Will High Court Expand Scope of Adverse Employment Action?

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1. **Introduction**

When an employer unilaterally transfers an employee to another department, division or assignment, such transfer does not automatically constitute an "adverse employment action" under Title VII of the Civil Rights Act of 1964 ("Title VII"). In *Muldrow v. City of St. Louis, Missouri*,[1] the U.S. Court of Appeals for the 8th Circuit clarified the circumstances under which a transfer or reassignment (or a denial of a transfer) might, in fact, constitute an adverse action. Under Title VII, one of the elements an aggrieved employee must demonstrate to prove his or her *prima facie* case of discrimination and/or retaliation is that he or she was subjected to an "adverse employment action" (e.g., termination, demotion, reduction in pay, etc.). The *Muldrow* court ventured into a previously gray area to determine the limits of what constitutes an adverse action. Of interest to Tennessee practitioners is the fact that, following the 8th Circuit's decision, the U.S. Supreme Court granted *certiorari* as to the following question: "Does Title VII prohibit discrimination in transfer decisions absent a separate court determination that the transfer decision caused a significant disadvantage?"[2] The case was argued before the Supreme Court in December 2023, and it currently remains pending.

2. **Case Summary**

In the instant case, police Sgt. Jatonya Clayborn Muldrow was employed as a patrol detective with the St. Louis Police Department ("SLPD," or the "Department").[3] In 2008, she was transferred to the Department's Intelligence Division, which granted her certain FBI clearances and privileges. In 2017, the interim police commissioner appointed a new commander of intelligence, Cpt. Michael Deeba, who subsequently transferred four officers — including Sgt. Muldrow — out of the Intelligence Division to the Fifth Police District.[4] This transfer resulted in a variety of changes to her position and duties, including her: (1) schedule; (2) access to certain patrol areas; and (3) ability to gain significant overtime work. *Id*. Additionally, Sgt. Muldrow had to return her unmarked FBI vehicle, and she had to wear a standard police uniform (rather than plainclothes) moving forward.[5]

As a result, in 2017, Sgt. Muldrow filed a charge of discrimination with the Missouri Commission on Human Rights, alleging she had been discriminated against because of her gender. Following issuance of a right-to-sue letter, Sgt. Muldrow was transferred back to the Intelligence Division. Nevertheless, Sgt. Muldrow filed a lawsuit in Missouri state court, alleging both gender discrimination and retaliation for reporting certain acts of discrimination. The Department removed the case to federal district court and ultimately filed a motion for summary judgment as to Sgt. Muldrow's claims. The District Court granted the Department's motion, following which Sgt. Muldrow appealed to the 8th Circuit.

3. **The Scope of an "Adverse Employment Action."**

To prove a *prima facie* case of gender discrimination, a plaintiff must demonstrate each of the following elements: (1) she is a member of a protected class; (2) she was qualified to perform her job; (3) she experienced an adverse employment action; and (4) such treatment was different from that of similarly situated male employees.[6] Digging deeper, an adverse employment action occurs when there "is a tangible change in working conditions that produces a material employment disadvantage."[7] Importantly, the 8th Circuit reiterated that "minor changes in duties or working conditions, even unpalatable or unwelcome ones, which cause no materially significant disadvantage, do not rise to the level of an adverse employment action."[8]

Sgt. Muldrow alleged that her transfer from the Intelligence Division to the Fifth District constituted an adverse employment action "because her Fifth District work was more administrative and less prestigious than that of the Intelligence Division, meaning that it was more akin to the basic entry level work of being a police officer or sergeant."[9] In holding for the Department, however, the 8th Circuit relied upon the following facts related to her transfer: (1) her pay and rank remained the same; (2) she was given a supervisory role in her new position; (3) she was responsible for investigating violent crimes; (4) she admitted that the transfer did not harm her future career prospects; and (5) even though she lost the opportunity to receive FBI-related overtime, she still was eligible for overtime pay, but elected not to take advantage of such opportunities.[10]

Ultimately, the court reiterated that "an employee's reassignment, absent proof of harm resulting from that reassignment, is insufficient to constitute an adverse employment action."[11] Instead, "an employer is not tethered to every whim of its employees."[12] Consequently,

were an employer to be subjected to a possible discrimination claim each time an employee is transferred, it would have no opportunity to run its business as it deems fit. Moreover, Sgt. Muldrow failed to demonstrate that any similarly situated male employees were treated differently than she was, particularly given the fact that two male employees also were transferred following Cpt. Deeba's appointment over the Intelligence Division.

4. **What's Next?**

Following the Supreme Court's grant of *certiarori*, oral argument occurred on Dec. 6, 2023. And while the court maintains a significant conservative majority, surprisingly, most court observers suggest that a majority of the justices seemed to lean in Muldrow's direction. In fact, while on the D.C. Circuit, Justice Brett Kavanaugh — a conservative stalwart — wrote a concurring opinion in which he stated that "all discriminatory transfers (and discriminatory denials of requested transfers) are actionable under Title VII."[13] Thus, while the current makeup of the court would suggest a decision that might lean in the employer's favor, generally, it will not be a surprise if the 8th Circuit's decision is overturned on appeal. If that happens, a subsequent rise in actions by employees alleging discriminatory transfer will likely follow suit.

We Can Help

Contact Scott Simmons or any member of Miller & Martin's Labor and Employment group with questions.

[1] 30 F.4th 680 (8th Cir. 2022).

[2] 143 S. Ct. 2686 (2023).

[3] 30 F.4th at 684.

[4] *Id.* at 685.

[5] *Id.*

[6] *Id.* at 687.

[7] *Id.* at 688 (citing *Clegg v. Ark. Dep't of Corr.*, 496 F.3d 922, 926 (8th Cir. 2007)).

[8] *Id.* (citing *Jackman v. Fifth Jud. Dist. Dept' of Corr. Servs.*, 728 F.3d 800, 804 (8th Cir. 2013)).

[9] *Id.* at 688.

[10] *Id.*

[11] *Id.*

[12] *Id.* at 692.

[13] *Ortiz-Diaz v. U.S. Dep't of Hous. & Urban Dev't,* 867 F.3d 70 (D.C. Cir. 2016).