Justices' Job Transfer Review Should Hold To Title VII Text

By **Lynne Bernabei and Alan Kabat** (August 1, 2023)

Lynne Bernabei

Alan Kabat

On June 30, the U.S. Supreme Court granted a writ of certiorari in Muldrow v. City of St. Louis, a U.S. Court of Appeals for the Eighth Circuit decision to resolve whether an employee can bring a discrimination claim under Title VII of the Civil Rights Act, Section 703(a)(1), codified in Title 42 of the U.S. Code, Section 2000e-2(a)(1), based on a discriminatory transfer in the workplace.

The federal circuit courts are split on this issue. The specific question the Supreme Court will address, as stated in the justices' decision to grant certiorari, is: "Does Title VII prohibit discrimination in transfer decisions absent a separate court determination that the transfer decision caused a significant disadvantage?"[1]

This is one of two significant employment cases that the court will hear in the 2023-2024 term, the other being the U.S. Court of Appeals for the Second Circuit's 2022 decision in Murray v. UBS Securities LLC, a Sarbanes-Oxley Act whistleblower-retaliation case.[2]

Based on the plain language of Title VII's definition of discrimination, i.e., acts that affect the "compensation, terms, conditions, or privileges of employment," the Supreme Court should hold that a transfer can be an adverse employment action, without having to show other adverse effects on an employee, such as a reduction in pay or position.

Factual Background

Sergeant Jatonya Muldrow worked in the St. Louis Metropolitan Police Department. From 2008 to June 2017, she worked in the intelligence division, which dealt with public corruption, human trafficking and gang violence cases. In April 2017, Captain Michael Deeba became her new supervisor and restructured the intelligence division.

After the reorganization, Deeba transferred Muldrow to the department's fifth district, and replaced her with a male officer with whom he had previously worked. He also assigned Muldrow to be a patrol sergeant in the fifth district, which was a less desirable position, as it impacted her schedule, gave her mainly administrative duties, and required her to wear a uniform and carry heavy gear. However, her salary and rank remained the same.

While working in the fifth district, Muldrow requested a transfer to the second district. The police department denied her request. After she spent eight months in the fifth district, the police department transferred her back to the intelligence division.

Subsequently, Muldrow filed Title VII discrimination and retaliation claims, alleging that her forced transfer and subsequent refusal to grant her a transfer were discriminatory. Both the district court and the Eighth Circuit ruled in favor of the police department on the ground that a forced transfer or refusal to transfer are not actionable under Title VII, as these actions are not adverse employment actions.[3]

The Circuit Split

All the circuit courts that have addressed this issue, other than the U.S. Court of Appeals for the District of Columbia Circuit and the U.S. Court of Appeals for the Sixth Circuit, have dismissed Title VII discrimination claims based on transfers, on the basis that the transfers are not adverse employment actions.

The U.S. Court of Appeals for the fifth district, as one example, held in its 2007 McCoy v. City of Shreveport decision that only an ultimate employment decision, such as a refusal to hire, termination, demotion or similar action constitutes unlawful discrimination.[4]

The fifth district held an en banc oral argument in another case, Hamilton v. Dallas County, on Jan. 24, to reconsider whether a transfer qualifies as an adverse employment action, but has not yet rendered a final decision.[5]

In 2004, the U.S. Court of Appeals for the Third Circuit ruled in Storey v. Burns International Security Services that an adverse action must be "serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment."[6] Under this test, the Third Circuit held that transfers are insufficient to qualify as alterations to employment terms and conditions.[7]

The U.S. Courts of Appeals for the Fourth, Seventh and Eleventh Circuits have applied varying tests to lead to the conclusion that transfers are not actionable.[8]

However, the D.C. Circuit and the Sixth Circuit have held that a transfer, or the denial of a transfer, based on protected status can be actionable under Title VII without the need to prove a separate and additional harm.[9]

The D.C. Circuit's en banc decision in Chambers v. District of Columbia reasoned that the statutory language of Section 703(a)(1) does not require "an employee alleging discrimination in the terms or conditions of employment to make a separate showing of objectively tangible harm."[10]

Similarly, in 2021 the Sixth Circuit held in Threat v. City of Cleveland that discriminatory shift changes are generally actionable under Title VII, even when not accompanied by reductions in pay or benefits.[11]

Both circuits have held that any other interpretation of Title VII is merely a judicial interpretation without support in the text of the statute.[12]

The Supreme Court called for a response from the solicitor general, who agreed with the petitioner Muldrow that the Eighth Circuit's decision was legally incorrect and that transfers could be actionable discrimination. The Supreme Court granted certiorari to decide the split in the circuits.

Supreme Court Should Hold Transfers Can Be Discriminatory

The Supreme Court should reject the impetus to engage in judicial activism to expand the requirements for an adverse action that are not in the anti-discrimination statutes. Title VII prohibits discriminating against employees in their "compensation, terms, conditions, or privileges of employment."[13] These four words are disjunctive, so that discrimination as to any one of them alone should be sufficient to state a claim.

While the Eighth Circuit and several other circuits treat certain actions like termination, failure to promote, denial of transfer or refusal to hire as separately actionable due to their easily identifiable nature, they dismiss other discriminatory acts as nonactionable, on the basis that these other actions are not sufficiently "adverse."

Their reasoning only encourages employers to engage in covert discrimination, including altering employees' schedules, giving poor evaluations and changing job responsibilities without any corresponding salary change or formal demotion.[14]

This heightened standard for an adverse employment action does not originate from the language of the statutes, but from the courts' misinterpretations of the 1998 Supreme Court decision in Burlington Industries Inc. v. Ellerth.[15]

The court in Ellerth engaged in judicial activism to create an entirely new list of adverse employment actions for purposes of an affirmative defense,[16] which a number of courts later misused to dismiss claims not on the list, including transfers. In fact, the actions on the Ellerth list are not listed in the statute as the exclusive actionable employment actions under Title VII.

The plain meaning of these statutory terms — compensation, terms, conditions or privileges of employment — indicate that the core purpose of Title VII is to safeguard protected individuals from any form of employment-related discrimination, irrespective of its impact.

While compensation is an important component of a job, it is not the only or necessarily most important component of the statutory "compensation, terms, conditions, or privileges." Therefore, the circuit courts that dismissed transfer decisions as nonactionable because there was no change in compensation undermine both the plain language of Title VII and the statute's fundamental mission to create a discrimination-free workplace.

The U.S. Equal Employment Opportunity Commission's compliance manual specifies that job assignments are included within the scope of workplace terms, conditions, or privileges of employment.[17] A work assignment, whether in the form of a transfer or reassignment, significantly impacts an employee's job scope.

Therefore, any type of transfer, regardless of whether it alters the timing of employment or involves changes in responsibilities, prestige, specialized training, supervisory roles or other aspects of the job, modifies the established terms, conditions or privileges of employment.[18]

Following similar reasoning, the D.C. Circuit, in its 2017 decision in Ortiz-Diaz v. U.S. Department of Housing and Urban Development, put forward a more literal interpretation of the "terms, conditions, or privileges of employment."[19] It recognized that discrimination encompasses any difference in treatment that harms protected individuals, and that seeking a transfer to escape a biased supervisor and protect career advancement may constitute an actionable claim under Title VII.[20]

Then-D.C. Circuit Judge Brett Kavanaugh's concurring opinion in that case suggested that determining whether a transfer is actionable rests on the facts of the case and cannot be decided as a legal matter.[21] It is crucial to underscore that the Supreme Court has never adopted a legal requirement that an adverse employment action is an element of an employee's discrimination case.[22]

The Supreme Court should focus on the straightforward language of the statute and avoid

judicial activism. The plain language states that discrimination in the terms, conditions, or privileges of employment extends beyond economic factors. Since the language of the statute is disjunctive, any one of these four categories of discrimination is actionable and can form the basis of an employment discrimination claim, including transfers.

Lynne Bernabei and Alan R. Kabat are partners at Bernabei & Kabat PLLC.

Bernabei & Kabat summer associate Robert Ryu contributed to this article.

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[1] Muldrow v. City of St. Louis, 30 F.4th 680 (8th Cir. 2022), cert. granted, No. 22-193 (U.S. June 30, 2023).

[2] Murray v. UBS Securities LLC, No. 22-660 (to be argued on October 10, 2023).

[3] Muldrow, 2020 WL 5505113, *8–10, *11-12 (E.D. Mo. Sept. 11, 2020), aff'd, 30 F.4th 680, 688-92 (8th Cir. 2022), cert. granted, No. 22-193 (U.S. June 30, 2023).

[4] McCoy v. City of Shreveport, 492 F.3d 551, 559–60 (5th Cir. 2007).

[5] Hamilton v. Dallas County, No. 21-10133 (5th Cir.).

[6] Storey v. Burns Int'l Sec. Servs., 390 F.3d 760, 764 (3d Cir. 2004).

[7] Langley v. Merck & Co., 186 F. App'x 258, 260 (3d Cir. 2006).

[8] James v. Booz-Allen Hamilton, Inc., 368 F.3d 371, 376 (4th Cir. 2004) (significant detrimental effect test); EEOC v. AutoZone, Inc., 860 F.3d 564, 568, 569 (7th Cir. 2017) (materially adverse test); Hinson v. Clinch County, Ga. Bd. of Educ., 231 F.3d 821, 829 (11th Cir. 2000) (reasonable person adversity test).

[9] See Chambers v. District of Columbia, 35 F.4th 870 (D.C. Cir. 2022) (en banc); Threat v. City of Cleveland, 6 F.4th 672 (6th Cir. 2021).

[10] Chambers, 35 F.4th at 879–80.

[11] Threat, 6 F.4th at 680.

[12] Chambers, 35 F.4th at 875; Threat, 6 F.4th at 679.

[13] 42 U.S.C. § 2000e-2(a)(1).

[14] See, e.g., Douglas v. DynMcDermott Petroleum Operations Co., 144 F.3d 364, 373 n.11 (5th Cir. 1998) (negative performance evaluation not actionable); Shackelford v. Deloitte & Touche, LLP, 190 F.3d 398, 407 (5th Cir. 1999) (denial of training on a discriminatory basis not actionable).

[15] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

[16] Ellerth, 524 U.S. at 744.

[17] EEOC Compliance Manual, § 613.1(a), 2006 WL 4672701; see also EEOC Compliance Manual, § 2-II, 2009 WL 2966754.

[18] See Threat, 6 F.4th at 679 (lateral transfer); Hinson, 231 F.3d at 830 (reduction in pay, prestige, or responsibility); Burns v. Johnson, 829 F.3d 1, 11 (1st Cir. 2016) (menial duties); Jude v. Hamilton, 872 F.2d 919, 921 (9th Cir. 1989) (reduction of supervisory responsibilities).

[19] Ortiz-Diaz v. U.S. Dep't of Hous. & Urban Dev., 867 F.3d 70 (D.C. Cir. 2017).

[20] Id. at 74–75.

[21] Id. at 81 (Kavanaugh, J., concurring).

[22] Minor v. Centocor Inc., 457 F.3d 632, 634 (7th Cir. 2006).