions as part of a retaliation claim. Raley alleged she was subjected to several retaliatory adverse actions, including the assignment of clerical work when she first complained about her supervisor's harassment.[57] However, the court held that Raley's assignment to clerical work was not a qualifying adverse action.[58] The court reasoned that Raley was unable to show the assignment to clerical work constituted an ultimate employment action pursuant to *Page's* definition.[59] The court recognized the *Page* standard did not align with other courts' interpretations of adverse actions in retaliation claims, stating:

> Some courts, in retaliation cases, have interpreted "adverse employment action" somewhat broader than in discrimination/disparate treatment cases. It is the view of this Court, however, that the guidelines of *Page v. Bolger* . . . must be applied in retaliation contexts as well. *Page* defines "adverse employment action" within the meaning of Title VII to be "ultimate employment

[49] *Id.*
[50] *Id.*
[51] *Raley*, 752 F. Supp. at 1275.
[52] *Id.* at 1275–76.
[53] *Id.*
[54] Raley's alleged adverse actions also included touching, verbal sexual comments, an unsatisfactory employment evaluation that was changed to satisfactory, a disciplinary reprimand that was rescinded, and a letter of caution that was never put on her record. The court eventually dismissed these actions because they did not ultimately impact her employment. *Id.* at 1278.
[55] *Id.*
[56] *Raley*, 752 F. Supp. at 1278.
[57] Raley also alleged she was retaliated against when she was not hired for her supervisor's position on two separate occasions. Ultimately, the court found failure to hire constituted an adverse action, but that she failed to show her action was causally connected to a protected activity. *Id.* at 1281–82.
[58] *Id.*
[59] *Id.*

> decisions," not "interlocutory or mediate decisions having no effect upon employment conditions."[60]

After *Raley*, other federal district and circuit courts followed suit analyzing all adverse actions—government and private employer alike—under the more stringent "ultimate employment action" standard.

V. FIFTH CIRCUIT ADOPTS "ULTIMATE EMPLOYMENT ACTION" LANGUAGE

Twenty-seven years prior to the *Hamilton en banc* opinion, the Fifth Circuit first applied the "ultimate employment action" standard in a 1995 case, *Dollis v. Rubin.*[61] The *Dollis* court determined 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."[62] In that case, Mary Dollis, a Black woman, worked for the Southern Region of the U.S. Customs Service and alleged race and sex discrimination.[63] Dollis claimed her employer unlawfully denied her a promotion due to her sex and race and was subsequently retaliated against for raising a complaint.[64] The court determined that none of Dollis's complaints rose to the level of an "ultimate employment action."[65] The court based its reasoning, according to the Fifth Circuit panel from the first appellate consideration of *Hamilton,* on a "misinterpretation" of *Page v. Bolger,* in which the Fourth Circuit described trends in litigation—not a bright line rule.[66]

Following *Dollis*, the Fifth Circuit's use of the "ultimate employment action" standard categorically left many employees outside the bounds of relief. For example, in *Petersen v. Linear Controls*, the Fifth Circuit concluded that allowing white employees to work indoors and take water breaks while Black employees worked outdoors without access to water did not amount to an "ultimate employment action."[67] The Court held that the complaints concerned "working conditions," not "ultimate employment actions," and thus were not actionable under Title VII.[68] Undoubtedly, blatant discriminatory behavior was enabled to continue so long as it did not rise to the high standard of an "ultimate employment action."

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[60] *Id.* at 1281 (internal citations omitted).
[61] Dollis v. Rubin, 77 F.3d 777, 782 (5th Cir. 1995), *abrogated by* Hamilton v. Dallas Cnty., 79 F.4th 494 (5th Cir. 2023).
[62] *Dollis*, 77 F.3d at 781–82.
[63] *Id.* at 780.
[64] *Id.* at 779.
[65] *Id.* at 782.
[66] *Hamilton*, 79 F.4th at 500.
[67] Peterson v. Linear Controls, Inc., 757 F. App'x 370, 372 (5th Cir. 2019), *abrogated by* Hamilton v. Dallas Cnty., 79 F.4th 494 (5th Cir. 2023).
[68] *Id.* at 374.

VI. SISTER CIRCUITS OVERTURN NARROW INTERPRETATIONS OF "ADVERSE EMPLOYMENT ACTIONS"

A textualist revolution begins. In *Hamilton*, the Fifth Circuit followed an emerging trend among circuits of overturning the narrow application of "ultimate employment action." In addition to the Fifth Circuit, the Fourth Circuit, Sixth Circuit, and the D.C. Circuit have also moved away from limited, restrictive definitions to expand the possibility of viable adverse employment actions under Title VII.

In 2001, the Fourth Circuit clarified its decision in *Page* that actions short of an "ultimate employment decision" may constitute an adverse action. In *James v. Booz-Allen & Hamilton*, the Fourth Circuit reiterated the standard required to assert a viable employment discrimination claim: an adverse employment action is a discriminatory act which "adversely affect[s] 'the terms, conditions, or benefits' of the plaintiff's employment."[69]

In 2021, the Sixth Circuit established a *de minimis* standard for adverse employment actions in *Threat v. City of Cleveland*.[70] In *Threat,* the court held that the City subjected Black emergency services officers to an adverse employment action that had more than a *de minimis* impact on the "terms" of their employment.[71] A determining factor in the court's decision was a race-based shift change that was imposed on Black officers.[72] Relying on a textualist approach, the Sixth Circuit adhered to the dictionary definition of "term" to conclude that "a shift change fit[] comfortably within the statutory phrase" of Title VII.[73]

In 2022, the D.C. Circuit overruled *Brown v. Brody* and moved away from a narrow "objectively tangible harm" requirement for viable adverse actions under Title VII.[74] In *Chambers v. District of Columbia*, the adverse action in question was the District's failure to grant a female employee's lateral transfer while male employees transfer requests were granted.[75] In overruling the "objectively tangible harm" standard, the court held that discriminatory job transfers violate Title VII "with respect to the terms . . . of employment."[76]

VII. SUPREME COURT ENDS USE OF "ULTIMATE EMPLOYMENT ACTION" STANDARD IN RETALIATION CLAIMS

In 2006, the Supreme Court issued a catalyst opinion that ended the use of the "ultimate employment action" standard in retaliation claims. Title VII's antiretaliation provision specifically prohibits employers from "discriminat[ing] against any of [its] employees or applicants for employment . . . because [they have]

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[69] James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 375 (4th Cir. 2004).
[70] Threat v. City of Cleveland, 6 F.4th 672 (6th Cir. 2021).
[71] *Id.* at 679.
[72] *Id.* at 678.
[73] *Id.*
[74] Chambers v. District of Columbia, 35 F.4th 870, 872 (D.C. Cir. 2022).
[75] *Id.* at 873.
[76] *Id.* at 872.

opposed any practice made an unlawful employment practice by this subchapter, or because [they have] made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."[77] Unlike Title VII's other provisions defining adverse actions (e.g. the substantive disparate treatment provisions analyzed above), the antiretaliation provision doesn't limit actionable claims to adverse actions. Rather, courts, like the U.S. District Court for the District of Maryland in *Raley,* narrowly interpreted the phrase "discriminate against" to exclusively refer to actions that were considered ultimate employment actions.[78] But the Supreme Court decided in *Burlington Northern & Santa Fe Railway Company v. White* that the adverse actions considered under the antiretaliation provision should not be so limited.[79]

In *Burlington*, an employee alleged she was reassigned after complaining about her supervisor. Sheila White was a forklift operator for the railway, a role that was typically held by senior railway workers.[80] While working at Burlington, White reported to the company that her supervisor repeatedly made derogatory comments about women, including a comment that women should not be working in the maintenance department.[81] White alleged that, as a result of her complaint, she was reassigned from forklift operator to a track laborer role with menial duties like cleaning litter and spillage away from the tracks.[82] This role was described as more arduous and less hygienic.[83] White then filed a charge with the EEOC and, in response, was suspended for thirty-seven days without pay.[84] White filed a Title VII action in federal district court alleging she was subjected to two retaliatory adverse actions: (1) reassignment to a menial job and (2) unpaid suspension for thirty-seven days.[85] Ultimately, a jury found in her favor.[86] Initially upon appeal, the Sixth Circuit reversed judgment on White's retaliation claims in favor of Burlington.[87] The matter was appealed again for an *en banc* hearing before the Sixth Circuit, this time vacating the reversal to affirm the District Court's decision.[88] However, the judges sitting *en banc* disagreed as to the proper standard for determining which actions are considered qualifying adverse actions.[89]

In *Burlington*, the Court held that "ultimate employment action" was not the proper standard in retaliation claims.[90] The Court recognized Congress's intentional textual differences between the substantive and antiretaliation provisions, stating "the two provisions differ not only in language but in purpose as

[77] 42 U.S.C. § 2000e-3(a).
[78] *Raley*, 752 F. Supp. at 1278.
[79] Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 57 (2006).
[80] *Id.*
[81] *Id.* at 58.
[82] *Id.* at 57–58.
[83] *Id.*
[84] *Id.* at 58–59.
[85] *Burlington*, 548 U.S. at 59.
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.* at 67.

well."[91] The Court reasoned the antiretaliation provision was intended to cover actions beyond "ultimate employment actions," otherwise "[a]n employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace.[92] Instead of using the "ultimate employment action standard," the Court espoused a new standard, stating the antiretaliation provision "covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant."[93]

Though *Burlington* redefined adverse actions for retaliation claims, federal district and circuit courts continued to use the "ultimate employment action" standard for cases involving private employers.

VIII. NOW, THE FIFTH CIRCUIT HAS REDEFINED WHAT ADVERSE ACTION MEANS

With the August 18, 2023 *en banc Hamilton* decision barely a month old, the Fifth Circuit continued to clarify the new definition of "adverse employment action" in *Harrison v. Brookhaven School District*. On September 21, 2023, the Fifth Circuit released *Harrison*, acknowledging that the outcome would have been starkly different a year earlier had the "older (and narrower) Title VII precedent" predating *Hamilton* been applied to the facts.[94]

In *Harrison,* plaintiff Dr. LaRenda Harrison was a Black female school administrator in Brookhaven School District in Mississippi.[95] She aspired to be a superintendent and enrolled in the Mississippi School Board Association Prospective Superintendent Leadership Academy.[96] Harrison asserted that the Brookhaven School District had an established precedent to pay for aspiring employees' attendance at the Leadership Academy once they were accepted into the program.[97] Harrison also gained confirmation from her deputy superintendent that the school district would pay for her attendance.[98] When the time came for payment, the superintendent refused and said Harrison should attend the Leadership Academy in two years.[99] Since her spot for the Leadership Academy was in the upcoming class, Harrison paid approximately $2,000 of her own money to attend.[100]

Upon discovering that the school district paid for similarly situated male employees to attend the Leadership Academy that year, Harrison sued the school district for sex and race discrimination in violation of Title VII.[101] On September

[91] *Burlington,* 548 U.S. at 63.
[92] *Id.*
[93] *Id.* at 57.
[94] *Harrison,* 82 F.4th at 428.
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Harrison,* 82 F.4th at 428, 432.
[101] *Id.* at 428.

15, 2021, the U.S. District Court for the Southern District of Mississippi dismissed Harrison's claims under Federal Rule of Civil Procedure 12(c), the dismissal hinging on Harrison's inability to establish that the School District's failure to pay her training fees constituted an "adverse employment action," a requisite element for establishing a prima facie Title VII case.[102] In issuing the dismissal, U.S. District Judge McNeel cited extensive Fifth Circuit precedent, which at the time, consistently declined to find that the denial of training can constitute an adverse employment action."[103] The district court's opinion noted that, given the circuit's deep-rooted precedent, the dismissal of Hamilton's case for failure to establish a viable "adverse employment action" should come as "no surprise."[104]

Yet the fate of Harrison's claim was far from predictable upon its appeal. By September 2023, when the Fifth Circuit panel comprised of Judge Willet, Judge Engelhardt, and Judge Wilson considered *Harrison* on appeal, the definition of "adverse employment action" had all but been turned on its head.[105] Indeed, this panel took steps to further define "adverse employment action" post-*Hamilton,* considering the *de minimis* standard presented by the *en banc* court.[106]

The Fifth Circuit panel in *Harrison* adopted the Sixth Circuit's standard in *Threat*, incorporating and providing additional illustration to define the *de minimis* standard "that forms the backdrop of all laws."[107] In *Harrison*, the court found that paying $2,000 in personal expenditures to attend a professional development training, particularly when such compensation was initially promised, was more than a *de minimis* action.[108] This ruling, a direct contradiction to the outcome predicted by the district court prior to *Hamilton,* demonstrates the *Harrison* court's significant expansion of "adverse employment actions" viable under Title VII in the Fifth Circuit.[109]

IX. CONCLUSION

The Fifth Circuit's *en banc* decision in *Hamilton* marks a return to textualism for Title VII interpretation. Rather than applying a narrow standard

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[102] *See* Fed. R. Civ. P. 12(c) (providing for a request for a court decision based solely on the initial pleadings); *Harrison,* 82 F.4th at 430.
[103] Harrison v. Brookhaven Sch. Dist., No. 5:20-CV-136-TBM-MTP, 2021 WL 4205656, at *5 (S.D. Miss. Sept. 15, 2021), *rev'd*, 82 F.4th 427 (5th Cir. 2023) (first citing Hollimon v. Potter, 365 F. App'x 546, 549 (5th Cir. 2010); then citing Roberson v. Game Stop, 152 F. App'x 356, 361 (5th Cir. 2005); and then citing Shackelford v. Deloitte & Touche, LLP, 190 F.3d 398, 406 (5th Cir. 1999)).
[104] *Id.* at 5.
[105] *Harrison*, 82 F.4th at 427; Hamilton v. Dallas Cnty., 79 F.4th 494, 506 (5th Cir. 2023) (en banc) (holding that "adverse employment action" under Title VII is not limited to "ultimate employment decisions").
[106] See *Harrison*, 82 F.4th at 429 (quoting *Hamilton*, 9 F.4th at 501–02).
[107] *Harrison,* 82 F.4th at 431 (quoting Threat v. City of Cleveland, Ohio, 6 F.4th 672, 678 (6th Cir. 2021)).
[108] *Id.* at 432.
[109] *Harrison,* 2021 WL 4205656, at *5 (dismissing Title VII claim with prejudice for lack of prima facie case); *Harrison*, 82 F.4th at 427.

rooted in inaccurate interpretations of case law, the circuit has chosen to revisit the original text of Title VII for guidance in determining whether an adverse action meets the standard for a prima facie case of discrimination. Looking forward, the expanded definition of "adverse employment action" is likely to broaden relief for plaintiffs experiencing discrimination in the workplace beyond ultimate employment actions.