Recent Supreme Court Decision Lowers Threshold for Employee Discrimination Claims – How to Mitigate Risk

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For years, employees haven't been able to challenge their employer's decision-making as discriminatory unless it caused a "serious," "significant," or "substantial" change in the "terms and conditions" of their employment. Not anymore, said the United States Supreme Court in its recent decision in *Muldrow v. City of St. Louis*. *Muldrow* involved a female police sergeant who, until 2017, worked in the St. Louis Police Department's prestigious "Intelligence Division" investigating public corruption and human trafficking. Among other perks of the job, Sgt. Muldrow was deputized by the FBI; had an unmarked take-home vehicle; could pursue investigations outside St. Louis; and worked a regular schedule. But after a new, male commander took over, Sgt. Muldrow was transferred out of the Division—over her objections—and replaced by a man. While Muldrow's reassignment didn't affect her rank or pay, it caused her to lose many of the perks that came with her position in the Intelligence Division—including her schedule, the types of investigations she could oversee, her FBI deputization, and her take-home vehicle.

Muldrow sued under Title VII of the federal Civil Rights Act, alleging she was transferred because she's a woman. But the Police Department argued that, even if that were true, its conduct wasn't actionable because it didn't "significantly" change the "terms or conditions" of her job (primarily because her rank and pay stayed the same). The district court and court of appeals agreed, granting and affirming summary judgment in the Department's favor.

The Supreme Court saw it differently, holding that Title VII does not require an aggrieved employee to show her employer's allegedly discriminatory decision affected the "terms and conditions" of her employment "***significantly***" (or other similar descriptors). The six-justice majority opinion (authored by Judge Kagan) acknowledged the employer's decision must amount to some "disadvantageous" change or cause "some harm" to the employee. But beyond this, Title VII does not demand a heightened showing or injury or materiality. Rather, the focus is on whether an employee was treated "worse" because of a protected characteristic—not ***how much*** worse.

By the majority's own admission, *Muldrow* overturns years of circuit precedent, including in the Tenth Circuit (which demanded a "significant change" before an employer decision was actionable). And while the precise scope and contours of the Court's lowered, "some harm" threshold will need to be developed through subsequent litigation in the lower courts, employers need to prepare for *Muldrow*'s impact now. Even without additional refinement, *Muldrow* likely lowers the burden employees must carry to mount a meritorious discrimination suit and threatens increased litigation exposure and costs in the coming months.

Here are some tips to mitigate risk and make sure you are not caught unprepared:

- **Review policies to drive internal reporting** by employees if they believe they are being treated unfairly ***because*** of a protected characteristic. If employees are raising their concerns internally, employers can investigate and address the concerns before the situation escalates.

- **Regularly train employees** to make their concerns known and to utilize internal reporting processes. If employees understand they can raise issues without fear of reprisal, employers will have the benefit of evaluating those concerns and ensuring there is adequate support for any action taken.

- **Ensure managers and supervisors are mindful** that their comments, remarks, jokes, and informal exchanges can (and will) be used against them.

- Educate and train supervisors and managers to **proactively engage in performance management** by:

    - clearly addressing performance issues;

    - communicating expectations to employees; *and*

    - documenting performance issues.

- **Engage legal counsel** early and often when making decisions with respect to an employee's terms and conditions of employment.

- **Utilize arbitration agreements with class action waivers**: GableGotwals' labor and employment practice group can audit any employer's current agreements or propose new ones.

Citation: *Muldrow v. City of St. Louis*, No. 22-93, 601 U.S. ---- (U.S. Apr. 17, 2024)

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