High Court's Job Bias Questions May Predict Title VII Ruling

By **Wendy LaManque** (January 9, 2024)

Wendy LaManque

For those of us whose interests include listening to recordings of U.S. Supreme Court oral arguments, Muldrow v. St. Louis provides 97 minutes of excitement and intrigue.

For those who prefer other ways to spend an hour and a half, I've listened to the Dec. 6 Muldrow oral arguments so you don't have to. I've explored what these arguments could mean for the eventual ruling in this case, which will have far-reaching impacts on employees and employers across the country.

The discussion among the justices and lawyers focuses on the claim by St. Louis police sergeant Jatonya Clayborn Muldrow that her job transfer violated the discrimination rules in Title VII of the Civil Rights Act. This case has potential implications both for employment discrimination law and corporate diversity, equity and inclusion programs.

Analyzing the justices' questions may help us predict case outcomes.

Some legal scholars have hypothesized that many judges, including Supreme Court justices, make up their mind on cases prior to oral argument.[1]

If that is true, the function of oral argument is not for the parties to convince the justices of their legal theories, but for the justices to convince one another of their views through the use of tendentious questioning, which a 2010 article in The Journal of Legal Studies defines as "questioning that signals a judge's view of the merits of the case being argued."[2]

This would mean that there is great value in analyzing the questions asked at oral arguments to try to predict the outcome of each case, in order to prepare ourselves and our clients to adapt to impending shifts in the legal landscape.

While interpreting the questions asked by the court in oral argument is not an exact science, some justices sent fairly clear messages regarding their position on the merits in Muldrow that are worth examining.

In Muldrow, the majority of the justices signaled agreement with the petitioner.

Justice Samuel Alito made comments that suggest that he may ultimately favor requiring proof of harm from a Title VII plaintiff beyond a showing that an employment decision was discriminatory. Early on, he noted that many courts in discrimination cases have found that "there should be some sort of threshold before it gets into court."[3]

Unlike Justice Alito, it seems that the majority of the court may agree with the petitioner that a discriminatory transfer decision is exactly the kind of workplace discrimination Title VII was designed to prohibit, without any additional showing of harm required.

For example, Justice Neil Gorsuch suggested the respondent's proposed test would add "a whole different extra-textual layer that [would] weed out a bunch of [Title VII] claims based on a judge's sensibilities."[4]

Justice Sonia Sotomayor similarly characterized the respondent's argument as saying that the court would have to overlay the fact that there was a change in terms, conditions and privileges of employment "with some sort of objective test." She expressed dismay at the idea that the court would have to undertake an individualized inquiry "to find out whether [the employee] was somehow injured more than in her personal preference" in order to prove an adverse employment action under Title VII.[5]

A decision in favor of the petitioner will change the standard for bringing Title VII claims in multiple circuits.

Altogether, it seems likely that the court will issue a decision finding that discriminatory workplace transfer decisions are unlawful under Title VII, and plaintiffs will not need to link their claims to other work-related harm, like loss of pay.

This will resolve a circuit split in two ways. First, it will uphold the standard currently followed by the U.S. Court of Appeals for the D.C. Circuit.

Second, it will effectively lower the threshold for future plaintiffs bringing Title VII cases in the U.S. Court of Appeals for the Eighth Circuit and other circuits that currently require showing that a discriminatory workplace transfer decision caused a "materially significant disadvantage" to a plaintiff before their claim can be actionable under the law.

A decision in favor of the petitioner may affect workplace DEI programs.

While the court limited the question presented in this case to the context of workplace transfers, a decision in favor of the petitioner may provide leverage to potential plaintiffs seeking to challenge workplace programs that focus on DEI.

Justice Amy Coney Barrett sent a signal early in oral arguments that this case could have broader implications for affirmative action or DEI efforts. This is perhaps unsurprising in the wake of the Supreme Court's 2023 decision in the Students for Fair Admissions v. Harvard case, which effectively struck down the use of affirmative action in college admissions; afterward, it seemed only a matter of time before this same issue was considered in the context of the workplace.

In the Muldrow arguments, Justice Barrett asked, "if [an] employer wants to increase diversity in the workplace and so promotes, say, some black employees and they get better jobs, then that's discrimination?"[6] This was in response to a line of questioning regarding the possibility of an employment decision based on sex or race having a positive impact on a particular group in the workplace, and how that might affect others not given the same advantage.

Similarly, Justice Clarence Thomas suggested that a finding that transferring an employee on the basis of race constitutes discrimination would run "headlong into the focus on diversifying the workforce in certain situations."[7]

Based on these exchanges, we can expect the possibility of a decision that opens workplace DEI efforts to future legal challenges.

The Muldrow decision may affect other federal statutes.

Title VII of the Civil Rights Act is not the only statute that prohibits discrimination by an

employer in an employee's "terms, conditions, or privileges of employment." The Age Discrimination in Employment Act,[8] the Americans with Disabilities Act[9] and other federal regulations rely on the same language and will likely be affected by the court's interpretation of that language in the Muldrow case.

While the court narrowed the question presented in Muldrow to only the issue of workplace transfers, it seems likely, based on the questions asked by the justices in oral argument, that this decision will have far-reaching effects. Employees, employers and their lawyers should all pay attention to this case.

Conclusion

While the standard for bringing a Title VII case in different judicial circuits across the country will remain the same until the Supreme Court hands down its Muldrow ruling, the signals sent by the justices' questions and statements during oral arguments can help us prepare for likely changes to workplace discrimination laws.

In-house lawyers, human resources staff and DEI professionals should ensure their policies and practices are compliant with Title VII and examine their DEI-related programs for potential legal risk in a post-Muldrow world.

Wendy LaManque is counsel at Pryor Cashman LLP.

[1] Lee Epstein, William M. Landes and Richard A. Posner, "Inferring the Winning Party in the Supreme Court from the Pattern of Questioning at Oral Argument," p. 436, The Journal of Legal Studies, Vol. 39, No. 2, June 2010.

[2] Id. at 437.

[3] Transcript of Muldrow v. City of St. Louis oral arguments at p. 20 (https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/22-193_8nk0.pdf).

[4] Tr. at p. 96.

[5] Id. at 104.

[6] Id. at 17.

[7] Id. at 44-45.

[8] 29 U.S.C. § 633(a).

[9] 42 U.S.C.A. § 12112.