SCOTUS Predictions: Justices Will Say Lateral Job Transfers Can Be Unlawful - But Ruling Will Be Limited

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The Supreme Court may soon clarify whether an employer's decision to transfer an employee to a lateral job – with no change in pay or benefits – violates federal civil rights law if it's done for discriminatory reasons. Federal appeals courts are divided on whether a forced lateral transfer is an adverse employment action when the employee fails to show that the move caused any additional injury – and the Justices seemed concerned at oral argument about where to draw the line. Does the transfer have to cause a significant disadvantage to the employee? While we expect the Court to side with the employee in this case, we think the ruling will be a narrow one that will leave to door open for further clarification in the future. Here's what you need to know about the case and our predictions on how SCOTUS will rule.

What Is This Case About?

Sex Discrimination Claim: In *Muldrow v. St. Louis*, a female police sergeant brought a sex discrimination suit claiming she was transferred to a lateral position in a different division because new leadership wanted to hire a man for her current role.

Nuances of the Law: Title VII of the Civil Rights Act bars employers from discriminating against employees based on race, color, national origin, religion, and sex. But what if an employee was allegedly forced to accept a lateral transfer – with the same pay and benefits – for a discriminatory reason? Is it still unlawful, even if the employee fails to show the transfer caused them a significant disadvantage?

The Facts: Sergeant Muldrow was transferred from the Intelligence Division to a role in the Fifth District when a new commander made a number of personnel changes, including transferring 22 officers (17 of whom were male) into various other positions.

Muldrow 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. Her prior position carried perks, including the opportunity to work in plain clothes, keep a strict Monday-to-Friday schedule, and access an unmarked FBI vehicle.

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Appellate Court Sided with Employer: The district court and the 8th U.S. 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 8th Circuit said, "an employee's reassignment, absent proof of harm resulting from that reassignment, is insufficient to constitute an adverse employment action."

Several other appellate courts, however, have found that a forced lateral transfer is an adverse action even if the employee fails to show that the move caused any additional injury.

The Question for SCOTUS to Answer: *Does Title VII prohibit discrimination in transfer decisions absent a separate court determination that the transfer decision caused a significant disadvantage?* Notably, the employee posed a broader question in her petition to the Supreme Court, and her attorney spent considerable time at oral argument discussing the ways the transfer actually caused her harm. But the Justices limited the question before the Court to the narrow issue above – leading our FP authors to think they will similarly issue a narrow ruling.

Where Do We Draw the Line?

While the Justices agreed that employers should not make biased employment decisions, they asked many hypotheticals during the December 6 oral argument about where to draw the line on what violates federal workplace law. Discrimination is "morally wrong," Justice Alito noted. "The question is whether it's the stuff of the district court case."

A key question was whether the employee had to show harm. The employee's attorney claimed that Title VII "doesn't require that an employer's conduct cause significant disadvantage, objective material harm, objective tangible harm, or the like." Title VII prohibits an employer from discriminating against an employee with respect to the terms, conditions, or privileges of employment because of the employee's sex. "Her job tasks have changed, and that's the most basic term of employment," he argued.

The Justices asked various questions to gauge where the limits of this standard would be:

- What if the transfer is from an office in one hall to an identical office in the next hall and everything else is the same except the paint color?
- What if women were assigned customer-facing offices to promote diversity?
- Does all discrimination cause a "stigmatic" injury?
- What is the "worse treatment" for the sergeant in this case?

"The worse treatment here is the discrimination itself," according to the employee's attorney.

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On the other side, counsel for the City of St. Louis argued that under Title VII, to "discriminate against" an employee requires "significant material objective harm." He pointed to 25-year-old SCOTUS precedent and noted that "the severity and the negative impact of the conditions must be looked at through an objective lens, not based on personal sensitivities."

Justice Thomas asked how that harm is quantified, whereas Justice Jackson seemed focused on whether there is a requirement to show harm at all. She indicated that the "harm" might be a matter of determining damages: A jury may say "fine, you might have been discriminated against, but your damages are zero because you haven't shown any harm for which you need to be compensated."

FP SCOTUS Prediction: Expect a Narrow Ruling

Notably, Chief Justice Roberts is very incremental in his decision making and has tried to steer his fellow Justices to move slowly when changing the law. By reframing the question before the Court, the Justices likely intend to limit the ruling to this particular set of facts and not make a broad sweeping pronouncement about Title VII.

Justice Alito is clearly looking at the fact that employment cases make up a big part of the docket. He appears concerned about whether *every* discriminatory act should be the subject of a federal lawsuit. Some Justices, however, didn't seem as concerned about this aspect.

So, how will they decide? Here are our specific predictions:

- **Randy Coffey**: 6-3 in favor of the employee. Justice Kavanaugh will write the majority (or plurality) opinion; Justices Alito, Gorsuch, and Thomas will dissent; and there will be at least one other opinion siding with the majority/plurality. I think the Justices will narrow the adverse employment action requirement, but the majority (or plurality) will leave some mechanism for weeding out complaints that truly don't show sufficient injury to justify bringing a lawsuit.
- **Leanne Coyle:** 5-4 with Justice Kavanaugh writing for the majority. The Court may be able to answer its limited question within the confines of the case law that already exists – and I predict the majority will say the transfer is actionable under Title VII.
- **Ed Harold:** 5-4 with Justice Kavanaugh writing for the majority. I think they will issue a narrow opinion focused on changes in the terms and conditions of employment if discrimination under Title VII is proven. As a result, this case might not give the clarity sought, and we might continue to see federal court disagreements. I anticipate seeing more from SCOTUS on this issue in the coming years.

Conclusion

We expect the court to issue an opinion sometime during the next few months. We will continue to monitor developments related to this case and provide an update when SCOTUS issues an opinion,

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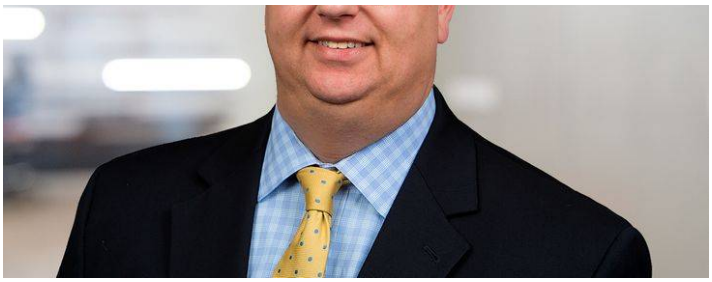

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