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EMPLOYMENT LAW

Does Title VII Prohibit Discrimination in Employment-Transfer Decisions Only if They Cause Materially Significant Disadvantages for Employees?

CASE AT A GLANCE

Petitioner Jatonya Clayborn Muldrow, a sergeant for the St. Louis Police Department, was transferred to another unit within the department. Muldrow sued the City of St. Louis for making a discriminatory transfer decision in alleged violation of Title VII. This case presents the question of whether Title VII prohibits discriminatory transfer decisions absent a separate court determination that the decision caused Muldrow materially significant disadvantages.

Muldrow v. City of St. Louis, Missouri

Docket No. No. 22-193

Argument Date: **December 6, 2023** From: **The Eighth Circuit**

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Introduction

Congress enacted Title VII of the Civil Rights Act of 1964 to “assure equality of employment opportunities and to eliminate...discriminatory practices and devices” in the workplace. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Section 703(a)(1), “Title VII’s core antidiscrimination provision,” *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006), makes it unlawful for an employer “to discriminate against any individual” concerning “terms, conditions, or privileges of employment, because of such individual’s...sex.” 42 U.S.C. § 2000e-2(a)(1).

At issue here are the statutory phrases “discriminate” and “terms, conditions, or privileges of employment.” The Supreme Court has interpreted the statutory term “discriminate” as meaning “[t]o make a difference in treatment or favor (of one as compared with others).” *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (quoting Webster’s New Int’l Dictionary 745 (2d ed. 1954)). The Court has also broadly interpreted “terms, conditions, or privileges of employment,” explaining that Title VII’s

prohibition on employer discrimination of employees’ “terms, conditions, or privileges of employment” “evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment.” *Oncala v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (other citations and internal quotation marks omitted)) (discussing terms and conditions of employment in the context of workplace harassment).

This case presents a question of statutory interpretation. The Court must decide whether Title VII covers all transfer decisions as “terms, conditions, or privileges of employment” and therefore that any transfer made because of sex is unlawful or whether Title VII prohibits only those transfer decisions that cause materially significant disadvantages for employees.

Issue

Does Title VII prohibit discrimination in transfer decisions absent a separate determination that the decision caused materially significant disadvantages for employees?

Facts

Petitioner Jatonya Clayborn Muldrow worked as a sergeant with the St. Louis Metropolitan Police Department (the Department). In 2008, Muldrow transferred to the Intelligence Division, where she covered public corruption and human trafficking, led the Gun Crimes Intelligence Unit, and ran the Gang Unit. In 2016, while maintaining a traditional 8-to-4 or 9-to-5 schedule, the Federal Bureau of Investigation (FBI) deputized her as a Task Force Officer (TFO) for its Human Trafficking Unit, granting her the same privileges as an FBI agent, including having access to an unmarked FBI vehicle, FBI field offices, and FBI databases; the privilege to work in plain clothes; the authority to conduct investigations related to human trafficking outside of the St. Louis city limits; and an opportunity to earn annual overtime pay up to \$17,500.

In April 2017, the City of St. Louis (the City) appointed Lawrence O’Toole as interim police commissioner for the department. Captain Michael Deeba was hired as the commander of intelligence to replace Captain Angela Counce, who had been transferred to the Second District. Captain Deeba became Muldrow’s new supervisor. Departing Commander of Intelligence Counce told Captain Deeba that Muldrow was a “workhorse” and that, “if there was one sergeant he could count on in the Division, it would be [Muldrow] because of her experience.”

In June 2017, Commissioner O’Toole announced several transfers. At this time, petitioner Muldrow was reassigned from the Intelligence Unit to the Fifth District. Muldrow retained her base pay, rank as sergeant, administrative responsibilities, and supervisory role. However, after the transfer, Muldrow lost her FBI credentials and was no longer eligible for the FBI’s \$17,500 annual overtime pay, although she could apply for other overtime opportunities. Moreover, she was required to work a rotating schedule including weekends, wear a police uniform, return the unmarked FBI car and drive a marked police vehicle, and work within a controlled patrol area. At Captain Deeba’s request, the City assigned Sergeant Ray Jackson, an officer whom Deeba had worked with for 20 years, to Muldrow’s position in the Intelligence Division.

Shortly thereafter, Muldrow applied for a transfer to Second District, where she would be assigned to work as Captain Counce’s assistant. She also applied for several other positions. In February of 2018, while awaiting the outcome of those applications, the City transferred

Muldrow back to the Intelligence Unit, and her FBI TFO privileges were reinstated.

* * *

On June 22, 2017, Sergeant Muldrow filed a charge with the Missouri Commission on Human Rights (the Commission), alleging that the City of St. Louis and Captain Deeba had discriminated against her. After the Commission issued her a right-to-sue letter, Muldrow sued in Missouri state court, alleging gender discrimination and retaliation in violation of Title VII and state law.

The City and Deeba removed the case to federal district court, which granted the City and Deeba’s motion for summary judgment on Sergeant Muldrow’s Title VII gender discrimination and retaliation claims and declined to exercise supplemental jurisdiction over her state law claims, dismissing them without prejudice. The court held that Muldrow’s discrimination claim based on the decision to transfer her from the Intelligence Division failed because the transfer did not “actually amount[] to an adverse employment action,” which in-circuit precedent defines as “a tangible change in working conditions that produces a material employment disadvantage.” See *Clegg v. Arkansas Dep’t of Corr.*, 496 F.3d 922 (8th Cir. 2007). The court rejected Muldrow’s claim—that the transfer was sufficiently adverse because she had been transferred from a “high visibility” position with career-raising “networking opportunities” to a position devoid of those opportunities—because, in its view, Muldrow had not “explain[ed] why these responsibilities constituted a material deviation from the responsibilities she had in Intelligence.”

The Eighth Circuit affirmed. The court held her claim nonactionable because the transfer had not caused Muldrow to suffer a “materially significant disadvantage.” The court found insufficient the evidence that Muldrow presented—that the “Fifth District work was more administrative and less prestigious than that of the Intelligence Division.” The court further found that the transfer “did not result in a diminution to her title, salary, or benefits” or “a significant change in working conditions or responsibilities.” The court added that Muldrow had expressed a “mere preference for one position over the other.”

The Supreme Court granted Sergeant Muldrow’s petition for *certiorari*.

Case Analysis

This case asks the Court to decide whether Title VII prohibits discrimination in employment transfer decisions or only when those transfer decisions result in material, objective harm to the employee. The answer to that question turns on the Court's interpretation of the statutory phrases "discriminate" and "terms, conditions, or privileges of employment."

Petitioner contends that Section 703(a)(1)'s text plainly prohibits any transfer decision because of sex. To support that contention, petitioner cites the Court's Title VII jurisprudence, which itself relies on dictionary definitions of "discriminate" to mean comparative "difference in treatment or favor" *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (quoting Webster's New Int'l Dictionary) or "differential treatment of similarly situated groups." *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999) (Kennedy, J., concurring in the judgment).

Petitioner then reviews the dictionary definitions of "terms," "conditions," and "privileges" to show each word's ordinary meaning capaciously "cover[s] the gamut of workplace requirements, obligations, customs, and benefits that an employer imposes on, or grants to, an employee." For example, the Merriam-Webster's Online Dictionary definition of the word "terms" means "provisions that determine the nature and scope of an agreement." The Webster's New International Dictionary definition of "conditions" means "attendant circumstances." Webster's Third New International Diction definition of the word "privileges" means "a right or immunity granted as a peculiar benefit, advantage, or favor" and "such right or immunity attaching specif[ically] to a position or an office." See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (Title VII's use of terms and conditions of employment "evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment") (citation omitted).

To bolster the textual argument, petitioner makes four additional arguments. First, petitioner reviews the Court's interpretation of similar language in the National Labor Relations Act, which Title VII borrowed, to support an expansive reading of those terms. See, e.g., *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967) ("comparatively slight" harms to employees' terms or conditions of employment violates the act where discriminatory intent is proven). Second, petitioner looks to Section 703's

legislative history, which reveals that Title VII was meant to have an expansive reach. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (Congress enacted Title VII to "assure equality of employment opportunities and to eliminate...discriminatory practices and devices" in the workplace). Third, petitioner reviews congressional amendments to Section 1981 to demonstrate that Congress added the words found in Section 703 to ensure that Section 1981 protected "all phases" of employment. See *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009 (2020) (Ginsburg, J., concurring in part and concurring in the judgment) (citation omitted) (discussing 42 U.S.C. § 1981(b)). Finally, petitioner reviews the EEOC Compliance Manual, which explains that Section 703(a)(1) "is to be read in the broadest possible terms," and that "'terms, conditions, or privileges'...include a wide range of activities or practices which occur in the work place."

In contrast, respondent contends that Title VII prohibits discrimination in only a subset of transfer decisions—namely those decisions that impose material, objective harm on the transferred employee. Respondent claims that the text—read in context—supports its position. But rather than relying on dictionary definitions, respondent relies on the Court's jurisprudence to make its argument. See, e.g., *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (explaining that "[t]he critical issue, Title VII's text indicates, is whether members of one sex are exposed to *disadvantageous terms or conditions of employment* to which members of the other sex are not exposed"); *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006) (explaining, in the context of Section 704(a), which prohibits retaliation, that "the term 'discriminate against' refers to distinctions or differences in treatment that injure protected individuals") (construing 42 U.S.C. § 2000e-3(a)).

To bolster its argument, respondent makes two main points. First, respondent uses the *ejusdem generis* canon. Under that canon, when "general words follow an enumeration of two or more things" the general words "apply only to...things of the same general kind or class specifically mentioned." Here, the general words—"otherwise to discriminate against"—follow the more specific words—"to fail...to hire," "to refuse to hire," or "to discharge." Those more specific words all cause material harm. Therefore, the better interpretation of the general phrase is to limit it to those actions that cause material harm. Second, respondent explains that Section 703(a)(2), which follows the statutory section in question, contains

language—“adversely affect”—that requires material harm. See, e.g., Oxford Illustrated Dictionary (1962) (defining “affect” as “to produce (material effect on)”). Accordingly, intrastatutory consistency favors a parallel reading of Sections 703(a)(1) and (2).

Petitioner appears to have the better textual argument. After all, petitioner meticulously shows that the dictionary meanings of statutory phrases would encompass a transfer. Therefore, if respondent transferred petitioner because she was a woman, Title VII’s plain-language prohibitions should apply. However, two of respondent’s counterarguments are persuasive. First, while a dictionary definition seems invariably to lead to petitioner’s interpretation of the statute, reading that section in context, particularly with the help of the *ejusdem generis* canon, may be sufficient to persuade the Court that respondent’s interpretation is better. Second, that the *Burlington* Court interpreted Title VII Section 704’s “discriminate against” language to require “distinctions or differences in treatment that injure protected individuals,” that is, to require harm, is compelling because *Burlington* involved a transfer decision. It is unclear whether *Burlington*’s analysis will be sufficient to convince the Court that transfer decisions for purposes of Section 703 must involve material, objective harm because the transfer decision at issue in *Burlington* was allegedly in retaliation against the employee for complaining about sexual harassment on the job, thereby invoking Section 704, rather than an actual discriminatory decision, which invokes Section 703. Therefore, the Court could distinguish *Burlington* on the grounds that it involved a different section of Title VII. Or the Court could give sufficient weight to *Burlington* to influence its interpretation of Section 703.

Significance

This is the second case of this term in which the Court will construe the term “discriminate.” In the first case, *Murray v. UBS Securities LLC*, Docket No. 22-660 (argued October 10, 2023), the Court has been asked to determine whether the term “discriminate” means “retaliatory intent” for purposes of the Sarbanes–Oxley Act, 18 U.S.C. § 1514A. In this case, the Court has been asked to determine whether the term “discriminate” requires material harm for purposes of Title VII § 703(a)(1) and in the context of a transfer decision.

There is a pattern here. In both cases, the petitioner–employees are asking the Court to read the relevant statute in a formalistic manner and then apply the statute in a Scalia-esque legalistic manner. By contrast, the respondent–employers are asking the Court to read a heightened requirement into the statutory language. Interestingly, and perhaps even ironically given the conservative justices’ penchant for textualism, although in both cases respondents couch their argument in textualist cloaks, their arguments need the Court to do more work than simply apply the plain language of the respective statutes at issue.

This case thus presents yet another opportunity for the Court to engage in statutory interpretation. This case will therefore give the legal community more insight into the Court’s commitment to textualism and the extent to which other canons of construction affect the textualist analysis.

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