In Addition to Affecting Employers, Is the High Court's *Muldrow* Decision a Harbinger for the Future of Employer-Supported Programs?

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A recent United States Supreme Court decision will make employers reexamine their transfer policies. On April 17, 2024, the Court unanimously ruled that a female police sergeant in the City of St. Louis, who was transferred out of a plainclothes position in the intelligence division and into a uniformed role in another division, had made the requisite showing of "some" harm necessary for her Title VII claim to survive the police department's motion for summary judgment. *Muldrow v. City of St. Louis, Missouri,* No. 22-193, ___ U.S. ___ (Apr. 17, 2024) (slip op. at 1). In doing so, the high court resolved a split among the federal courts of appeal, in which most circuits had concluded that a Title VII plaintiff in a transfer case had to establish that the harm they suffered was "materially significant," "significantly adverse," "serious," or some other phrase indicating a heightened level of harm. *Id*. at __ (slip op. at 4). The Supreme Court held that the plain text of Title VII only required plaintiffs in transfer cases to show that "some" injury had occurred. *Id*. at __ (slip op. at 10). Because they found Muldrow to have satisfied this requirement, the Court reversed the lower court's grant of summary judgment in favor of her employer. *Ibid.*

The Court's decision provides much clarity about what a Title VII plaintiff is required and not required to show. Going forward, "some" harm is needed, but a "significant," "substantial," "serious," or "material" harm is not. *Id*. at __ (slip op. at 7). Undoubtedly, the Court's decision is a significant boon to employees and the plaintiffs' bar, who will no longer need to treat summary judgment as a serious hurdle to vault over but as a mere bump on the path to trial. By lowering the standard that Title VII plaintiffs must satisfy, "many cases will come out differently" and "claims that failed under a significance standard should now succeed." *Id.* at __ (slip op. at 7 and n.2). To that end, Justice Alito's comment 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" appears to be off the mark. *Id*. at __ (slip op. at 2) (Alito, J., concurring in judgment). To the contrary, this decision will make a significant difference in how lower courts will treat these types of cases and will make it harder for employers to successfully obtain dismissal of such claims.

Notwithstanding the Supreme Court's guidance, the boundary line between "some" harm (that is actionable) and something lesser (that is not) will not always be clear. While the Court provided examples of what now satisfies Title VII—*i.e.*, an engineer assigned to work in a wind tunnel, a shipping worker required to work only nights, and a school principal moved into an administrative role outside of the school—these examples raise new questions of their own. Does an employer violate Title VII by transferring an employee from one team to another in the same department while compensation and benefits remain unaffected? Is Title VII violated when an employer moves an employee's office down the

hall further away from a key decision-maker? Does modifying an employee's schedule by one hour in either direction implicate Title VII?

For Justice Kavanaugh, the answer to these questions unequivocally would be “yes.” In his view, “the text of Title VII does not require a separate showing of some harm.” *Id*. at __ (slip op. at 2) (Kavanaugh, J., concurring in judgment). As he explained, “the discrimination is the harm.” *Ibid.* While disagreeing with the Court's requirement that Plaintiffs must show “some” harm, Justice Kavanaugh nonetheless noted that this bar is “relatively low” and any change 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” would be sufficient. *Id*. at __ (slip op. at 3) (Kavanaugh, J., concurring in judgment). He contends that his approach will lead to the same result as the Court's approach in 99% of discriminatory transfer cases.

In light of *Muldrow*, employers should carefully examine and, when necessary, update their policies and procedures to remain compliant with Title VII and similar state laws, where federal precedent is often considered persuasive authority. When transferring employees, employers would be prudent to meticulously document the business reasons supporting these moves. The fact that a transferred employee maintains the same level of seniority and compensation is unlikely—on its own—to be sufficient to defend against a Title VII claim.

The Supreme Court's decision in *Muldrow* also raises questions as to its potential implications beyond the transfer context. While nothing in Muldrow expressly states it applies in other areas, the Court has shifted substantially to the right and expressed skepticism about certain programs in recent years. For example, less than a year ago, in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, the conservative Justices determined that college and university admissions programs that provided a “plus” factor on the basis of race violated the Equal Protection Clause. 600 U.S. 181 (2023). If the “some” harm requirement can be met by a transfer that has some impact on professional relationships or networking opportunities, as Justice Kavanaugh posits, employers should be mindful of this new standard and its potential application to other employment decisions and perhaps even affinity or diversity, equity, and inclusion programs. Employers will be wise to review their policies, practices, and programs to ensure that all meet this new standard and are carefully considered.

Recommended Actions for Employers

In light of the Supreme Court's decision in *Muldrow*, even when considering a transfer that will not change an employee's rank, title, and compensation, employers should comprehensively evaluate whether the transfer might run afoul of the “some” harm standard. Failing to do so will likely result in many more cases proceeding beyond the summary judgment stage. In addition, human resources personnel should receive additional training and be involved in all cases where transfers are under consideration.

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