The Supreme Court's "Some Harm"• Definition Leaves SomeTHING to be Desired in Discrimination Cases Involving Workplace Transfers

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One of the decisions avid Supreme Court watchers have been waiting for was Muldrow v. City of St. Louis, Missouri.

"Why?" you ask. This case posed the question whether a workplace transfer has to "significantly disadvantage" an employee in order to give rise to a discrimination claim under Title VII?

The facts of the case are that the plaintiff/employee, Ms. Muldrow, worked as a plainclothes police officer in the Intelligence Division of the City of St. Louis Police Department from 2008 to 2017. In 2017, the new Intelligence Division commander requested that Ms. Muldrow be transferred and replaced in her (then current) position with a male officer. The Police Department approved the transfer (against Ms. Muldrow's wishes) and reassigned her to a uniformed position in another division of the Department.

The reason this case made it to the U.S. Supreme Court is that while Ms. Muldrow's job title, rank, and pay remained the same, her responsibilities, perks, and schedule changed. For example, she went from working with high-priority intelligence matters to supervising neighborhood patrol officers. She also lost use of an unmarked take-home vehicle and was scheduled to work weekend shifts.

The federal trial court in which Ms. Muldrow originally filed her Title VII sex discrimination claim dismissed her lawsuit, and the Eighth Circuit Court of Appeals upheld the dismissal on the grounds that she had failed to establish that the transfer caused her a "materially significant disadvantage." Both courts agreed that her transfer "did not result in a diminution to her title, salary, or benefits" and had caused "only minor changes in [her] working conditions."

A unanimous U.S. Supreme Court disagreed with this "materially significant disadvantage" test, however.

The new test the Court recognized was a "some harm" test – a plaintiff/employee must show that "a transfer brought about 'some harm' with respect to an identifiable term or condition of employment, but that harm need not be significant."

The issue with this new test is that employers – along with all lower courts – have been left to guess (and in the meantime wait possibly several more years while plaintiffs'/employee attorneys make various expensive arguments) regarding what "some harm" means.

Even the Supreme Court justices were not in agreement on this. While they issued a unanimous opinion that "some harm" means "less than materially significant," several of the justices in turn admitted they do not know what "some harm" means. In their concurring opinions, Justice Alito said he had "no idea." Justice Thomas said he thinks it means "more than trifling harm." Justice Kavanaugh said the Court's intention was to set a "low bar" in that he anticipated "anyone who has been transferred because of race, color, religion, sex, or national origin 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."

This sounds similar to the obscenity ruling from the 1960s, in which the high court said they would "know it when they see it."

So, the practical takeaway from this opinion – to the extent there is one – is to be aware that if (as in the underlying "Ms. Muldrow" scenario presented to the Supreme Court) you have an employee who can point to another employee who is not in a protected class who was not transferred in a similar situation or who replaced them, you most likely will have the makings of a Title VII EEOC charge then lawsuit on your hands. As, at least for now, it is going to be – to use Justice Kavanaugh's term – "easy" for the transferred employee to be able to show "some harm" resulted to him/her personally as a result of the transfer – even if, like Ms. Muldrow, his/her pay, job title, etc. was not impacted.

To close with our police-related theme today – "Be careful out there!" ("Hill Street Blues" people – it helps to be a child of the 1980s in reading these alerts!)

As always, if you have questions regarding this new decision or employment decisions involving those in protected classes in general, please contact Stacie Caraway or any other member of our Labor & Employment Practice Group.