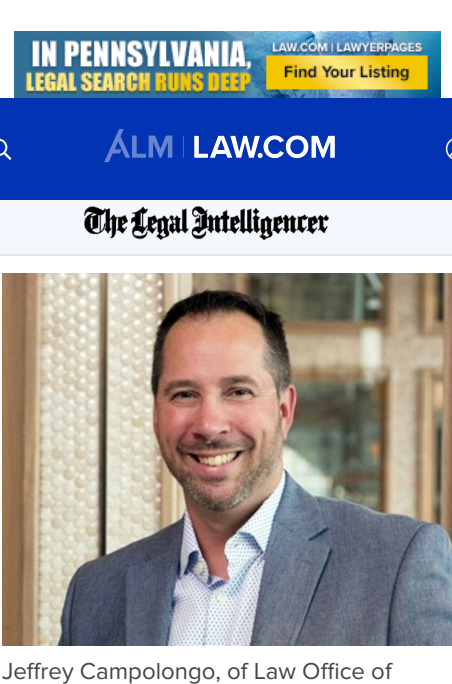

Jeffrey Campolongo, of Law Office of Jeffrey Campolongo.

COMMENTARY

Circuit Split Sets Stage for High Court to Mull Adverse Employment Action Under Title VII

Three cases making their way through the federal courts of appeals are garnering attention because of the breadth and impact on who can bring a claim under Title VII of the Civil Rights Act of 1964 (Title VII).

January 19, 2023 at 11:25 AM

9 minute read

Employment Law

By Jeffrey Campolongo | January 19, 2023 at 11:25 AM

Three cases making their way through the federal courts of appeals are garnering attention because of the breadth and impact on who can bring a claim under Title VII of the Civil Rights Act of 1964 (Title VII). The U.S. Supreme Court recently asked the federal government to submit briefs on whether a paid suspension or a forced transfer can form the basis of a claim under Title VII.

U.S. Solicitor General, Elizabeth Barchas Prelogar, has been invited to file briefs in separate cases involving an ex-congressman who claims he was forced out as head of a legal aid agency because of his race, and a St. Louis police officer who alleges she was transferred to an undesirable position due of her sex. In both cases, appellate courts ruled that the employees' claims did not amount to an "adverse employment action" under Title VII. The cases are *Muldrow v. St. Louis, Missouri* and *Davis v. Legal Services of Alabama*, U.S. Supreme Court, Nos. 22-193 and 22-231.

For many years, courts employed a rigid standard to determine if an employment discrimination claim was actionable by demanding there be a "tangible change in working conditions that produces a material employment disadvantage." This standard was largely employed by courts to bar claims that did not result in tangible economic harm, such as lateral transfers and paid suspensions.

The exacting standard has been oft criticized by employee rights advocates on the belief that people are injured by discriminatory treatment that does not necessarily have an economic dimension. That is precisely why Congress amended Title VII in 1991 to add compensatory and punitive damages to the available remedies under the statute. Moreover, employee advocates contend, the development of harassment jurisprudence over the past four decades is rooted in the premise that Title VII reaches far beyond "economic or tangible discrimination" and extends to the "entire spectrum of disparate treatment."

Forced Transfer Not Actionable Under Title VII in Eighth Circuit

Jatonya Clayborn Muldrow, a sergeant in the St. Louis police department, claimed that her transfer from a specialized intelligence unit to an administrative role constituted an adverse employment action because the administrative work was less prestigious than that of the intelligence division, meaning that it was more akin to "the basic entry level work of being a police officer or sergeant." Muldrow claimed she was transferred out of the intelligence unit by a new supervisor to make way for a male officer. With the transfer, although Muldrow's pay remained the same, her schedule, responsibilities, supervisor, workplace environment, and other job requirements and benefits changed in a significant way. Dissatisfied with her forced transfer, Muldrow sought transfer to a new position, which the department denied. See *Muldrow v. City of St. Louis*, 30 F.4th 680 (8th Cir. 2022).

The U.S. Court of Appeals for the Eighth Circuit affirmed the district court that dismissed Muldrow's claims, holding that the department's forced transfer and refusal to transfer were not "adverse employment actions" and, therefore, are not actionable under Title VII. In the Eighth Circuit's view, Muldrow's forced transfer did not cause a "materially significant disadvantage." Similarly, Muldrow's failure-to-transfer claim failed because she did "not demonstrate how the sought-after transfer would have resulted in a material, beneficial change to her employment." Muldrow has filed a petition for certiorari before the U.S. Supreme Court.

Paid Suspension Not Adverse Employment Action Under Title VII in Eleventh Circuit

In a separate case, former U.S. Rep. Artur Davis claimed he was forced out from his position as executive director with Legal Services Alabama (LSA) in 2017 because he is Black. Davis claimed that race-related issues began almost immediately after he began work. Some staff members complained that Davis did not hire enough senior-level Black staff and favored white employees over Black employees in internal disputes. Davis was suspended with pay pending an investigation into complaints about his treatment of employees and whether his leadership created a hostile work environment.

Following the suspension, Davis learned that LSA had taken other steps related to his suspension, including posting armed security guards in front of its building to prevent Davis from physically entering the office, implying to staff he might pose a threat. The suspension also prevented Davis from attending a reception that LSA held days later for the president of the organization's primary funder. Shortly thereafter, Davis resigned. Throughout this ordeal, Davis claimed his treatment diverged starkly from the way LSA had acted months earlier when it received hostile-work-environment complaints against one of LSA's white executives. See *Davis v. Legal Services Alabama*, 19 F.4th 1261 (11th Cir. 2021).

The district court granted summary judgment to the employer on Davis' race-discrimination claims, holding that his suspension did not rise to the level of an "adverse employment action" because the circumstances were not "materially adverse" to Davis. The Eleventh Circuit affirmed on grounds that Davis had not been fired, denied a promotion, reassigned to significantly different responsibilities, or suffered any significant change in benefits.

The court concluded that Title VII and Section 1981 do not prohibit a discriminatory "simple paid suspension." The statutes prohibit only discriminatory "adverse employment actions" that "affect continued employment or pay" or are "similarly significant standing alone," the court wrote. Joining at least eight other federal appeals courts, the circuit court panel said a paid suspension is not an "adverse employment action" under Title VII because it does not affect a worker's continued employment or pay.

Lateral Transfer Deemed Actionable Under Title VII in D.C. Circuit

The U.S. Court of Appeals for the D.C. Circuit reached an opposite result in *Chambers v. District of Columbia*, 35 F.4th 870, 874 (D.C. Cir., 2022). There, the court, which is largely believed to be the second most prestigious court behind only the U.S. Supreme Court, issued a stunning decision, reversing its own circuit precedent, holding that Title VII does not require employees to demonstrate an "objectively tangible harm."

Mary Chambers worked as a support enforcement specialist within the District of Columbia's Office of the Attorney General (OAG), child support division for 20 years. Although initially assigned to the interstate unit, Chambers later sought transfers to the intake unit, also within OAG's child support division. Over the years, the OAG denied Chambers's multiple requests for a lateral transfer to a different unit within OAG. Chambers alleged that under Title VII, those lateral transfer denials constituted unlawful sex discrimination and unlawful retaliation for filing discrimination charges with the Equal Employment Opportunity Commission (EEOC).

The district court, relying on circuit precedent, granted summary judgment because Chambers failed to show materially adverse consequences arising from the denials of her purely lateral transfer requests. Initially, a panel of the D.C. Circuit affirmed that dismissal on the same grounds. Sitting en banc, however, the full court reversed precedent and ruled that denial of a job transfer request based on protected status is actionable under Title VII without proving any additional harm, such as a change in pay or benefits.

The court explained: "Refusing an employee's request for a transfer while granting a similar request to a similarly situated employee is to treat the one employee worse than the other. Like "refusing to hire" or "discharging" an employee, refusing a request for a transfer deprives the employee of a job opportunity. An employer that does this because of the employee's "race, color, religion, sex or national origin" has surely discriminated against the first employee because of a protected characteristic. The court compared the denial of a lateral transfer request as the "functional equivalent" of a refusal to hire.

In a forceful rebuke of the dissent, the majority of the court rejected the notion that its holding would now make a federal case out of "a salesperson transferred from sporting goods to power tools." Refusing to let women work in the power tools department because of gender stereotypes, the court wrote, is part of the "minutiae of personnel management" that escapes Title VII's prohibitions.

Split Among Circuits

In the petition for certiorari on behalf of Muldrow and Davis, the case was made that circuit courts have departed markedly from Title VII's text and are split over which discriminatory employment practices are forbidden. Title VII makes it unlawful for an employer to discriminate against an employee "with respect to his compensation, terms, conditions, or privileges of employment" because of various characteristics, including the employee's sex. See 42 U.S.C. Section 2000e- 2(a)(1). Terms, conditions, or privileges are everyday English words with straightforward meanings, the petitioners wrote in their brief seeking review at the high court.

The D.C. and Sixth Circuits have applied the statutory text as written, however, in the Fifth and Third Circuits, various discriminatory practices, such as discriminatory shift assignments, lateral transfers, and other actions do not constitute "ultimate employment decisions" under Title VII. The First, Second, Fourth, Seventh, Eighth, Tenth and Eleventh Circuits—toggle between many varying adverse-employment-action tests, none of which is tethered to the text of Title VII.

Here, in the Third Circuit, the rule appears somewhat tethered to the text, but it yields the same results as the Fifth Circuit's ultimate-employment-decision standard. Supposedly "minor actions" like "lateral transfers" that involve changes to "title, office, reporting relationship and responsibilities" are "generally insufficient" to alter terms, conditions or privileges of employment in the Third Circuit. Until the split is resolved by the Supreme Court, employers would be wise not to make employment decisions that take into consideration a person's race or sex or other protected characteristics.

Jeffrey Campolongo *is the founder of the Law Office of Jeffrey Campolongo, which, for over a decade, has been devoted to counseling employees, working professionals and small businesses in employment discrimination and human resource matters.*