Published on *The National Law Review* https://natlawreview.com

Some Harm is All it Takes – the Supreme Court Lowers the Bar for Title VII Discrimination Claims Involving Lateral Job Transfers

Article By:

Paul M. Huston

Delaney M. Busch

In *Muldrow v. City of St. Louis, Mo.*, the U.S. Supreme Court made it easier for employees who are involuntarily transferred to a lateral position to pursue discrimination claims, even when they retain the same pay, benefits and supervisory status.

Title VII prohibits employees from, among other things, discriminating against an employee with respect to the employee's "terms" and "conditions" of employment because of the employee's race, color, religion, sex or national origin. Many circuit court of appeals had previously required employees to show that the transfer resulted in a "materially significant disadvantage" or had a "significant detrimental effect" or other material or serous level of harm. The Supreme Court rejected that approach, noting that Title VII just requires an employee to show that they suffered ***"some harm respecting an identifiable term or condition of employment."*** The phrase to "discriminate against" in Title VII, the Court wrote, just "means treat worse" and Title VII did not say "anything about how much worse," and nothing suggests that an employee must meet "an elevated threshold of harm" to make that showing. In reaching its conclusion, the Court was keen to note that often a "forced transfer leaves workers worse off respecting employment terms or conditions. . . . [a]fter all, a transfer is not usually forced when it leaves the employee better off."

In this instance, the Court stated that although the plaintiff police sergeant's pay and rank remained the same, she met the "some harm" test "with room to spare," as she was moved from a specialized intelligence division to a new division that required her to work weekends, she lost her access to an unmarked vehicle, and would be more involved in administrative matters and less involved in high visibility matters.

To be clear, the Court did not conclude that all lateral transfers would be harmful under Title VII. Employers will be left to weed out transfer-based complaints that are unlikely to show sufficient harm or injury. However, the Court declined to clarify what constitutes "some harm," leaving the door open for future litigation on this issue, as lower courts will continue to grapple with where to draw the line. But Justice Roberts noted in his concurring opinion that he expected the bar to be low.

What Employers Should Do Now:

- Provide involuntary lateral transfers the same consideration and scrutiny one would give more traditional adverse employment actions, like a demotion or pay cut, and otherwise analyze them to see whether and how the transfer may place the employee at an overall disadvantage;
- Update training materials to account for the proper evaluation of lateral transfers and/or work assignments; and
- And as we wrote about in our previous post here, employers should be aware of the potential implications that this decision may have for corporate DEI initiatives. As we wrote:

In a statement, the EEOC Commissioner, Andrea Lucas recently identified a number of DEI initiatives that *Muldrow* could implicate—"from providing race-restricted access to mentoring, sponsorship, or training programs; to selecting interviewees partially due to diverse candidate slate policies; to tying executive or employee compensation to the company achieving certain demographic targets; to offering race-restricted diversity internship programs or accelerated interview processes, sometimes paired with euphemistic diversity 'scholarships' that effectively provide more compensation for 'diverse' summer interns."

National Law Review, Volume XIV, Number 113