

# Supreme Court Reconsiders Decades-Old “Adverse Employment Action” Standard for Discriminatory Transfers Under Title VII

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On December 6, 2023, the United States Supreme Court heard oral arguments in *Muldrow v. City of St. Louis, Missouri*, a case involving a St. Louis Police Department officer’s claim that she was subject to a discriminatory job transfer based on her gender. The Supreme Court’s decision in *Muldrow* could significantly modify the standard required to prove employment discrimination under Title VII of the Civil Rights Act of 1964 (“Title VII”) as it applies to job transfers.

## The “Adverse Employment Action” Standard

Plaintiffs must prove that they suffered an “adverse employment action” in order to prevail on a Title VII employment discrimination claim. Over the years, the courts of appeal have used varying terminology to develop definitions of “adverse employment action” that require something more than a merely trivial or non-impactful alteration to one’s working conditions.

For example, in a 2007 case, *Clegg v. Ark. Dep’t of Corr.*, the Eighth Circuit Court of Appeals (where the *Muldrow* case originated) ruled that “[a]n adverse employment action is a *tangible change* in working conditions that produces a *material* employment disadvantage.”<sup>[1]</sup>

Examples of typical adverse employment actions may include termination, reduced compensation, demotion, etc.

## The *Muldrow* Case

In *Muldrow*, the officer has challenged any definition of “adverse employment action” that requires a plaintiff to suffer a “tangible” or “material” employment disadvantage in order to prevail on a Title VII claim. Muldrow alleges that she was transferred from her position in the St. Louis Police Department’s Intelligence Division to the Department’s Fifth District because of her gender.

After her transfer, Muldrow experienced no change in pay or rank; she maintained a supervisory role; she had similarly serious and important responsibilities; and she suffered no harm to future career prospects. The trial court and the Eighth Circuit court of appeals, applying the long-standing

reasoning described above, both ruled that Muldrow's transfer did not constitute an "adverse employment action" because she suffered no **material** employment disadvantage.

At oral argument before the Supreme Court, Muldrow's attorney argued that the existing standard is incorrect, and despite the absence of "tangible" or "material" disadvantages resulting from Muldrow's transfer, the transfer gives rise to a Title VII claim **solely** because the decision was allegedly based on Muldrow's gender. Muldrow argues that, aside from a few unique exceptions, **any** decision based on an employee's protected characteristic is sufficient to create Title VII liability. This, Muldrow argues, is because any quantum of differential treatment based on one's protected characteristics is, in and of itself, harmful and discriminatory.

Counsel for the City of St. Louis disagreed with Muldrow's assessment when arguing before the Supreme Court and pushed instead for maintenance of the status quo. Specifically, the City of St. Louis argued that Title VII liability arises only where an employee experiences some sort of material, objective, or tangible harm. Otherwise, the City reasoned, Title VII would permit frivolous claims based on minor, trivial changes to the work environment, which would overwhelm the courts and undermine the purpose of Title VII.

## Potential Implications of a Supreme Court Decision in *Muldrow*

It is important to remember that the *Muldrow* case is limited to job transfers only, and thus, depending on its scope, any resulting decision would not necessarily be applicable to other employment-related decisions.

In any event, a Supreme Court decision in Muldrow's favor would mark a significant departure from the definition of "adverse employment action" that has been in place for nearly 30 years.

## Conclusion

As always, employers should remain apprised of any changes to Title VII's standards and should be on the lookout for the Supreme Court's *Muldrow* decision, anticipated in 2024.

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[1] *Clegg v. Ark. Dep't of Corr.*, 496 F.3d 922, 926 (8th Cir. 2007) (emphasis added).