

WorkSmarts Virtual Seminar

## **The Aftermath of *Muldrow v. City of St. Louis***

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# Disclaimer

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# The Problem

- Title VII prohibits an employer from discriminating against employees with respect to:
  - their compensation,
  - terms,
  - conditions or
  - privileges of employment
- Because of an individual's race, color, religion, sex or national origin or any other protected category.

# The Problem

- Job transfers cannot be based on protected category and historically, could not cause significant harm to employee.
- Generally, transferring employee to new role with the same title, pay, and benefits did not cause significant harm.





# Split Among Circuit Courts

# Circuits Requiring Significant Harm

- **First Circuit:** *Caraballo-Caraballo v. Correctional Admin.*, 892 F.3d 53 (1st Cir. 2018) (“materially changes” employment conditions in a manner “more disruptive than a mere inconvenience or an alteration of job responsibilities”);
- **Second Circuit:** *Williams v. R.H. Donnelley, Corp.*, 368 F.3d 123 (2d Cir. 2004) (“materially significant disadvantage”);
- **Fourth Circuit:** *James v. Booz-Allen & Hamilton, Inc.*, 368 F. 3d 371 (4th Cir. 2004) (“significant detrimental effect”);
- **Seventh Circuit:** *O’Neal v. Chicago*, 392 F. 3d 909 (7th Cir. 2004) (“materially adverse”);
- **Tenth Circuit:** *Sanchez v. Denver Public Schools*, 164 F. 3d 527 (10th Cir. 1998) (“significant change”); and
- **Eleventh Circuit:** *Webb-Edwards v. Orange Cty. Sheriff’s Office*, 525 F. 3d 1013 (11th Cir. 2008) (“serious and material change”).

# Circuits Abandoning Ultimate-Employment Decision Requirement

- **Fifth Circuit:** *Hamilton v. Dallas County*, 79 F.4th 494, 497 (5th Cir. 2023) (holding that a plaintiff need not show an “ultimate employment decision” to establish an adverse employment action).
- **Sixth Circuit:** *Threat v. City of Cleveland*, 6 F.4th 672 (6th Cir. 2021) (finding that shift changes and scheduling decisions based on a protected characteristic are actionable; essentially, abandoning the ultimate-employment decision requirement).
- **DC Circuit:** *Chambers v. District of Columbia*, 35 F. 4th 870, 872 (D.C. Cir. 2022) (en banc) (overruling precedent that demanded an “objectively tangible harm” and rejecting a “material adversity” requirement).



# Foreshadowing of Muldrow



# Groff v. DeJoy, 600 U.S. 447 (2023)

- Groff is a Christian and U.S. Postal Service worker who refused to work on Sundays due to his religious beliefs. USPS offered to find employees to swap shifts with him, but on numerous occasions, no co-worker would swap, and Groff did not work. USPS subsequently fired him.
- Groff sued USPS under Title VII of the Civil Rights Act of 1964, claiming USPS failed to reasonably accommodate his religion because the shift swaps did not fully eliminate the conflict.
- The district court concluded the requested accommodation would pose an undue hardship on USPS and granted summary judgment for USPS. The U.S. Court of Appeals for the Third Circuit affirmed.

# Before Groff: *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977)

- In *Hardison*, the Supreme Court held:
  - Title VII does not require employers to violate a collectively bargained seniority system and doing so would be an undue hardship.
  - Granting accommodation of not working on Saturday Sabbath would have distributed the benefit of preferred shifts on the basis of religion and would have come “at the expense of others who had strong, but perhaps nonreligious, reasons for not working on weekends.”
  - Requiring the employer in the case to “bear more than a de minimis cost” in making a religious accommodation would create an undue hardship.
- The Circuit courts interpreting *Hardison* took the decision to mean that any cost or hardship “more than de minimis” justifies denying a religious accommodation.

# US Supreme Court Ruling- Taking a Textualist Approach

- Supreme Court applied a textualist approach, explaining that Title VII’s text warrants a standard higher than *de minimis* for undue hardship.
- The Court stated the plain meaning of the words “undue” and “hardship” in Title VII’s text mitigates using *de minimis* as the standard because “in common parlance,” a “hardship” is “something hard to bear,” and, under any definition, the use of the word “hardship” indicates something greater than a “mere burden.”
- Court concluded that *even if* Title VII merely stated “hardship,” “an employer could not escape liability simply by showing that an accommodation would impose some sort of additional costs.”
- Further, adding the modifier of “undue” means that this requisite burden must rise to an “‘excessive’ or ‘unjustifiable’ level.” These words – in substance – are markedly different than “*de minimis*,” which merely requires, per Black’s Law Dictionary, a “very small or trifling” hardship.



# *Muldrow v. City of St. Louis*

# Who is Muldrow?

- Female sergeant with the City of St. Louis, Missouri.
- Worked in a specialized division as a plains-clothes officer.
- Involuntarily transferred to a uniformed job and was replaced by a male officer.
- Rank and pay remained the same, her responsibilities, perks and schedule did not remain the same.
- What about the new role?



# What Happened?

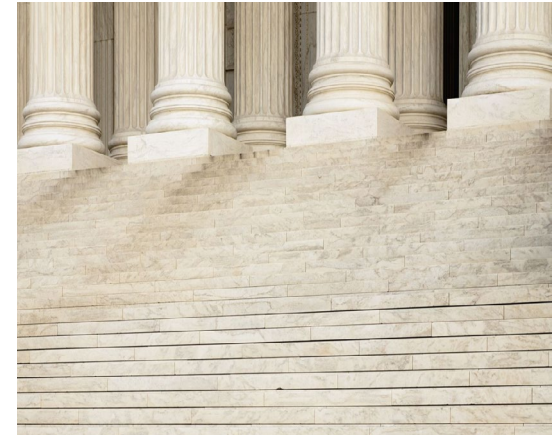
- Muldrow sued City of St. Louis for gender discrimination because it transferred her to another job and discriminated against her because she's a woman.
- Muldrow argued the new role was less prestigious and affected her work schedule, overtime pay structure, and work attire.
  - Her former role was also filled by a male employee.

# What Happened?

- The City argued that:
  - It did not violate Title VII.
  - Muldrow's new role was similar to her prior role.
  - Her new role provided the same pay and benefits.

# What did the lower courts decide?

- District Court granted employer's MSJ.
- Muldrow appealed, 8th Circuit Court of Appeals affirmed.
  - Muldrow had to also establish that her reassignment imposed a “material employment disadvantage.”
- Muldrow appealed again to the Supreme Court.





## *Before Muldrow...*

- Previous standard required employee to show “substantial,” “material,” or “significant harm.”
- Employee who challenged some employment action must show the employee experienced an adverse employment action and that the action was taken on the basis of their protected class.
- If action taken by employer did not involve hiring, firing, or compensation, generally courts have held that the challenged action was not an adverse employment action.

# Supreme Court Takes Textualist Approach Again

- Majority opinion focused on the language of Title VII finding:
  - Plaintiffs do not need to show that a job transfer constituted some material or significant change in the terms or conditions of their employment because the **language** of Title VII contains no such requirement.
  - Instead, Title VII requires a plaintiff merely to show some injury with respect to employment terms or conditions; thereby, rejecting the “extra-textual” heightened standard of significant harm.
  - The “terms [or] conditions” phrase “is not used in the narrow contractual sense” but instead “covers more than the economic or tangible.”
- The Court states that its ruling “lowers the bar Title VII plaintiffs must meet.”

## After Muldrow

- New standard requires employees to only show “some harm respecting an identifiable term or condition of employment.”
- Low standard but employee still has to show injury and transfer was based on protected category.



# What are the Justices saying?

- Justice Thomas disagrees that the new standard lowers the bar Title VII plaintiffs must meet. Specifically, plaintiffs “must have suffered an actual disadvantage as compared to minor changes (i.e., more than a trifling harm.)”
- Justice Alito concurred with the judgment but does not join with the Court’s “unhelpful opinion” noting that “[t]he primary definition of ‘harm’ is ‘physical or mental damage,’ and an ‘injury’ is defined as ‘ an act that damages, harms, or hurts: an unjust or undeserved infliction of suffering or harm.” Thus, these definitions “incorporate at least some degree of significance or substantiality.
- Justice Kavanaugh concurs with the judgment but disagrees that the plaintiff should be required to some “some harm” beyond the harm of being transferred to another position based on a protected category.

# Effects of Muldrow on Cases

- *Gelin v. N-Able Techs., Inc.*, No. 5:22-CV-345-FL, 2024 WL 1747628, at \*10 (E.D.N.C. Apr. 23, 2024)
  - Finding job transfer was adverse action in light of *Muldrow v. St. Louis*, but still granting Defendant's motion for summary judgment for national origin discrimination).
- *Phillips v. Baxter*, No. 23-1740, 2024 WL 1795859, at \*3 (7th Cir. Apr. 25, 2024)
  - Phillips' reassignment from the processing hub to the local office was not an adverse action because there is no evidence that it left him "worse off" with respect to the terms and conditions of his employment.

## Continued...

- JAKE PECCIA, Plaintiff-Appellant, v. CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, Defendant-Appellee., No. 21-16962, 2024 WL 1985817, at \*1 (9th Cir. May 1, 2024).
  - Overturned in light of the *Muldrow* decision.
- Previously, under California law, “[a] transfer is not an adverse employment action when it is into a comparable position that does not result in substantial and tangible harm.”

# What does this mean?

- Broadens scope of Title VII.
- More lawsuits will survive initial stages of litigation.
- Lower burden for employees to establish *prima facie* case of discrimination.
- More litigation for forced transfer because employee does not have to show a significant harm from the transfer.

# What does this mean?

- Employers need to be able to explain the reason(s) for transfer decisions that are not based on protected characteristics.
- Issues with corporate diversity programs.
- Likely additional litigation is necessary to fully understand implications.



# What can employers do?

- Evaluate whether transfer negatively impacts employees even if pay or job classification level remains the same.
- Document legitimate business reason for job transfers and assess whether any potential bias was involved with transfer.
- Non-discrimination and equal employment training.
- Promptly investigate any complaints about discrimination.
- Consider privileged review of DEI programs to evaluate any potential risks in light of *Muldrow*.





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