The Muldrow Divide: Differing Adverse Action Standards for Different Types of Discrimination Claims

Published: 06/17/24

Author Name: Diane Juffras (https://canons.sog.unc.edu/post-author/diane-juffras/)

In a previous blog post (https://canons.sog.unc.edu/2024/06/u-s-supreme-court-decision-expands-grounds-for-discrimination-claims-to-include-job-transfers-and-other-employment-actions/), I discussed how the U.S. Supreme Court's decision in *Muldrow v. City of St. Louis* opened the door for employees to bring employment discrimination claims over transfers and other seemingly minor employment actions under Title VII of the Civil Rights Act. By rejecting the heightened "significant disadvantage" test, the Court made it easier for workers to demonstrate they suffered discriminatory harm based on race, color, religion, sex or national origin. But *Muldrow* did more than just lower the bar for Title VII discrimination claims – it created a split, with different adverse action standards now applicable across different federal workplace laws. This divide means the same employment actions could violate Title VII's core anti-discrimination provisions but be permissible under Title VII's anti-retaliation rules and under the anti-discrimination provisions of statutes like the Americans with Disabilities Act and Age Discrimination in Employment Act.

Adverse Actions under Title VII's Anti-Retaliation Provisions

While *Muldrow* clarified the adverse action standard for Title VII discrimination claims, a different test applies to Title VII's anti-retaliation provisions. In addition to prohibiting discrimination based on race, color, sex, religion or national origin, Title VII also prohibits an adverse action against an employee opposing discrimination or bringing or helping another employee bring a discrimination charge. See here (https://www.law.cornell.edu/uscode/text/42/2000e-3). In its 2006 decision in *Burlington Northern & Santa Fe Railway Co. v. White* (https://www.law.cornell.edu/supct/pdf/05-259P.ZO), the Supreme Court adopted a different test to evaluate claims of discrimination under Title VII's anti-retaliation

provisions. In *Burlington Northern*, the Supreme Court held that for retaliation claims, an adverse action must be "materially adverse" – causing "significant harm" that would dissuade a reasonable worker from opposing discrimination.

In *Muldrow*, the Court made clear it was not overruling the more exacting "materially adverse" standard of *Burlington Northern* for retaliation cases. The Court explained having two different standards is appropriate because:

1. The anti-retaliation provision aims only to capture those employer actions serious enough to "dissuade a reasonable worker from making or supporting a charge of discrimination."
2. The anti-discrimination provision seeks to eliminate workplace discrimination on the basis of traits like race and sex.

See here (https://www.supremecourt.gov/opinions/23pdf/22-193_q86b.pdf) at pp. 10-11; internal citations omitted.

In essence, the Court said it is proper to have different adverse action standards because the anti-discrimination and anti-retaliation sections of Title VII serve distinct purposes – preventing injury based on who someone is (protected class status) versus what they do (opposing discrimination).

Adverse Actions under the Aged Discrimination in Employment Act and the Americans with Disabilities Act

The *Muldrow* decision currently applies only to Title VII claims of discrimination based on race, color, religion, sex or national origin. The decision does not apply to the standards for determining an adverse action under other federal anti-discrimination laws, like the Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA).

For age discrimination claims under the ADEA and disability claims under the ADA, federal courts have maintained a higher bar. An adverse action under the ADEA and ADA has generally been defined as one resulting in a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or in a decrease in salary or benefits. This is the standard applied by the Fourth Circuit in ADEA and ADA cases. *See, for example*, *Darnell v. Tyson Foods, Inc.* (https://law.justia.com/cases/federal/appellate-courts/ca4/13-1011/13-1011-2013-07-31.html) (holding that reassignment and shift change that did affect salary, benefits, job title, and promotion opportunities were not adverse actions in age discrimination case under the ADEA); *Laird v. Fairfax Cnty., Virginia* (https://scholar.google.com/scholar_case?

case=11313242021290788532&hl=en&as_sdt=6&as_vis=1&oi=scholarr) (lateral transfer as accommodation of disability not an adverse action without some significant detrimental effect).

The new *Muldrow* standard of "some harm" therefore creates a division in how employment actions are analyzed for the purposes of antidiscrimination law. The same type of employment action – a job transfer or reassignment to a different shift or working group — might be considered a violation of Title VII (provided it is based on protected class status), but not meet the significant harm standard required by the ADEA or the ADA, or the anti-retaliation provisions of Title VII itself.

Conclusion

Local government attorneys and human resources directors will need to be attuned to the different standards for showing that a harm has occurred that violates Title VII's anti-discrimination provisions, on the one hand, and the ADEA's and ADA's (and Title VII's anti-retaliation provisions), on the other. To the author's mind, the rationale for finding the "some harm" standard for a Title VII discrimination claim might apply equally well to an ADEA or ADA discrimination claim. But that is a decision for the Supreme Court to make.