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Employers Beware: Impending SCOTUS Ruling Could Impact Title VII Discrimination ?Standard

Labor & Employment Workforce Watch

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Is the transfer of an employee to a different position with the same base pay and benefits an adverse employment action under Title VII of the Civil Rights Act of 1964? The answer is a resounding ***probably***.

The United States Supreme Court is expected to answer this question soon in the case of [Muldrow v. City of St. Louis, Missouri](#). If the Court finds that an employee's transfer to a lateral position based on a protected characteristic is an adverse employment action, which the Fifth Circuit recently held does not need to rise to an "ultimate employment action," employers will need to pay closer attention when re-assigning or transferring members of its workforce to different positions even if the re-assignments do not alter pay and other benefits.

Circuit Split

Currently, there is a split among the United States Courts of Appeals as to the answer to this question. The District of Columbia, Sixth, Eighth, and Ninth circuits appear to favor the argument that a transfer without further impact does not give rise to a discrimination claim under Title VII. On the other hand, the [Third](#) and Fifth circuits seem to take the opposite view.

Case Background

In *Muldrow*, a female police sergeant with the City of St. Louis Police Department, Jatonya Clayborn Muldrow, was transferred from the department's intelligence division to another police district. The sergeant's new position did not alter her pay and rank, but it did change her responsibilities and her potential to earn overtime pay. Following her transfer, the sergeant initiated legal action against the police department, arguing that her transfer was a sex-based decision in violation of Title VII regardless of the similar benefits she would receive in her new position.

The district court granted summary judgment in favor of the City and opined that re-assignment alone, without proof of some disadvantage resulting from the re-assignment, is not sufficient to constitute an adverse employment action. The United States Court of Appeals for the 8th Circuit agreed with the district court, ruling that minor changes in duties or working conditions, even unwelcome ones, which cause no materially significant disadvantage, do not rise to the level of an adverse employment action for purposes of a discrimination claim

under Title VII.

The sergeant petitioned successfully to have the Supreme Court decide the case, and oral arguments were held in early December 2023.

Supreme Court Argument

At oral arguments before the Supreme Court, Muldrow's counsel urged the Court to decide that transfer alone, regardless of whether or not it causes any significant harm, based on a protected characteristic, is an adverse employment action. The respondent police department, on the other hand, contended that transfer alone is not enough; that material harm to the employee must occur to trigger a viable adverse employment action claim under Title VII.

The Court appeared to side with Muldrow. Justices Gorsuch and Kavanaugh articulated that disparate treatment based on a protected characteristic, such as sex, is inherently discriminatory and Justice Alito acknowledged disparate treatment based on a protected characteristic is also improper. However, the justices indicated that whatever decision the Court rendered would be narrowly limited to transfers.

Implications for Employers

If the Court rules in favor of Muldrow, employers will have to monitor transfers and job re-assignments to ensure they do not constitute unlawful adverse employment actions. This task may be particularly relevant when employers re-assign employees to new positions when they return to work after taking leave. In those instances, the employees could allege that their re-assignments not only violated Title VII, but also the Family and Medical Leave Act or the Americans with Disabilities Act. Additionally, requiring an employee to transfer positions to reasonably accommodate a disability, particularly where the employee does not favor the particular accommodation, could be challenged as unlawful. Employer policies regarding transfers of employees per a company's nepotism or non-fraternization policies also may become an issue. Of course, to compose a viable claim based on a job transfer, employees will still bear the burden of establishing that a job change was due to a protected characteristic, and employers will continue to be able to counter that the employee was transferred for a legitimate non-discriminatory reason.

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