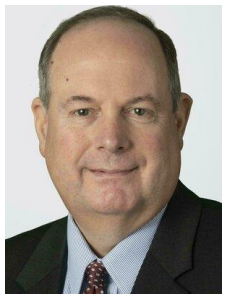
Where A Textual Reading Of Title VII Could Lead Justices

By **Stephen Fink and Bryan Neal** (March 7, 2023)

Stephen Fink



Bryan Neal

The U.S. Supreme Court recently requested the federal government's views in Muldrow v. City of St. Louis, Missouri and Davis v. Legal Services Alabama Inc.[1]

Additionally, an en banc panel of the U.S. Court of Appeals for the Fifth Circuit recently heard oral arguments in Hamilton v. Dallas County.[2]

All three cases concern the scope of Title VII.

As such, it seems a good time to consider what may have led essentially every court in the country to conclude, for more than 25 years, that Title VII creates a civil action only when discrimination causes harm that is "material," "tangible," "more than de minimis," "ultimate" and the like — a set of adjectives that we summarize as meaning "objective harm."

Why Harm?

The discrimination prohibited by Title VII is wrong, and unlawful to boot. Why isn't that enough to support the civil action created by the statute? In Hamilton, the U.S. as amicus argued that harm from discrimination is "inherent."[3]

The jurisdiction of a federal court depends on a plaintiff having standing, which, according to the Supreme Court's 2021 ruling in Transunion LLC v. Ramirez, requires a "concrete injury in fact … even in the context of a statutory violation."[4]

Perhaps in part because federal judges must always concern themselves with standing, and perhaps in part because of the systemic considerations that led to the equitable maxim known as de minimis non curat lex — or, "the law cares not for trifles"[5] — in federal court the question "what's the harm?" occurs naturally, even inevitably.

For experienced judges, "concrete" is equally intuitive. It requires, as Transunion held, "a close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts."[6]

Additionally, as stipulated by the Supreme Court in Burlington Northern & Santa Fe Railway Co. v. White in 2006: "It avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings."[7]

But practical reasons for the universal objective harm standard under Title VII also come readily to mind:

- The volume of employment discrimination litigation in federal courts;
- Bloated dockets generally and the effect they have on the functioning and reputation of the judicial system; and

- Concerns about the direct and indirect economic effect of ill-founded discrimination lawsuits on employers and the economy.

As longtime practitioners in the area we add another reason: Many federal judges — trial and appellate — have for years seemed exasperated not just with the number, but also the content of Title VII cases on their calendars. Too many are disputes that, but for the claim of discrimination, appear better suited to resolution by methods other than litigation in federal court.

U.S. Circuit Judge Richard Posner captured the sentiment in 1993 when describing the claims in a public-employment case under the U.S. Constitution, Swick v. City of Chicago. In his opinion for the U.S. Court of Appeals for the Seventh Circuit he characterized these claims as:

> the sorts of intangible injuries normally small and invariably difficult to measure that must be accepted as the price of living in society rather than made a federal case out of. … to protect our overburdened federal district judges from being flooded with minor claims better handled [elsewhere].[8]

What About The Text?

Bowing to the prevailing mode of statutory interpretation, those who disapprove of the objective harm requirement, including the U.S., have begun to argue primarily that the requirement is atextual.[9]

Because the text does not say "adverse employment action" or include one of the adjectives mentioned above, there is no such requirement, they assert. That argument necessarily, if implicitly, suggests long-standing and widespread judicial blindness toward statutory text in Title VII cases**.**

But it seems to us highly unlikely, despite the undoubted force of the systemic and practical considerations, that federal judges across the country over 25 years uniformly failed to read — or misunderstood — the statutory text.

There is a far more likely explanation: The objective harm requirement is supported by, indeed required by, a proper textualist interpretation of the statute.

Section 703 (a)(1) of Title VII makes it an unlawful employment practice "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, because of [a protected characteristic]."[10]

Prohibition of discrimination in three specific kinds of employment decisions — hiring, firing and compensation — is followed by a prohibition of discrimination with respect to employment decisions generally: terms, conditions or privileges of employment.

To the legally trained, that structure immediately suggests ejusdem generis, a maxim of statutory interpretation holding, as the Supreme Court observed in Circuit City Stores Inc. v. Adams in 2001, that

> where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.[11]

The logic of the canon can be summed up with respect to Section 703(a)(1) in these questions: If Congress intended to make any employer conduct or decision that affected any term, condition or privilege of employment actionable, why did it go to the trouble of first listing, specifically, hiring, firing and compensation? Why not just prohibit discrimination involving terms, conditions or privileges of employment?[12]

Through the ejusdem generis lens, Section 703(a)(1) prohibits discrimination in any employment decision other than hiring, discharging and compensation that are similar in nature to hiring, discharging and compensation. What kind of decisions qualify?

First, hiring initiates employment, and with it employment compensation. Discharge ends employment, and with it employment compensation. Compensation is the principal purpose and value of employment from the employee's perspective. The specific employment decisions listed in Section 703(a)(1) start, end or set compensation.

Second, hiring, discharge and compensation are all decisions indisputably — one might say ultimately — employer-made: Employees are not — or are not for long — hired, discharged or paid accidentally without express employer authorization.

Judges therefore could have quite naturally read the general words in Section 703(a)(1) — terms, conditions or privileges of employment — to encompass only decisions authorized, or adopted, by the employer that negatively affect employment compensation in the same way hiring, discharge and compensation decisions do, i.e., decisions that cause objective harm.

In Circuit City, the Supreme Court described the ejusdem generis canon as an insurmountable obstacle to giving the general clause at issue in that case a meaning broader than the specific terms that precede it.[13]

But, as in Circuit City with the Federal Arbitration Act,[14] ample signals from Title VII's text other than ejusdem generis suggest that Congress had more modest goals than making actionable in federal court every discriminatorily motivated deed or decision in the American workplace.

Those signals include, most notably, Congress' choice to make employment discrimination a civil wrong redressable only in a civil action presumptively subject to common law adjudicatory principles,[15] while modeling Title VII's substantive prohibitions and remedies on the National Labor Relations Act, which was understood at the time of Title VII's passage to allow only back pay as a monetary remedy.

So there it is. Judges focused with a gimlet eye on the text of Title VII could have readily arrived at the standard long applied in the Fifth Circuit and questioned in Hamilton: ultimate employment action,[16] which requires an authorized employer decision that causes past or probable future loss of employment compensation**.**

Can Objective Harm Be Right?

From the perspective of today's circumstances and values, it is easy to wonder how the legislators who enacted Title VII in 1964 could have been satisfied limiting Section 703(a)(1) to discrimination that caused loss of employment compensation. But 1964 is not

today.

Yet, even setting aside presentism,[17] what about Fifth Circuit cases such as 2019's Peterson v. Linear Controls Inc.[18] and, more recently, Hamilton, where the employer is alleged to have imposed worse general working conditions on the basis of race or sex, or even to have maintained an expressly segregated workplace?

Title VII's text again has an answer.

Another part of Title VII — Section 703(a)(2) — makes it an unlawful practice for an employer "to limit, segregate, or classify his employees … because of [a protected characteristic]." Unlike Section 703(a)(1), which prohibits discrimination against any individual, Section 703(a)(2) expressly prohibits group discrimination — "his employees."

Congress in 1964 was familiar with racially segregated production lines, seniority systems, and workplace bathrooms, locker rooms, and lunchrooms. So it did not tie a claim under Section 703(a)(2) to lost compensation as it did a discrimination claim under Section 703(a)(1).

Instead, segregation, limitation or classification need only "deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee."

Now consider the facts alleged in Peterson and Hamilton.

First Peterson. The plaintiff claimed, among other things, that the employer made black employees work outdoors while white employees were allowed to work indoors with air conditioning.

Almost any conceivable workplace activity or facility that is expressly segregated by race is unavoidably stigmatizing and denies equal status as an employee for a straightforward reason: Race is always irrelevant to job performance.

But Peterson did not claim express job segregation; he alleged discrimination in violation of Section 703(a)(1), a racially hostile work environment, not a violation of Section 703(a)(2).[19]

Compare Hamilton, where female corrections officers were allegedly not allowed full weekends off while male officers were, expressly because of sex.

What is true of race is not always true of sex. Sex sometimes can matter in the workplace. Almost all employers offer sex-segregated bathrooms for example, in many instances without employees of either natal sex feeling stigmatized.

In the correctional environment specifically, there can be legitimate reasons for employers to limit or classify employees by sex, usually related to the sex of the inmates.

It's the difference between being told "the men need weekends off and women don't" and "we need our female officers to work weekends because of our officer/inmate ratios." One stigmatizes; the other does not. Whether that explanation will apply in Hamilton remains to be seen; the case is before the Fifth Circuit on a motion to dismiss, so the court reviews the facts as pleaded.

But the Hamilton plaintiffs too alleged only discrimination, not segregation, limitation or classification because of sex in violation of Section 703(a)(2).[20]

Stigmatization based on a protected characteristic, whether by express segregation or classification, or through humiliating, degrading, or unsafe terms and conditions of employment, could have a serious and lasting effect on employees' feelings of self-worth and thus their ability to succeed in the work environment.

That's why the Supreme Court recognized hostile work environment claims — even though the words "hostile work environment" don't appear in the statute — as viable under Title VII without proof of direct loss of compensation, while at the same time setting a high bar for liability.[21]

Moreover, stigmatizing working conditions should usually support a claim of constructive discharge. And express segregation, classification or limitation of employees based on membership in a protected class is particularly well suited to the injunctive relief available under Title VII since its enactment.

In short, the objective harm standard for actionable disparate treatment discrimination under Section 703(a)(1) does not create some hard-to-explain gap in Title VII's coverage.

The "Ultimate" Question

Assessing past or future loss of employment compensation from authorized employer actions and inactions involves a judicially administrable determination.[22]

As the Supreme Court's Burlington Northern opinion stated: "It avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings."[23] This is because it is a standard that:

- Lawyers can offer evidence on;
- Courts can use to assess the admissibility of proffered evidence;
- Juries can be instructed on; and
- Trial and appellate courts can use to evaluate the sufficiency of the evidentiary record.

It is also the standard we believe most courts have had in mind over the years when requiring objective harm.

Are we saying, then, that all is well? Not entirely.

In Fox v. Vice in 2011, the Supreme Court described the legal standard "fairly attributable to" as "no standard at all," a mere "restate[ment of the] question" that "would leave to each and every trial court not only the implementation, but also the invention, of the applicable legal standard."[24]

Further, in Ash v. Tyson Foods Inc. in 2006 the Supreme Court likewise criticized a vague standard for assessing differences in qualifications for a job.

That standard said that "[p]retext can be established ... when 'the disparity in qualifications is so apparent as virtually to jump off the page and slap you in the face'." In Ash, the court described this standard as "unhelpful and imprecise," requiring instead "some formulation … [that] would better ensure that trial courts reach consistent results."[25]

"Restatement of the question" and "unhelpful and imprecise" fairly describe conclusory adjectives such as "material," "tangible," "more than de minimis," and, yes, even "ultimate" that courts have used to describe the required degree of harm for a claim under Section 703(a)(1) of Title VII.

Judges, jurors and lawyers — along with the public's interest in transparent, consistent and predictable judicial outcomes — would be better served by a standard defined by its substantive content.

So if the Supreme Court decides to take up the issue, fidelity to the full relevant statutory text would lead it not to "ultimate employment decision" as the standard, but to this: Section 703(a)(1) of Title VII reaches discrimination in authorized employer actions that have caused or probably would cause a loss of employment compensation.

Analysis, and litigation, could then focus on the empirical rather than defining fuzzy semantic boundaries.

Stephen Fink is of counsel and Bryan Neal is a partner at Holland & Knight LLP.

[1] Muldrow v. City of St. Louis,No. 22-193 (U.S.); Davis v. Legal Services Alabama, Inc., No. 22-231 (U.S.).

[2] Hamilton, et al. v. Dallas County,42 F.4th 550, reh'g en banc granted, 50 F.4th 1216 (5th Cir. 2022).

[3] Hamilton, et al. v. Dallas County, No. 21-10133, En Banc Brief For The United States As Amicus Curiae In Support Of Plaintiffs-Appellants And Urging Reversal, ECF No. 164, at 18 (5th Cir. Nov. 23, 2022).

[4] Transunion LLC v. Ramirez, 141 S. Ct. 2190, 2205 (2021).

[5] Wisconsin Department of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214, 231 (1992).

[6] Transunion LLC, 141 S. Ct. at 2200.

[7] Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53, 68-69 (2006).

[8] Swick v. City of Chicago, 11 F.3d 85 (7th Cir. 1993).

[9] See Hamilton, et al. v. Dallas County, No. 21-10133, En Banc Brief For The United

States As Amicus Curiae In Support Of Plaintiffs-Appellants And Urging Reversal, ECF No. 164, at 18 (Nov. 23, 2022).

[10] 42 U.S.C. § 2000e-2(a)(1).

[11] Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 114 — 15 (2001).

[12] Id. at 114 (making the same point about the statute in issue there).

[13] Id. at 114

[14] Id. at 115.

[15] Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991).

[16] Or "ultimate employment decision," the phrase used in Mattern v. Eastman Kodak Co.,104 F.3d 702 (5th Cir 1997), the first case in the Fifth Circuit applying the "ultimate" standard to a non-governmental-employer. We represented the employer in this case.

[17] https://www.yourdictionary.com/presentism ("The interpretation of past events in the light of present-day attitudes, rather than in the light of their own historical context.")

[18] Peterson v. Linear Controls, Inc., 757 F. App'x 370 (5th Cir. 2019).

[19] Peterson, 757 F. App'x at 370.

[20] Hamilton, 42 F.4th at 553.

[21] Faragher v. Boca Raton, 524 U.S. 775, 786-88 (1998).

[22] Burlington Northern & Santa Fe Railway Co., 548 U.S. at 68-69.

[23] Id.

[24] Fox v. Vice, 563 U.S. 826, 835-36 (2011).

[25] Ash v. Tyson Foods, Inc., 546 U.S. 454, 456-57 (2006).