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Client Alert: The Supreme Court Grants Certiorari in *Muldrow v. City of St. Louis*: How the Case Could Bolster Attacks Against Corporate DEI Initiatives

Publications

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On June 30, 2023, just one day after the Supreme Court issued its decision in the *Students for Fair Admissions* cases striking down race-conscious college admissions programs,[1] the Court agreed to hear a case next Term that could bolster legal challenges to corporate Diversity, Equity, and Inclusion (DEI) programs.[2] The case, *Muldrow v. City of St. Louis*, concerns Title VII, the statute that prohibits employment-discrimination on account of race, color, religion, sex (including sexual orientation and gender identity), and national origin. *Muldrow* gives the Court an opportunity to resolve a circuit split about the types of discriminatory employment practices that are actionable. This case has the potential to lower the standard for bringing a Title VII action, which would expose employers to a wider range of litigation implicating their DEI initiatives.

While *Muldrow* does not squarely address DEI efforts, the Supreme Court's forthcoming opinion could put those efforts at greater risk. If the Court were to interpret Title VII broadly, an employee excluded from a DEI program because of a characteristic Title VII covers, such as race or sex, could succeed in a reverse-discrimination suit even if exclusion from the program did not cause any significant harm. Broadening Title VII in this way could spill over into other areas of anti-discrimination law as well. Although the Court may well decline to take this approach, *Muldrow* is worth monitoring given these potential implications.

Background

Section 703(a)(1) of Title VII forbids employers from discriminating on the basis of race, sex, and other protected characteristics with respect to employees' "compensation, terms, conditions, or privileges of employment."[3] Lower courts have typically interpreted Section 703(a)(1) to require plaintiffs to demonstrate an "adverse employment action,"[4] but such terminology does not appear in the statute itself. The judge-made legal standard for how much harm a plaintiff must experience

to have suffered an "adverse employment action" cognizable under Title VII varies from circuit to circuit.[5]

In this case, Jatonya Muldrow—a sergeant with the St. Louis Police Department—challenged her involuntary transfer from one division to another, arguing that she was transferred solely on the basis of sex. Though her compensation and formal rank remained unaffected, Muldrow claimed that her transfer led to altered scheduling and responsibilities, thereby constituting discrimination in her "terms, conditions, or privileges of employment." The Eighth Circuit Court of Appeals disagreed, holding that "an employee's reassignment, absent proof of harm resulting from that reassignment, is insufficient to constitute an adverse employment action."[6]

But other circuits, like the DC and Sixth Circuits, have reached different conclusions in similar cases on the basis that the plain text of Title VII does not require any showing of harm beyond the discriminatory act itself.[7] *Muldrow* asks the Supreme Court to resolve this circuit split.[8] Notably, the Biden Administration has sided with the Petitioner in *Muldrow*, arguing that Title VII prohibits "discriminatory conduct with respect to an employee's terms, conditions, or privileges of employment" regardless of whether "a certain level of harm" results.[9]

Potential Implications for Corporate DEI

Muldrow's potential implications are complex. On one hand, broadening Section 703(a)(1) would likely enable traditionally underrepresented employees to more easily bring meritorious employment-discrimination claims. On the other, it could allow opponents of DEI to more easily bring "reverse-discrimination" claims against employers, without ever alleging that DEI initiatives have caused any employee to suffer a materially significant disadvantage. Expanding the scope of Section 703(a)(1) thus poses potential risks to employers who adopt DEI initiatives targeted toward certain protected classes.

Andrea R. Lucas, an Equal Employment Opportunity Commission (EEOC) Commissioner, has publicly identified a large roster of DEI initiatives that *Muldrow* could implicate—"from providing race-restricted access to mentoring, sponsorship, or training programs; to selecting interviewees partially due to diverse candidate slate policies; to tying executive or employee compensation to the company achieving certain demographic targets; to offering race-restricted diversity internship programs or accelerated interview processes, sometimes paired with euphemistic diversity 'scholarships' that effectively provide more compensation for 'diverse' summer interns."[10] While there are strong arguments that such a decision would not lead to this type of sea change, it would almost certainly prompt an influx of litigation and increased risk of liability.

Such risks may also reach other areas of anti-discrimination law. For example, Title VII doctrine informs the analysis of employment-discrimination claims under Section 1981, which prohibits racial discrimination in making and enforcing contracts (including between private entities).[11]

Muldrow's spillover effect in Section 1981 litigation could prove significant to employers. Section 1981 contains a longer statute of limitations than Title VII—and unlike Title VII, there is no administrative exhaustion requirement and no cap on damages under Section 1981.[12] In addition, the Court still may decide to hear *Davis v. Legal Services Alabama, Inc*. next Term—a case that explicitly questions the meaning of racial discrimination under both Title VII and Section 1981.[13]

Jenner & Block has a deep commitment to diversity, equity, and inclusion as well as extensive experience supporting our clients' DEI efforts through litigation, investigations, and strategic counseling. In light of this commitment and experience, the firm has launched a task force—composed of leading lawyers serving a wide variety of industries—to develop creative, strategic, and tailored solutions for clients across industries to accomplish their DEI goals while minimizing legal risk. We are currently working with clients, including institutions of higher education and corporations, on ways to maintain diversity in the evolving legal landscape. If you are interested in learning more about our work in this area, please contact Task Force Co-Chairs Ishan Bhabha (ibhabha@jenner.com), Lauren Hartz (lhartz@jenner.com), Marcus Childress (mchildress@jenner.com), Katie Wynbrandt (kwynbrandt@jenner.com), or Erica Turret (eturret@jenner.com).

Footnotes

[1] *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023) (consolidating the cases involving Harvard and UNC, respectively).

[2] *Muldrow v. City of St. Louis*, No. 22-193, 2023 WL 4278441 (US June 30, 2023) (partially granting cert.).

[3] 42 USC § 2000e-2(a)(1).

[4] *See Minor v. Centocor, Inc.*, 457 F.3d 632, 634 (7th Cir. 2006) ("Although hundreds if not thousands of decisions say that an 'adverse employment action' is essential to the plaintiff's prima facie case, that term does not appear in any employment-discrimination statute…. The statutory term is 'discrimination,' and a proxy such as 'adverse employment action' often may help to express the idea—which the Supreme Court has embraced—that it is essential to distinguish between material differences and the many day-to-day travails and disappointments that, although frustrating, are not so central to the employment relation that they amount to discriminatory terms or conditions.").

[5] *Compare Chambers v. District of Columbia*, 35 F.4th 870, 874 (DC Cir. 2022) (holding that the plain text of Title VII does not require any additional showings of harm beyond the discriminatory act itself), *with Thompson v. City of Waco*, 764 F.3d 500, 503 (5th Cir. 2014) (holding that transfers to less prestigious or interesting roles can be functionally equivalent to demotions and thus be "adverse employment actions" under Title VII), *with Place v. Abbott Lab'ys*, 215 F.3d 803, 810-11 (7th Cir. 2000) (holding that a transfer to a less interesting job with fewer supervisory duties was not an "adverse employment action" since the plaintiff held the same pay, benefits, and official title).

[6] *Muldrow v. City of St. Louis*, 30 F.4th 680, 688 (8th Cir. 2022), *cert. granted in part*, No. 22-193, 2023 WL 4278441 (US June 30, 2023).

[7] *See Chambers*, 35 F.4th at 874; *Threat v. City of Cleveland*, 6 F.4th 672, 679 (6th Cir. 2021).

[8] Specifically, the question presented is whether "Title VII prohibit[s] discrimination in transfer decisions absent a separate court determination that the transfer decision caused a significant disadvantage." 2023 WL 4278441.

[9] Brief for the United States as Amici Curiae at 9, *Muldrow v. City of St. Louis*, No. 22-193 (US May 18, 2023). But the government has acknowledged textual limits on the scope of what "terms, conditions, or privileges of employment" can be. Notably, Title VII only protects individuals from "*employment-related* discrimination," and "merely offensive conduct alone" does not violate the statute. *Id.* at 16 (internal quotation marks omitted).

[10] Andrea R. Lucas, *With Supreme Court Affirmative Action Ruling, It's Time for Companies to Take a Hard Look at Their Corporate Diversity Programs*, Reuters (June 29, 2013), https://www.reuters.com/legal/legalindustry/with-supreme-court-affirmative-action-ruling-its-time-companies-take-hard-look-2023-06-29. In addition, the US Equal Employment Opportunity Commission (EEOC) Compliance Manual already considers many employment activities that do not rise to the level of adverse employment actions, including mentoring and networking, as within the scope of Title VII. *See* EEOC Compliance Manual § 15-VII, 2006 WL 4673430 (examples 24 and 25).

[11] *See, e.g., Body by Cook, Inc. v. State Farm Mut. Auto. Ins.*, 869 F.3d 381, 386 (5th Cir. 2017); *Bratton v. Roadway Package Sys., Inc.*, 77 F.3d 168, 176 (7th Cir. 1996); *Rodemaker v. Shumphard*, 859 F. App'x 450, 451-52 (11th Cir. 2021); *Haynes v. D.C. Water & Sewer Auth.*, 924 F.3d 519, 529 (DC Cir. 2019). Section 1981's reach does not extend to the other protected classes covered under Title VII.

[12] However, Section 1981 requires that a plaintiff establish that race was a but-for cause of the asserted injury, a more demanding standard than Title VII's requirement that a plaintiff establish that race was a "motiving factor" of the employment decision. *See Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1017-19 (2020).

[13] Petition for Writ of Certiorari, *Davis v. Legal Services Alabama, Inc.*, No. 22-231 (US Sept. 8, 2022), 2022 WL 4236675.

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