

# Employee Relations LAW JOURNAL

## **U.S. Supreme Court Lowers Standard to Challenge Discriminatory Job Transfers Under Title VII: What Employers Need to Know**

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*In this article, the authors examine a decision by the U.S. Supreme Court that lowers the standard needed to challenge a job transfer under Title VII of the Civil Rights Act of 1964.*

**T**he U.S. Supreme Court issued a decision that lowers the standard needed to challenge a job transfer under Title VII of the Civil Rights Act of 1964 (Title VII).

In *Muldrow v. City of St. Louis*, the Court ruled that Title VII prohibits a discriminatory job transfer as long as the transfer brings about “some harm” – however, that harm does not need to be “significant.” The Court’s decision resolves a circuit split regarding the standard of harm required for a plaintiff to bring an actionable claim under Title VII, the federal employment law that prohibits discrimination based on certain protected categories.

### **BACKGROUND**

In *Muldrow v. City of St. Louis*,<sup>1</sup> the Supreme Court considered whether Title VII<sup>2</sup> prohibits discrimination in employee transfer decisions absent a separate determination that the transfer decision caused a “significant” disadvantage.

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In *Muldrow*, Jatonya Muldrow, a police officer, claimed that her employer, the St. Louis Police Department, impermissibly transferred her from a “premier” position in the department to a less “prestigious,” more “administrative” uniformed position because she was a woman. While Muldrow’s rank and pay remained the same in her new position, she alleged that her responsibilities, perks, and schedule did not. After her transfer, Muldrow claimed she no longer worked with high-ranking officials on certain departmental priorities, she lost access to an unmarked take-home vehicle, and she had a less regular schedule involving weekend shifts. A male officer was placed in Muldrow’s prior position. Consequently, Muldrow sued the City of St. Louis under Title VII, alleging that she had suffered sex discrimination with respect to the “terms or conditions” of her employment.

The U.S. District Court for the Eastern District of Missouri granted the city summary judgment, finding that under circuit precedent, Muldrow was unable to show that her transfer effected a “significant” change in working conditions producing a “material employment disadvantage.”<sup>3</sup>

The U.S. Court of Appeals for the Eighth Circuit affirmed the lower court decision, finding, among other things, that Muldrow’s transfer “did not result in a diminution to her title, salary, or benefits” and had caused “only minor changes in working conditions.”<sup>4</sup>

The Supreme Court granted certiorari on June 30, 2023, to “resolve a Circuit split over whether an employee challenging a transfer under Title VII must meet a heightened threshold of harm – be it dubbed significant, serious, or something similar.” Prior to *Muldrow*, federal circuits were split on how much harm a plaintiff must show to have suffered an “adverse employment action” cognizable under Title VII, with some circuits finding no showing of harm necessary beyond the discriminatory act itself and other circuits generally applying a heightened standard of harm for claims to be actionable under Title VII.

## THE DECISION

In a unanimous decision, the Supreme Court held in *Muldrow* that while a job transferee does have to show “some harm” respecting an identifiable term or condition of employment, such harm does not need to be “significant” or otherwise “exceed a heightened bar.”

Writing for the majority, Justice Elena Kagan said that “discriminate against” means “treat worse” – and nothing in Title VII itself establishes an elevated threshold of harm.

The majority rejected the city’s three key arguments in defense of adding a heightened harm requirement.

As to the city’s textual argument, the Court found that the statute simply did not contain a significant harm requirement, and there was no need to read that into the statute.

The Court likewise rejected the city's argument that the standard for Title VII antiretaliation provisions, which apply when a retaliatory action is "materially adverse," should apply to the antidiscrimination provision because the purposes of each provision differ.

Last, the Court disagreed with the city's policy arguments, doubting that employees would flood courts with litigation in the absence of a significant injury requirement. Nevertheless, the Court reasoned that there are "multiple ways to dispose of meritless Title VII Claims challenging transfer decisions," and even if the city's "worst predictions come true," that would not be reason to "add words to the law."

Notably, the Court did not fully adopt Muldrow's position that no separate showing of harm is necessary. It ruled that the proper standard under Title VII is that there must be some harm that left the plaintiff "worse off" but not significantly so.

In his concurring opinion, Justice Samuel Alito criticized the Court's majority opinion as being "unhelpful," saying he could only imagine how its guidance – that some harm is needed but that the harm need not be significant – "will be greeted by lower court judges." Seeing "little if any substantive difference between the terminology the Court approves and the terminology it doesn't like," Justice Alito predicted that the result of the decision will be that careful lower court judges will "mind the words they use but will continue to do pretty much just what they have done for years."

In a separate concurring opinion, Justice Brett Kavanaugh disagreed with the Court's opinion that a plaintiff in a discriminatory-transfer case show at least "some harm" beyond the harm of being transferred on the basis of a protected category. In his view, "[t]he discrimination is harm." However, he still expected that the Court's "some-harm requirement" and his own preferred approach would yield the same result in most, if not all, discriminatory-transfer cases. Justice Kavanaugh predicted that anyone transferred because of a protected class "should easily be able to show some additional harm – whether in money, time, satisfaction, schedule, convenience, commuting costs or time, prestige, status, career prospects, interest level, perks, professional relationships, networking opportunities, effects on family obligations, or the like."

## **IMPLICATIONS FOR EMPLOYERS**

While the full impact of the Supreme Court's decision remains to be seen, the ruling likely will make it easier for plaintiffs to bring workplace discrimination suits under the lower standard established by the Court. Although the Court's holding was focused on job transfers, the decision could lead employees to challenge other types of employment actions that do not rise to the level of "significant" adverse changes in employment terms and conditions, such as scheduling changes, work assignments, training and mentorship, or other opportunities.

Additionally, although the Court did not address diversity, equity, and inclusion (DEI) initiatives in its decision, the question of whether diversity initiatives at work would be considered actionable under Title VII did come up during oral argument. Activist groups and plaintiffs could leverage the lower standard set forth in *Muldrow* to support challenges to corporate DEI initiatives and reverse discrimination claims.

Employers should continue to review their internal policies, practices, and programs and consult with legal counsel to mitigate against legal risk in light of the *Muldrow* decision.

## NOTES

1. *Muldrow v. City of St. Louis*, No. 22-193.
2. Title VII prohibits discrimination in the “terms, conditions, or privileges of employment” because of an individual’s race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1).
3. *Muldrow v. City of St. Louis*, No. 4:18-CV-02150-AGF, 2020 WL 55053, \*8-9 (E.D. Mo. Sept. 11, 2020).
4. *Muldrow v. City of St. Louis*, 30 F.4th 680, 688-89 (8th Cir. 2022).

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