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Extern! Extern! Read All About Them!

Law schools want to place them, law students seek the opportunity, and local government law offices can benefit.



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AMICUS

By: AMANDA KARRAS,
IMLA Executive Director and General Counsel

SCOTUS to Decide: What's Materiality Got to Do with It?

The Supreme Court will hear an important Title VII employment discrimination suit this term that could have significant impacts for all local governments as employers. If the Court sides with the employee, the case could create increased costs and liability for local governments while also diverting resources away from the critical missions that they serve. The case could also have serious implications for public safety, as explained more fully below.

In the case, Jatonya Muldrow, a Sergeant with the St. Louis Police Department was laterally transferred from a position as a patrol detective with the Intelligence Division, where she worked on public corruption and human trafficking cases, to the Fifth District in the City where she retained her rank, pay, supervisory role, and duties investigating violent crimes, including homicides, robberies, and assaults. The transfer was a part of several personnel changes in the police department that included transferring seventeen men and five women from various positions to new lateral assignments. Sgt. Muldrow sued, claiming the transfer was based on her sex in violation of Title VII of the Civil Rights Act.

Section 703(a) of Title VII states:

> It shall be an unlawful employment practice for an employer - (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

Sgt. Muldrow was not fired or demoted, so at issue in this case is construing the terms in the statute "discriminate against" and "terms, conditions, or privileges of employment." Sgt. Muldrow's original position with the Intelligence Division involved a 9:00 am – 5:00 pm or 8:00 am – 4:00 pm Monday – Friday schedule. She also worked as a liaison to the FBI field office and in this capacity, had the same privileges as an FBI agent, including working in plain clothes and access to an FBI vehicle. When she was transferred, she was required to work a rotating schedule, which included some weekends, and she was required to wear a police uniform.

In order to establish an employment discrimination claim under Title VII, a plaintiff must first demonstrate a *prima facie* case of discrimination by showing: (1) that she belongs to a protected class; 2) that she was qualified for the job; 3) that despite those qualifications, she suffered an adverse employment action; and 4) the circumstances surrounding the employment action allow for an inference of discrimination.[1] The burden then shifts to the employer to "articulate some legitimate, nondiscriminatory reason" for the action.[2] After the employer meets its burden, the burden then shifts back to the plaintiff to show that the employer's reasons are pretext for discrimination.[3]

The Eighth Circuit found in favor of the City, concluding that the lateral transfer was not an adverse employment action and Sgt, Muldrow therefore failed to establish a prima facie case of discrimination.[4] The Eighth Circuit explained:

> [a]n adverse employment action is a tangible change in working conditions that produces a material employment disadvantage... A transfer involving only minor changes in working conditions and no reduction in pay or benefits will not constitute an adverse employment action, '[o]therwise every trivial personnel action that an irritable ... employee did not like would form the basis of a discrimination suit.'[5]

The court reasoned that Sgt. Muldrow retained her pay and rank as well as her supervisory role and her responsibilities to investigate violent crimes and she therefore suffered no significant change to her working conditions which would rise to the level of an adverse employment action under Title VII.[6] Other courts have found that a change to a shift, from day to night for example, would constitute a material "term of employment" under the statute.[7] On this point, the Sixth Circuit recently noted the question of whether a shift change was a material term of employment was so "easy" that "[i]t's not even clear that we need dictionaries to confirm what fluent speakers of English know."[8]

The Supreme Court granted certiorari to resolve the question of whether an adverse employment action under Title VII must cause "significant disadvantage" or put another way, must have a materiality requirement to it. Nearly every circuit court to address the question has found that materiality is required to demonstrate an adverse action.[9] This has been the rule in most courts for decades.

Under the Petitioner's (employee's)

theory, *any* change to an employee's working conditions would constitute an adverse action under Title VII, regardless of how trivial the change. The Petitioner argues that in a purely textualist sense, the word "discriminate" means "any differential treatment" and there is no requirement for "heightened harm" or materiality.[10] Adopting this rule, which is also advocated by the federal government, would be a sea change under Title VII in the vast majority of circuits.

Even if the Court were to adopt the Petitioner's theory of liability, employees would still need to prove that the change in working conditions was due to the employee's protected status. In other words, the analysis does not stop at materiality, which provides some comfort to employers if the Court sides with the employee. However, one of the biggest problems with the Petitioner's proposed rule is that whether the change to the employee's job was due to the employee's race or sex (or other protected status) will often be a jury question. Employees, who after all would not be suing if they did not think so, will claim that the transfer or employment action was because of their protected status and employers (unless they settle) will claim that it was not because of the employee's protected status. These suits are already expensive and time consuming to litigate, but if most of the issues that are now being resolved at summary judgment due to a lack of materiality become jury questions, employers will be forced to settle more lawsuits or go to trial, spending even more money to defend these already expensive suits.

And while every employer, both public and private, will feel a drain on their resources with the addition of new Title VII liability, public employers have an added concern in this case regarding public safety. That is because lateral transfers of paramilitary employees – i.e., those in police and fire departments - are common and necessary. Most local governments provide their police and fire chiefs (as well as their designees) with the authority to assign personnel within their departments as they see fit. Transfers may be necessary due to budgetary limitations, staffing shortages, ADA and religious accommodations, familiarizing employees with other units of a department, filling vacancies, preventing burnout, and avoiding ongoing harassment.

One of the most important reasons a chief may need to transfer an employee is to satisfy staffing demands. Police departments across the country are facing significant personnel shortages caused by a spike in retirement, resignations, and insufficient recruitments. The deficits are significant. For example, Baltimore is short 532 police officers, Portland, Oregon is down 100 officers, Dallas is facing a 550-officer shortage, and Washington D.C. is 800 officers below full strength.[11] Public safety requires the proper personnel in the proper places. Chiefs may need to disband specialized units, move personnel from the day shift to the night shift, or move officers to different units to address staffing shortages and ensure proper emergency response. All of these reassignments are necessary for public safety, and they would all be potentially actionable under Petitioner's theory. Of course, the employees would still need to demonstrate that the transfers were due to the person's protected status, but right now, if a transfer like this is not considered a material adverse action, most courts can address the claim at earlier stages of litigation, saving time, money, and resources for public employers.

In deciding the question presented, this Court will determine who should be responsible for allocating scarce personnel resources to address public safety. Adopting the Petitioner's definition of Title VII's threshold will turn federal courts into the overseers of minute employment decisions routinely made by local governments, which is particularly problematic for paramilitary employers. IMLA believes that these decisions should be made by the leadership of the police or fire department, not a federal court with no public safety experience.

IMLA drafted an amicus brief in support of the City of St. Louis in this case, arguing many of these points.[12] The case will be argued on December 6, 2023, and we can expect a decision before the end of June 2024.

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Notes

1. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).
2. *Id.* at 802.
3. *Id.* at 804.
4. Muldrow v. City of St. Louis Missouri, 30 F.4th 680, 687 (8th Cir. 2022), *cert. granted in part,* 143 S. Ct. 2686 (2023).
5. *Id.* at 688.
6. *Id.* at 688-89.
7. Threat v. City of Cleveland, Ohio, 6 F.4th 672, 677 (6th Cir. 2021).
8. *Id.*
9. *See* Hamilton v. Dallas Cnty., 79 F.4th 494, 504 (5th Cir. 2023) (noting "nearly every circuit seems to have adopted" a materiality requirement and collecting cases); *But see* Chambers v. D.C., 35 F.4th 870, 872 (D.C. Cir. 2022). The court in *Hamilton* rejected the circuit's previous requirement that the adverse action be an "ultimate employment decision", but the court did not decide what level of materiality was necessary to plead a Title VII violation.
10. *See* Petitioner's Brief, p, 16, available at: https://www.supremecourt.gov/DocketPDF/22/22- 193/278337/20230828212608509_Petitioner%20opening%20merits%20brief%20-%208.28.2023.pdf.
11. Ryan Young, *et al.*, *'We Need Them Desperately': US Police Departments Struggle with Critical Staffing Shortages*, Cable News Network (July 20, 2022), https://www.cnn.com/2022/07/19/us/police-staffing-shortages-recruitment/index.html; Rebecca Pryor, *Baltimore Police Turn to 'Drastic Measures' Amid Severe Staffing Shortages*, WPBN FCC (Aug. 2, 2023) (hereinafter "*Baltimore Police*"), https://upnorthlive.com/news/nation-world/baltimore-police-turn-to-drastic-measures-amid-severe-staffing-shortages-high-crime-rates-patrol-officers-baltimore-city-police-department-understaffed-districts-gun-violence-juvenile-crime; Megan Cloherty, *DC's Police Chief Says Recruiting Officers is Harder Due to New Laws*, WBFF Staff (Feb. 24, 2023), https://wtop.com/dc/2023/02/dc-police-chief-blames-recruiting-struggles-on-new-laws/#:~:text=Standing%20at%203%2C400%20officers%2C%20D.C.,policies%20that%20increase%20officer%20accountability.
12. IMLA's amicus brief is available here: https://www.supremecourt.gov/Docket PDF/22/22-193/285432/20231018151003442_Muldrow%20Amicus%20Brief%20Final%20for%2010.18.23.pdf.