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### Muldrow Sets a New Standard for Workplace Discrimination



On April 17, 2024, in *Muldrow v. City of St. Louis*, the Supreme Court of the United States held that an employer may violate Title VII's anti-discrimination provisions when it transfers an employee even if the transfer did not result in a loss of pay or benefits.

The decision resolves an open question among the federal appellate courts as to whether a plaintiff needs to establish that an employer's adverse actions resulted in substantial harm. By holding that Title VII's language does not support a heightened standard of harm, requiring only "some harm" to exist, the Court answers that question. In its opinion, the majority recognizes that the decision sets the stage for further employment discrimination claims. In addition to potentially opening the floodgates of traditional discrimination claims, the decision may also be leveraged by opponents of diversity, equity, and inclusion (DEI) efforts to challenge some aspects of employers' efforts to advance workplace DEI.

In this Update, we cover the Supreme Court's much anticipated opinion and address its potential impacts on the workplace.

#### **What Had the Plaintiff Alleged?**

Until her transfer, the plaintiff, Sergeant Jatonya Clayborn Muldrow, had worked for the St. Louis Police Department as a plainclothes officer in its specialized Intelligence Division. This position came with certain privileges, steady weekday hours, and opportunities to network with high-ranking individuals in the department. In this role, the plaintiff was also deputized as a task force officer within the Federal Bureau of Investigations (FBI), providing her with FBI credentials and access to an unmarked police vehicle.

However, following a change in the Intelligence Division's command, the new division head transferred Sergeant Muldrow out of this role. Although featuring the same official rank and pay, the new role came with a

rotating weekend shift, fewer opportunities to work on important investigations, reduced responsibilities, and the loss of Sergeant Muldrow's FBI credentials, including access to the unmarked police vehicle. The plaintiff alleged, based on the decision to replace her with a male police officer, that the division head violated Title VII by transferring her because of her sex.

### **The District and Circuit Court Opinions**

The district court and the U.S. Court of Appeals for the Eighth Circuit each ruled against the plaintiff, with both courts applying the well-established principle that because the employment actions taken against Muldrow did not amount to a "materially significant disadvantage," she could not establish a Title VII claim. To show a "materially significant disadvantage," a plaintiff would ordinarily need to suffer a change in pay, rank, or benefits. The Eighth Circuit did not address the plaintiff's schedule change or her loss of an unmarked vehicle. Both lower courts—and both parties—agreed that the transfer implicated the terms and conditions of the plaintiff's employment.

### **The Supreme Court's Analysis**

In the landmark decision, the Supreme Court unanimously agreed that Plaintiff Muldrow's transfer constituted an adverse action in violation of Title VII. The majority opinion held that the text of Title VII does not require a plaintiff to show *significant* harm and that, instead, Title VII requires merely a showing of *some* harm for a discriminatory transfer to violate the act.

Justice Elena Kagan, writing for the majority, noted that the parties agreed that "the what, where, and when" of Sergeant Muldrow's police work had changed. Turning to the language of Title VII, as well as the Court's prior decisions in *Oncale v. Sundowner Offshore Services, Inc.*, and other cases, Justice Kagan then recognized that Title VII requires that the plaintiff show some identifiable harm related to the terms and conditions of employment. However, according to the majority opinion, the Court found that this standard of harm did not need to be "'significant' . . . [o]r serious, or substantial, or any similar adjective[.]" As such, the Court found that the lower courts had wrongly applied a significance requirement and that the transfer at issue clearly met the standard for establishing harm even though Sergeant Muldrow did not experience a change in pay or benefits.

The City of St. Louis had raised three main arguments to defend against the plaintiff's claims that the transfer violated Title VII. In its first argument, the city claimed that Title VII's language, applying the *ejusdem generis* canon, should be read to cover only employment actions that are similar in degree to the others listed by the statute, such as discriminatory discharge or a failure to hire. The Court dismissed this argument by noting that the employment focus of the list sufficed as a shared trait for purposes of the canon.

Second, the city argued that the Court should liken the standard for a Title VII adverse employment action to the standard required for a Title VII retaliation claim. The Court wholly rejected this argument, distinguishing the Title VII anti-retaliation language from Title VII's anti-discrimination provisions. Here, the Court explained that retaliation claims are specifically intended to address actions that are "serious enough to dissuade a worker from making or supporting a charge of discrimination," whereas Title VII's anti-discrimination provisions, in contrast, focus not on deterrence but instead on ensuring up front that individuals are not discriminated against based on a protected status.

Lastly, the city argued that setting a lower "some harm" standard would flood courts with new, meritless Title VII claims. The Court responded here that lower courts "retain multiple ways to dispose of meritless Title VII claims challenging transfer decisions," and that even if the city's predictions were true, this would be a "result of the statute Congress drafted."

Justices Clarence Thomas, Samuel Alito, and Brett Kavanaugh all contributed separate, concurring opinions. Justice Thomas disagreed with the Court's interpretation of the Eighth Circuit decision as applying a significance test, but he concurred that the Eighth Circuit's analysis was inconsistent with a "more-than-trifling-harm requirement." Justice Alito's opinion argued that the majority's opinion provided too little substantive guidance to lower court judges, who would now merely "mind the words they use but [] continue to do pretty much just what they have done for years[.]" Justice Kavanaugh wrote that, although he agreed with the outcome of the majority opinion, he preferred the straightforward approach outlined by the U.S. Court of Appeals for the D.C. Circuit in *Chambers v. District of Columbia*. Justice Kavanaugh would have held that any involuntary transfers made on the basis of an employee's protected status violate Title VII.

### **How Should Employers Respond to the Decision?**

The *Muldrow* decision is expected to have a major impact on standard employment practices outside of the DEI context. Employers should carefully review internal transfers, especially supervisor-directed internal transfers, and ensure that internal transfers are not made based on an individual's protected status. Given the opinion's focus on *changes* to an employee's terms and conditions of employment, other modifications to an employee's position—such as desk swaps, changes to worksite reporting, or a shift from hybrid to in-person work—should be carefully reviewed as well. These other job-related changes should also not be based on a protected status. When internal transfers or other changes to employees' terms and conditions of employment are necessary, employers should ensure that all such changes—and any reasons for the changes—are well-documented.

Additionally, under the new "some harm" standard, potentially even minor, unwanted adjustments to an employee's role may become an important source of new litigation risks. For now, it remains to be seen how the lower courts will apply this new standard to employment discrimination claims arising out of minor employee complaints. Regardless, employers should now consider expanding efforts to better understand the morale of their employees, including by identifying early how their employees feel about even minor role adjustments. Tracking employee morale has been important in the modern workplace for some time, but this decision likely increases the importance of noting early any significant drops in employee morale.

### **Why Has This Decision Been Closely Watched by Corporate DEI Programs?**

Employment law is an ever-changing practice, and the legal landscape for employer-led DEI efforts in particular has been in a state of continual flux over the past year. Employers committed to diversity as a core value and business imperative have been required to closely watch the Court's activity in this space.

During oral arguments, justices Amy Coney Barrett and Clarence Thomas asked how a lowered standard for Title VII harm would affect corporate DEI efforts. As a result, court watchers and advocates for DEI in the workplace had been concerned with how those issues may play out in the final decision.

Because Justice Kagan's opinion for the Court is cabined to the question of employee transfers, the opinion reduces concerns that the *Muldrow* decision implicates well-recognized, legally permissible efforts to advance DEI in the workplace. Neither the majority opinion nor any of the concurrences discuss application of the lowered standard for an adverse employment action to the DEI context. Relatedly, the Supreme Court recently [denied certiorari](#) in a much-discussed case arising from the U.S. Court of Appeals for the Fourth Circuit covering race-neutral admissions with disproportionate racial impacts: *Coalition for TJ v. Fairfax County Board*. That case was also closely watched by corporate DEI officers and attorneys who practice in this area due to concerns that a negative ruling there would hamper measures to advance DEI in the workplace. Looked at in tandem, these decisions may indicate that the Court is presently unwilling to take up the many percolating issues surrounding workplace DEI.

Given the limited lens of the *Muldrow* opinion, the decision does not directly disturb many crucial means for advancing DEI in the workplace, including the creation and use of employee resource groups, the implementation of enhanced recruiting efforts, and supplier diversity programs that are not solely based on race. Still, lingering concerns exist that future rulings could upend currently accepted practices, so ongoing tracking of the latest developments is essential. It is expected that opponents of efforts to advance DEI in the workplace will attempt to leverage the *Muldrow* decision to attack longstanding, accepted practices to advance workplace diversity. It remains to be seen how lower courts will respond to these likely challenges.

Finally, as always, employers should continue to seek advice from trusted outside counsel for ongoing guidance on the latest employment and DEI legal issues. Major changes in employment law, including workplace DEI efforts, are expected as courts continue to grapple with a range of new questions arising in anti-discrimination law. Perkins Coie will continue to closely monitor the developments in this space, including how lower courts choose to apply the new "some harm" standard.

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