DISCRIMINATORY EMPLOYMENT TRANSFERS: THE NEW CIRCUIT SPLIT

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Does Title VII of the 1964 Civil Rights Act forbid employers from laterally transferring employees based on race, sex, religion, or other protected category, including when the transfer results in no "material" harm to the employee?

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice . . . 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."[1] Courts have interpreted this provision to apply to employment transfers based on an employee's protected status. Until recently, federal courts of appeals generally held that claims under this antidiscrimination provision were only actionable if the discriminatory transfer resulted in adverse employment conditions. In other words, it was not sufficient for plaintiffs to prove that their job transfers resulted from discrimination—plaintiffs also had to prove that they were transferred to inferior positions. The D.C. Circuit issued an en banc ruing this June breaking that trend and overruling an earlier D.C. Circuit precedent.[2]

In this recent ruling, Chambers v. District of Columbia, the D.C. Circuit held that an employer that transfers an employee or denies the employee's transfer request because of the employee's protected status violates Title VII, including when the transfer or denial of transfer results in no adverse employment consequences for the employee.[3] This is because, in doing so, the employer discriminates against the employee with respect to "terms, conditions, or privileges of employment[.]"[4] As the court noted, the plain text of Title VII section 703(a)(1) contains no "material" harm requirement. It only requires discrimination.[5]

This decision explicitly overruled existing D.C. Circuit precedent and placed the D.C. Circuit at odds with other circuits. The overruled case, Brown v. Brody, had held that denial or forced acceptance of a job transfer was actionable only if it caused the employee "objectively tangible harm."[6] Other circuits currently retain similar holdings, but with some differing interpretations of how much harm is required for a claim to be actionable. The Fifth Circuit considers a job transfer to be actionable if the transfer is to a position that is "less prestigious or less interesting."[7] The Eleventh Circuit considers it relevant "whether the new job was less prestigious[.]"[8] The Seventh Circuit has seemingly set the bar for adverse employment actions higher, holding that transferring an employee "from an interesting job she liked that involved overseeing several other people to a boring job she didn't like and that lacked any supervisory duties" was not sufficient.[9] The Sixth Circuit has held that transfers are actionable only if they cause harms that are more than "de minimis."[10] The First Circuit has indicated that transfers may qualify as adverse, but that not all of

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1 42 U.S.C. § 2000e-2(a)(1).
2 Chambers v. District of Columbia, 35 F.4th 870 (C.A.D.C., 2022).
3 Id.
4 42 U.S.C. § 2000e-2(a)(1).
5 Id.
6 Brown v. Brody, 199 F.3d 446, 457 (C.A.D.C., 1999).
7 Thompson v. City of Waco, 764 F.3d 500, 503 (5th Cir. 2014) (internal quotation marks omitted).
8 Hinson v. Clinch County, 231 F.3d 821, 830 (11th Cir. 2000).
9 Place v. Abbott Laboratories, 215 F.3d 803, 810 (7th Cir. 2000).
10 Threat v. City of Cleveland, 6 F.4th 672, 679 (6th Cir. 2021).

them will.[11] The Chambers dissent lists many cases from other circuits demonstrating the general consensus among the other circuits that some form of harm is required to have an actionable discrimination claim under Title VII.[12]

While the justifications on both sides of the interpretive question are numerous, a core disagreement can be isolated. The Chambers majority argued that both the plain text and the intent of Title VII point toward outlawing discriminatory treatment, irrespective of how much harm it causes. The Chambers dissent, echoing other circuits, argued that this opens the proverbial "floodgates" and allows litigation and costly settlements over what amounts to no more than trifling harm in some cases.[13]

The subject of this new circuit split is a highly relevant issue that may have consequences for employers and employees across the country. The D.C. Circuit's ruling in Chambers now stands as the primary authority in contrast to the prevailing view among other circuits.[14] Two petitions for writs of certiorari addressing this question, citing Chambers, have been filed to date.[15]

Although Chambers focused on a government employer, many of the other circuits in the split have focused on private employers, and there appears to be no difference in the way they are treated. Indeed, the Chambers dissent appears to presume that Chambers applies to private employers.[16] As such, the outcome of this circuit split would be relevant to both government and private employers alike.

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[11] Caraballo-Caraballo v. Corr. Admin., 892 F.3d 53, 61 (1st Cir. 2018).

[12] See Chambers, 35 F.4th 870, 895 (C.A.D.C., 2022) (Katsas, J., dissenting) (citing Williams v. R.H. Donnelley, Corp., 368 F.3d 123, 128 (2d Cir. 2004); Oguejiofo v. Bank of Tokyo Mitsubishi UFJ Ltd, 704 F. Appx 164, 168 (3d Cir. 2017); James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 376 (4th Cir. 2004); Pegram v. Honeywell, Inc., 361 F.3d 272, 283 (5th Cir. 2004); Deleon v. Kalamazoo Cnty. Rd. Comm'n, 739 F.3d 914, 918 (6th Cir. 2014); O'Neal v. City of Chicago, 392 F.3d 909, 913 (7th Cir. 2004); Ledergerber v. Stangler, 122 F.3d 1142, 1144 (8th Cir. 1997); Chuang v. Univ. of Cal. Davis, Bd. of Trs., 225 F.3d 1115, 1126 (9th Cir. 2000); Sanchez v. Denver Pub. Schs., 164 F.3d 527, 532 n.6 (10th Cir. 1998); Kidd v. Mando Am. Corp., 731 F.3d 1196, 1204 n.11 (11th Cir. 2013)).

[13] See Chambers, 35 F.4th 870 (C.A.D.C., 2022).

[14] Id. at 895.

[15] See Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, Jatonya Clayborn MULDROW, Petitioner, v. CITY OF ST. LOUIS, STATE OF MISSOURI ET AL., Respondents., 2022 WL 3999807; Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, Artur DAVIS, Petitioner, v. LEGAL SERVICES ALABAMA et al., Respondents., 2022 WL 4236675.

[16] See Chambers, 35 F.4th 870, 901 (C.A.D.C., 2022) (Katsas, J., dissenting) ("[A] transfer from selling sporting goods to selling power tools at the same department store would qualify…but what about a transfer from selling sports equipment to sportswear? Or from selling hunting rifles to pistols? Or snow skis to snowboards? Must the positions in question be formally different, or is it enough that the employer simply imposes a change of duties within the employee's current job description?").