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SCOTUS Removes 'Significant Harm' Requirement for Title VII Transfer Suits

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Introduction

On April 17, 2024, the Supreme Court decided *Muldrow v. St. Louis*, No. 22-193, holding that Title VII of the Civil Rights Act of 1964 prohibits discriminatory job transfers that cause “some harm” with respect to the terms, conditions, or privileges of employment, but the harm need not be “significant,” as the lower court in that case had required.

Background

Title VII prohibits discrimination in the “terms, conditions, or privileges of employment” because of an individual’s race, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1). Sergeant Jatonya Muldrow with the St. Louis Police Department argued that her eight-month transfer out of the Department’s Intelligence Division constituted sex discrimination within the meaning of Title VII, even though she had not suffered any economic damages as a result of the transfer.

Muldrow brought a Title VII gender discrimination suit against the City of St. Louis, alleging that the position to which she was transferred was less prestigious and affected her work schedule, overtime pay structure, and work attire. She further alleged that her former intelligence position was filled by a male employee and no male sergeants had been transferred out of her division. The federal district court dismissed her discrimination claim, finding she had failed to establish harm resulting from the transfer. The U.S. Court of Appeals for the Eighth Circuit affirmed the dismissal, holding that the transfer was not an adverse employment action because it did not result in a “materially significant disadvantage.” The United States Supreme Court granted *certiorari*, and last week, it vacated the Eighth Circuit’s decision and remanded the case for further proceedings.

The Decision

In a unanimous decision, the Supreme Court held that Title VII does not require employees to prove that alleged discrimination caused “significant harm,” such as a pay cut, demotion, or job loss upon a transfer. Justice Elena Kagan, writing for the Court (with Justices Thomas, Alito, and Kavanaugh writing separately and only concurring in the judgment), reasoned that “[a]lthough an employee must show some harm from a forced transfer to prevail in a Title VII suit, she need not show that the injury satisfies a significance test. Title VII’s text nowhere establishes that high bar.” The Court rejected the legal standard some appellate courts have used to analyze Title VII claims centered on job transfers that didn’t come with a “significant employment disadvantage.” Because Title VII expressly prohibits

discrimination with respect to someone's terms, conditions, or privileges of employment, the Court held that a transfer to a new role, even if it does not alter someone's pay, can constitute unlawful discrimination where there is "some harm."

The Court rejected the textual argument that to "otherwise ... discriminate" with respect to employment terms or conditions, the employer's actions must rise to the same level of disadvantage as "fail[ing] or refus[ing] to hire" or "discharge[ing]" someone. A transfer is an employer action, the Court explained, and practices that "treat[] a person worse" because of a protected trait are the object of the statute. Pointing to its prior decisions in *Oncale* and *Meritor Savings Bank*, the Court said that "terms [or] conditions" of employment "covers more than the 'economic or tangible.'"

The Court discussed the anti-retaliation provision, which the Court believed did not match the case. The "significant harm" standard applied to the anti-retaliation provision is intended to capture employer actions that would deter employees from reporting discrimination. In contrast, the anti-discrimination provision only seeks "a workplace where individuals were not discriminated against." Therefore, the question of deterring employee conduct is immaterial.

Concurrences

Justices Thomas, Alito, and Kavanaugh all wrote separate concurring opinions.

Justice Thomas agreed that the case should be vacated and remanded because an employee need only show "more-than-trifling-harm."

Justice Alito also agreed with the result, but found the Court's distinction between "harm" and "significant harm" to be simply splitting hairs, because all harm has a degree of significance. He surmised that the standard set out by the Court here will make little difference in lower court judges' decisions going forward.

Justice Kavanaugh agreed with the result too, but he advocated for a standard that would deem the discrimination itself to be the harm. Nonetheless, he found the "some harm" standard to be a low bar, and that anyone who was transferred for discriminatory reasons should be able to show some additional harm.

Implication for Employers

The immediate consequence of the Supreme Court's decision is the elimination of an employer's summary judgment argument in circuits that had adopted the "significant" harm standard in transfer cases. It remains to be seen, however, whether the lower courts generally will see the decision as otherwise expanding the scope of what is actionable under Title VII. What employer actions constitute harm under Title VII? The three concurrences offer a spectrum of responses, suggesting standards from Justice Kavanaugh's approach that the discrimination itself is sufficient to Justice Thomas's "more-than-trifling-harm" benchmark.

A related issue is whether a paid leave of reasonable duration constitutes an adverse employment action. The Court has pending before it a certiorari petition in *Davis v. Legal Services of Alabama, Inc.*, no. 22-231, that presents this question. It is slated to be reviewed in conference on April 26, 2024, and the Court may vacate and remand for further consideration in light of *Muldrow* or may decide to take this up.

The decision in *Muldrow* is part of a larger trend in both decisional law and statutory developments (particularly at the state and local level) to subject a broader range of employment actions to scrutiny under the employment discrimination laws. But it will always be the case that only employment decisions that discriminate against employees *because* of their race, religion, sex, national origin, age, or other protected basis are actionable. The real lesson of *Muldrow* and similar developments is that employers must redouble their efforts to enforce their non-harassment and non-discrimination policies even with respect to modest changes that seem to threaten no real harm.



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