

How bad is bad enough to sue? The U.S. Supreme Court clarifies when a work transfer is “adverse” enough to support a lawsuit under Title VII.

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The United States Supreme Court recently clarified the law that applies to federal workplace discrimination claims based on an employee’s allegation that he or she was transferred to a job they didn’t want for a prohibited reason. In *Muldrow v. City of St. Louis*, Justice Elena Kagan wrote for a unanimous Court and reversed the Eighth Circuit’s dismissal of a police sergeant’s sex discrimination complaint against the City of St. Louis. The sergeant alleged that her employer transferred her to a position that involved the same pay and rank, but with different (and to the sergeant, more unfavorable) job duties – and so violated Title VII of the Civil Rights Act of 1964.

For context, when there is no *direct* evidence of discrimination, courts apply a burden-shifting framework. That requires a plaintiff first to show a “prima facie” case: that they were a qualified member of a protected class, that they suffered an *adverse employment action*, and that the employment action was connected to their membership in a protected group. If the plaintiff meets this standard, the employer/defendant can provide legitimate, non-discriminatory reasons to explain the employment action, and the plaintiff then has the chance to show those reasons are false, or “pretext.” However, if a plaintiff fails to establish a “prima facie” case—if the employment action wasn’t “adverse,” for example—the case cannot proceed to the next phase, and judgment for the defendant is usually appropriate. That is exactly how the Eighth Circuit handled this case: because Muldrow was provided the same pay and rank after her transfer, her complaints did not rise to affecting the “terms and conditions” of her employment, and the court therefore granted judgment to the defendant and dismissed her action. The Eighth Circuit specifically found that her objections to the new job duties did not cause a “materially significant disadvantage” to Muldrow because they represented “only minor changes in [her] working conditions.”

In *Muldrow*, the Supreme Court reversed the judgment of the Eighth Circuit, thereby expanding the circumstances in which a plaintiff can successfully sue an employer for transferring the plaintiff to a position considered less desirable, even though it brings the

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same pay, benefits, and seniority. The Court reached its decision based on the text of Title VII: employers may not “discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex.” While the parties agreed that Muldrow’s transfer implicated the “terms and conditions” of her employment, the Court broke with lower courts by finding that the term “discriminate against” does not require a showing of some special, significant harm: “‘Discriminate against’ means treat worse But neither that phrase nor any other says anything about *how much worse*.” (Slip. Op. at 6) (emphasis added). So, the Court reasoned that so long as a Title VII plaintiff alleges *some harm* resulting from a transfer, they have alleged an “adverse action” sufficient to establish a prima facie case.

While the majority opinion provides little practical guidance, the ruling highlights some long-standing best practices for employers:

- **Determine the specific reason for a transfer decision and document it.** Under the *Muldrow* standard, it may be less likely defendants will be able to obtain dismissals based on the failure of a plaintiff’s prima facie case. Accordingly, employers must be prepared to explain their rationale for any transfer decision and back it up with documentation. If a business need justifies an individual’s transfer, ensure that reason is both sound and well documented.
- **Use transfers carefully in personnel matters.** Transferring an employee to a different division to cover a business need is straightforward enough. But when using transfers as a tool to eliminate workplace conflicts, employers should proceed extremely cautiously. To provide an example, it is typically unwise to transfer an employee who complains about coworkers harassing them without investigating and addressing any potential wrongdoing on the part of the coworkers. Where an employer transfers an individual and (a) it causes *some* harm to the employee and (b) the employer does not have a legitimate, non-discriminatory reason that explains the transfer in the face of an accusation that it was made because of a protected characteristic, then Title VII liability is possible.