Can a Lateral Job Transfer Ever Be Discriminatory? Supreme Court Will Soon Weigh In

Insights
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When is a job transfer not just a transfer? The Supreme Court will soon decide whether lateral job transfers, with no change in pay or benefits, violates federal civil rights law if done for discriminatory reasons. Read on for an early preview of the case and an outline of what to expect in the coming months.

Police Sergeant Not Pleased With Lateral Transfer

Jatonya Muldrow served as a patrol detective for the City of St. Louis Police Department before being promoted to the Intelligence Division in 2008. In this role, she worked high-profile public corruption cases and also oversaw the Department's Gang Unit. In 2016, she was deputized to work as an officer for the local FBI unit. This position carried perks, including the opportunity to work in plain clothes, a strict Monday-to-Friday schedule, and access to an unmarked FBI vehicle. She also had the opportunity to earn up to $17,500 in overtime pay.

In 2017, the Department was shaken up when Captain Michael Deeba took over as Commander of Intelligence. He made a number of personnel changes, including transferring 22 officers (17 of whom were male) into various other positions. Of those transfers, four officers were removed from the Intelligence Division and placed elsewhere – two male, and two female. Sergeant Muldrow was transferred to a role in the Fifth District.

In her new position, she was responsible for the administrative upkeep and supervision of officers on patrol and responding to calls for service for serious crimes such as homicides. As a result of her transfer, Sergeant Muldrow was required to work a rotating schedule including weekends, wear a police uniform, and drive a marked police vehicle. Her salary remained the same, and although she was no longer eligible for the FBI's annual overtime pay, she had other OT opportunities available to her.

She immediately began applying for other roles out of the Fifth District, and after about eight months was accepted back into the Intelligence Division.

Lawsuit Runs Into Brick Wall

Sergeant Muldrow brought a Title VII sex discrimination suit claiming the transfer from Intelligence was motivated by new leadership wanting a man for her previous role. She alleged the transfer constituted an adverse employment action that could sustain a Title VII claim because her Fifth District work was more administrative and less prestigious than that of the Intelligence Division, and more akin to basic entry level work.

The district court and the 8th Circuit Court of Appeals sided with the police department, finding that Title VII bars only adverse employment actions that result in a materially significant disadvantage for the employee. Specifically, her pay and rank remained the same, she was given a supervisory role, she was responsible for investigating important crimes such as homicides, and her time in the Fifth District did not harm her future career prospects. As the 8thCircuit said, "an employee's reassignment, absent proof of harm resulting from that reassignment, is insufficient to constitute an adverse employment action."

But Could Muldrow Earn Final Victory at SCOTUS?

Appellate courts are divided on whether a forced lateral transfer is an adverse action when the employee fails to show that the move caused any additional injury. And because there is a split in the Circuits – meaning aggrieved plaintiffs might succeed in some parts of the country but lose in others despite having the exact same circumstances – the Supreme Court decided to weigh in.

For example, one of the nation's most conservative federal courts of appeal recently opened the door for plaintiffs to file more discrimination charges and lawsuits by expanding the scope of Title VII. In August, the 5th Circuit Court of Appeals concluded that employees are not limited to bringing claims only when subjected to "ultimate employment decisions" like terminations or applicant rejections. Instead, the court said workers can bring Title VII claims against employers for all sorts of alleged bad behavior. It joined the 2nd, 4th, 9th, 6th, 11th, and D.C. Circuits, which have all explicitly held that Title VII claims can be brought even if the alleged discrimination does not involve an ultimate employment decision.

In fact, when Justice Brett Kavanaugh was a judge on the D.C. Circuit Court, he expressed his view that the "ultimate employment decision" rule should be abandoned.

The Court's decision in the case could provide clarity for employers on what level of harm an employment decision must cause an employee for the decision to be an adverse employment action under Title VII. The implications could result in the need for you to revisit current HR practices, so this is a case you will want to track.

Relevance to Your Operations

The *Muldrow* case is not just a tale of one employee's journey through the legal system; it's a potential harbinger of changes that could reshape the HR landscape for businesses across the nation. Here's why you should keep a keen eye on the outcome:

- **Could Change the Game When it Comes to EEO Claims:** At its core, this case challenges the notion of what workplace actions can be challenged by aggrieved employees in the form of EEOC claims and Title VII lawsuits. If SCOTUS decides that lateral transfers made for discriminatory reasons are unlawful, the decision could have broader implications for other day-to-day workplace actions or decisions, such as performance issues, discipline and performance improvement plans, work assignments, meeting attendance, travel decisions, and other actions that are short of terminations or demotions.
- **HR Policies and Training May Need to be Adjusted:** A ruling in favor of Muldrow could necessitate an overhaul of your HR policies and managerial training sessions. Discrimination training might need to be expanded to emphasize the nuances of lateral transfers and other actions that might support claims.
- **Potential Litigation Increase:** If the definition of what constitutes an 'adverse employment action' broadens, you could see an uptick in the number of discrimination claims.

In essence, the ramifications of the decision will determine the scope of actions for which employees can make claims with the EEOC or in court, potentially altering how businesses conduct their daily operations and strategize long-term HR goals. It underscores the need for employers to be agile, informed, and ready to adapt.

What Will Happen?

On the one hand, Sergeant Muldrow and plaintiffs across the country might feel energized by the Supreme Court's agreement to weigh in. After all, the Court could have denied her request and let her case die. The fact that the Justices agreed to examine her case at least gives her a chance to fight another day and raises the hope that the Court will issue an employee-friendly ruling.

On the other hand, it is possible that the Court decided to accept this case to issue a wide-sweeping ruling rebuking the other federal appeals courts that would have allowed Muldrow's claim to proceed to trial. Perhaps it wants to avoid the potential for the federal courts to be flooded with claims involving no economic injury.

Stay Tuned for Predictions!

SCOTUS has not yet scheduled this case for oral argument, but we expect the hearing to take place in late 2023 or early 2024. We should see a decision in this case by March or April of next year. In advance of that decision, we will issue our predictions on the case and provide employers with some prep work you can do in advance of the decision to best position yourself. Make sure you're subscribed to Fisher Phillips' Insight Systems so you don't miss out.

If you have any questions in the interim, contact your Fisher Phillips attorney or the authors of this Insight.

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