

A Focus on Unlawful Discrimination of Transfers and Promotions

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Today's Presenters



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The Story so Far. . .

- ❑ Title VII made it unlawful for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual’s race, color, religion, sex, or national origin.”
 - 42 U.S.C. §2000e-2(a)(1)
- ❑ Almost from the beginning, judges worried about their courts being swamped with actions alleging discrimination in employment.

Fears that were not Unfounded

Since 2003, civil rights cases have represented a declining proportion of federal civil caseloads

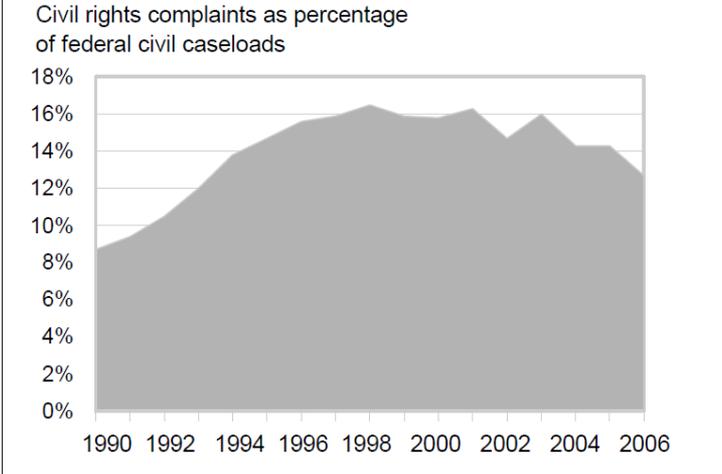


Figure 2

Civil rights cases involving employment discrimination demonstrated the same trend as civil rights cases overall, 1990-2006

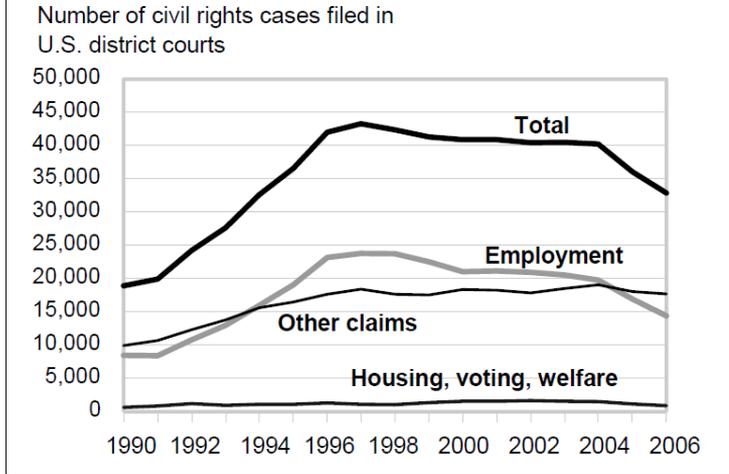


Figure 3

Source: Bureau of Justice Statistics, Special Report, Civil Rights Complaints in U.S. District Courts, 1990-2006 <https://bjs.ojp.gov/library/publications/civil-rights-complaints-us-district-courts-1990-2006> (August 2008)

The Courts are not “Super Personnel Departments”

- ❑ Courts will not act as “super personnel departments” substituting their judgment for that of management.
 - *E.g. Meuser v. Fed. Express Corp.*, 564 F.3d 507, 519 (1st Cir. 2009); *Smith v. Leggett Wire Co.*, 220 F.3d 752, 763 (6th Cir. 2000); *Krenik v. County of Le Sueur*, 47 F.3d 953, 960 (8th Cir. 1995; *Elrod v. Sears, Roebuck Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991)
- ❑ As part of the effort to keep the courts from usurping management's discretion (and to control their dockets), judges have looked at every part of the Title VII prohibition:
 - What does it mean to fail or refuse to hire
 - What constitutes “discharge”
 - What does it mean to “otherwise” discriminate
 - What is encompassed within the phrase “compensation, terms, conditions, or privileges of employment”
 - When is an action taken “because of” an individual's race, color, religion, sex, or national origin”

Employee Challenges to Transfer Decisions

- ❑ Some courts have held that an employee challenging a transfer under Title VII must meet a heightened threshold of harm
- ❑ *Muldrow v. City of St. Louis, Missouri*, 601 U.S. ____ (2024) holds:
 - to make out a Title VII discrimination claim, a transferee must show some harm respecting an identifiable term or condition of employment.
 - What the transferee does not have to show is that the harm incurred was significant. Or serious, or substantial, or any similar adjective suggesting that the disadvantage to the employee must exceed a heightened bar.

Can Discrimination Alone be the Harm?

- ❑ In a concurring opinion, Justice Kavanaugh writes that Title VII does not require any separate showing of harm: “The discrimination is harm.”
- ❑ During the oral argument, Justice Barrett asked Muldrow’s counsel: “are you saying then, if the employer wants to increase diversity in the workplace and so promotes, say, some black employees and they get better jobs, then that’s discrimination?”
 - Transcript at 17
- ❑ What does this decision mean for
 - Government contractors’ affirmative action programs?
 - Voluntary diversity efforts?

What “Promotions” Allow Title VII Challenge?

□ The **Muldrow** decision affects all Title VII challenges to the “terms and conditions” of employment (“**Ts&Cs**”):

- transfers...promotions...demotions...assignments...training, etc.

What Title VII cares about are “changes” to the Ts&Cs...almost any change (Majority opinion), AND perhaps ALL changes (if Justice Kavanaugh is correct)

Human Resources departments ascribe names to various employment transactions, local to each company, the company tracks (i.e., “promotions”)

Title VII/Executive Order 11246 do not care about names...just “changes” to the Ts&Cs

OFCCP, however, also cares about names: i.e., it demands “promotions” data

What “Promotions” Allow Challenge? (con’t)

OFCCP’s Federal Contract Compliance Manual (Jan, 16, 2020) defines a promotion this way:

“Any personnel action resulting in, for example, the movement to a position affording higher pay, greater rank, change in job title, or increase in job grade, an increase in pay, requiring greater skill or responsibility, or the opportunity to attain such. A promotion may be either competitive or noncompetitive.”

USDOL Office of Administrative Law Judges has issued two case decisions (in other USDOL programs, not OFCCP) finding no promotion:

- ***Robinson v. Morgan Stanley***, et al, Case No. 2005-SOX-44 at p. 57 (March 26, 2007) [Change of job grade (from 70 to 72) was not a promotion since it did not increase pay]
- ***ligenfritz v. U.S. Coast Guard Academy***, Case No. 1999-WPC-3 at p.28 (March 30, 1999) [Assignment of new duties were not a promotion, but rather a “collateral duty” to original job functions]

What “Promotions” Allow Challenge? (con’t)

Muldrow *sub silentio* (meaning silently) over-ruled the dozens of Title VII promotion decisions which, like earlier federal court “transfer” case decisions, have created a “heightened” standard to exclude some changes of employee pay/responsibility, etc., from Title VII challenge

Those earlier decisions did so by saying the change at issue had to affect an **“ultimate employment decision”** meaning the change was “centrally related to a persons’ status affecting pay, types of responsibility and/or management level.” It was NOT A PROMOTION, for example, if:

- pay stayed the same, or was going down
- involved slight changes to job duties to clarify them
- was a “temporary” assignment
- it involved only a new title, no added pay or responsibilities, etc.

THESE CASE DECISIONS MAY NO LONGER BE VALID FOLLOWING MULDROW

What “Promotions” Allow Challenge? (con’t)

SO, ERASE WHAT YOU THOUGHT YOU KNEW ABOUT DEFINITIONS OF PROMOTIONS. START OVER.

What should a contractor do to prepare Disparity Analyses for “promotions” or to respond in audit to OFCCP demands for “promotions” data?

NOTE: Your two great defenses to a statistical promotions claim will be:

- 1) employees OFCCP has mushed together into a promotions group are **not “similarly situated”** (where that is true), and
- 2) there was **no adverse action** (i.e., there was either no harm above a “trifle,” or no harm whatsoever based on a Protected Status: TBD) where that is true. NOTE: A change to Ts&Cs without adverse action (i.e., harm) may still be a “Promotion” with no unlawful consequence

FIRST, Identify all “**changes**” in employee “terms and conditions of employment” including all changes in pay AND/OR Job Title AND/OR job responsibilities, etc., when looking for “promotions” eligible to be challenged under Title VII/EO 11246

What “Promotions” Allow Challenge? (con’t)

SECOND, EXCLUDE all EEs who are “**Not Applicants**” for Promotion (not interested); **not minimally qualified** for promotion (skill acquisition lacking; time-in-service not met, etc.); **not considered** for promotion (maybe a “freeze” on promotions) and/or **company did not continue to promote** employees like claimant from any Protected Group (maybe changed the promotion rules)

THIRD, EXCLUDE all changes to the Ts&Cs not involving “adverse action” (no harm)

NOTE: Why did I say “Ts&Cs” in the prior sentence and NOT “promotions”?

- I do not know what a promotion is pending new case decisions
 - when is a transfer not a promotion?

Practical: I will identify “promotions” (most of the time) by identifying which EEs subject to changes to their Ts&Cs are “similarly situated” (see below)

What “Promotions” Allow Challenge? (con’t)

FOURTH, EXCLUDE from your statistical pool all changes to Ts&Cs as to employees where there was less than “some harm”

- i.e., all changes to employee's status that are less than “a trifle” (Justice Thomas' concurring decision in **Muldrow** seeking to define “some harm”)

Cautious approach: Include in your statistical pool a change causing any “harm” no matter how “trifling” (Kavanaugh)

What “Promotions” Allow Challenge? (con’t)

FIFTH, EXCLUDE all employees who are not “**similarly situated**”

To conduct class-based statistical analyses (as OFCCP loves to attempt) employees are not “similarly situated” for promotion purposes if one EE received a perk, for example, while a second EE received pay (unless the first employee received the perk in lieu of pay).

- thus, you would not combine into a single group those employees who were denied perks with those who were denied pay
- all those who did not receive the perk could be similarly situated if all other similarly situated requirements are met
- all those who did not receive the pay could be similarly situated if all other similarly situated requirements are met

In other words, compare “like employees” facing similar limitations

What “Promotions” Allow Challenge? (con’t)

BTW: **Muldrow** repeats (as all other federal court decisions do) that Title VII discrimination analyses--whether individual in nature or whether statistically-based claims--analyze employer **decisions**, including “pay decisions” (not pay amount...other than the Equal Pay Act: special wording in that statute):

“Each kind of a prohibited discrimination occurs by way of an employment **action** (*emphases added*)-whether pertaining to hiring, or firing, or compensating, or (as here) altering terms or conditions through a transfer.” **Muldrow** Slip Op. at p.8 (Section B of Justice Kagan’s Majority Opinion)

Non-Competitive changes to an employee’s Ts&Cs may be a Promotion but may not offend Title VII because no “adverse action”: i.e., no harm

- Non-Competitive “promotions” (i.e., more pay after growing a year older) may be problematic if the pay increase is not dependent on a neutral design like time-in-service, but rather driven by discretion: i.e., Manager awards more pay to White but not African American EEs

Thank You!!!

