

## **Introduction**

In April of 2024, the United States Supreme Court rendered a significant decision in the case of *Muldrow v. City of St. Louis, Missouri* (601 U.S. 346, 144 S.Ct. 967). See the July 2024 Legal Notepad for details of the Court’s decision in that case. By way of brief recap, Muldrow was a police officer who was transferred from what she described as a prestigious position to a lesser one within the police department. Her rank and pay remained the same. Muldrow brought suit against the City under Title VII for discrimination based on sex to challenge the transfer. At both the District Court level and the Eighth Circuit Court of Appeals, Muldrow lost because the Courts found that she had not suffered a “materially significant disadvantage.” There was no loss of rank, salary or benefits, but “only minor changes in working conditions.” Muldrow was unable to meet the required heightened injury standard.

On appeal to the Supreme Court, Justice Kagan wrote that “the text of Title VII imposes no such requirement,” of a heightened injury standard. In very direct language, the unanimous decision pointed out:

“There is nothing in the provision to distinguish, as the courts below did, between transfers causing significant disadvantages and transfers causing not-so-significant ones. And there is nothing to otherwise establish an elevated threshold of harm. To demand “significance” is to add words—and significant words, as it were—to the statute Congress enacted. It is to impose a new requirement on a Title VII claimant, so that the law as applied demands something more of her than the law as written.” *Id.* at 355.

## **The Immediate Impact of Muldrow**

The impact of the Muldrow decision gave employers significant concerns, as the Court had clearly lowered the bar for plaintiffs and their attorneys to argue that their clients suffered “some” harm or adverse disadvantage to the terms or conditions of their employment. In his concurring opinion, Justice Kavanaugh even enumerated several non-economic and purely

subjective “harms” that plaintiffs could raise to include money, time, satisfaction, schedule, convenience, commuting costs or time, prestige, status, career prospects, interest level, perks, professional relationships, networking opportunities, or effects on family obligations. *Id.* at 365.

In the *Muldrow* case, the City of St. Louis argued that in lowering the bar for plaintiffs, the Courts would become swamped with insubstantial lawsuits requiring burdensome discovery and trials. The Supreme Court was undeterred by that argument, responding that if that occurred, it would be because of the statute that Congress drafted. In the immediate aftermath of *Muldrow*, Circuit Courts of Appeals across the country had pending appeals before them where the lower courts had dismissed plaintiffs’ cases on the previous precedents requiring a heightened level of harm. As a result, many cases were sent back to the District Courts to reconsider their decisions of dismissal based on the lowered standard of harm decided in *Muldrow*. As an example, in *Scheer v. Sisters of Charity*, 144 F.4<sup>th</sup> 1212, a 2025 Tenth Circuit decision, the Appeals Court reversed the District Court’s summary judgment prior holding for the employer where the plaintiff argued the harm she suffered was being placed on a performance improvement plan that required a mandatory referral to an employee assistance program.

Plaintiff’s attorneys have no doubt taken notice of their ability to show harm to their clients under the lowered threshold provided by *Muldrow*. As we will look at next, the federal appeals courts are now beginning to give guidance as to what constitutes “some” harm in the context of employer’s actions. An examination of the appellate decisions shows that various plaintiffs have advanced as “some” harm the following as adverse employment actions:

- Reallocating or whittling an employee’s duties
- Admonishing an employee not to eat at their work post
- Failure to receive an adequate bonus for cost-cutting suggestions
- Negative performance evaluations
- Being given work assignments above pay grade
- A supervisor taking credit for an employee’s work

- Delaying a performance review
- Delaying training
- Denying a request for reassignment
- Adding additional students to a teacher's classroom
- Fluctuating room temperatures in an employee's workspace
- A one-week assignment to a different office

### **What Have the Courts Said?**

Before looking at what the appellate courts have decided about “some” harm post-*Muldrow*, it is important to remember that the issue of any harm is only one aspect that plaintiffs must prove to establish a prima facie case of discrimination, retaliation, or any other viable action. In spite of the somewhat frivolous actions advanced as harm, if the employer can prevail on summary judgment by showing equal treatment or defeating other prongs of the plaintiff's prima facie case, *Muldrow's* impact will be negated. In fact, employers have proven that they can still get cases summarily dismissed because they acted properly.

One example is *Martinez-Medina v. Rollins*, 144 F.4<sup>th</sup> 1091, an Eighth Circuit case (where *Muldrow* originated) decided in 2025. Martinez-Medina filed a Title VII action against the United States Agriculture Secretary alleging disparate treatment based on race, sex and national origin, retaliation, and a hostile work environment. The District Court granted the Secretary's motion for summary judgment. Martinez-Medina appealed and contended that she had established a prima facie case of disparate treatment based on the following adverse employment actions:

- 1) her supervisor assigned her work previously performed by higher grade employees
- 2) her supervisor took credit for her work
- 3) her performance review was delayed
- 4) her request for reassignment was not granted

In upholding the District Court’s summary judgment finding, for purposes of our analysis, the Court relied on *Muldrow* to find that the first three “harms” advanced by the plaintiff were not adverse employment actions, saying:

“An adverse employment action is one that results in “some harm” to “an identifiable term or condition of employment.” *Muldrow v. City of St. Louis*, 601 U.S. 346, 354-55, 144 S.Ct. 967, 218 L.Ed.2d 322 (2024). The first three acts are not adverse employment actions because they did not affect “an identifiable term or condition of [Martinez-Medina's] employment.” *Id.* at 355, 144 S.Ct. 967. There is no evidence that Martinez-Medina suffered termination, a reduction in pay or benefits, or some other discriminatory effect due to her employer's actions.” (144 F.4<sup>th</sup> 1091, 1098)

It is worth noting that the Court did not address the issue of the reassignment request because the plaintiff had not succeeded in her prima facie claim. Arguably, a requested reassignment could be an adverse action given that the triggering event in the *Muldrow* case was a transfer of assignment.

In rendering its opinion in *Martinez-Medina*, the Eighth Circuit cited the Seventh Circuit’s opinion in *Arnold v. United Airlines, Inc.*, 142 F.4<sup>th</sup> 460. In that case, plaintiff alleged age discrimination, retaliation, and hostile work environment. She cited the following actions by United as constituting adverse employment actions that caused her harm:

- 1) as a result of a reorganization and a change in her title, plaintiff’s role was altered from “project based” to “data entry” work, which resulted in “far less visibility and partner action,” and greatly increased her workload
- 2) plaintiff was removed from a project, which humiliated her and confused her business partners
- 3) following an evaluation, she was placed on a Performance Improvement Plan (PIP)

In upholding the District Court’s grant of summary judgment for United, the Seventh Circuit issued some very favorable language when it considered plaintiff’s claims and stated:

Here, even under the more generous standard of *Muldrow* and considering the facts in the light most favorable to Ms. Arnold, she can maintain only that she was placed on a PIP and that the reorganization brought about some changes in her daily responsibilities. She remained a member of the same team and continued to work in the communications department of United's operation. Her compensation, benefits, vacation times, and working hours were not affected. Nor did she provide any evidence that her assignments

while on the PIP were impossible for her to complete. She was given some additional assignments, and some of her assignments changed. But these changes were all within the normal scope of her employment and thus did not adversely affect the terms and conditions of her employment. The record hardly describes an adverse action under the standard articulated in *Muldrow*.

142 F.4<sup>th</sup> at 471.

The Court also pointed out that “On several occasions, we have held that PIPs and negative performance reviews are generally not materially adverse. *Langenbach v. Wal-Mart Stores, Inc.*, 761 F.3d 792, 799 (7<sup>th</sup> Cir. 2014) (collecting cases).” *Id.* at 476.

Conversely, in a case that did not go well for the employer, the Seventh Circuit also gave guidance on what may constitute adverse employment actions. In *Thomas v. JBS Green Bay, Inc.*, 120 F.4<sup>th</sup> 1335, Thomas sued his employer under Title VII alleging he was discriminated against because of his race. The District Court granted the employer’s motion to dismiss for failure to state a claim. The dismissal of the case occurred before *Muldrow* was decided. Part of the District Court’s rationale for dismissing the complaint was that the events that the plaintiff complained about were not sufficiently serious to be cognizable under Title VII.

In this case, the plaintiff alleged the adverse employment actions that caused him harm included:

- 1) the employer delayed his training on a particular machine for three years
- 2) the employer denied his request for vacation time while granting equivalent requests by other workers
- 3) the employer transferred him to a different shift even though it knew that this caused plaintiff problems in raising a young child

In reversing the District Court’s dismissal of the complaint, the Seventh Circuit pronounced:

Whether or not the first aspect (insufficient injury) reflected circuit law at the time, it has been overtaken by *Muldrow v. St. Louis*, 601 U.S. 346, 355, 144 S.Ct. 967, 218 L.Ed.2d 322 (2024), which says that a Title VII plaintiff “must show some harm respecting an

identifiable term or condition of employment. What the [plaintiff] does not have to show, according to the relevant text, 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” (cleaned up). Decisions requiring allegations of “significant” or “material” injury did not survive *Muldrow*.

Each of the three things we have mentioned entails “some harm.” Deferred training can mean deferred promotions or deferred raises. Denial of one's preferred vacation schedule can make the vacation less pleasant—not just because it may end up off-season at the destination but also because the goal of a vacation may be to see family members who will not be available at a different time. Title VII does not permit employers to confine that pleasure to workers of particular colors; it must distribute fringe benefits equally. Likewise with the third allegation: if the employer considers family circumstances when assigning shifts, it must do so without regard to color, because inability to care for a child is a deeply felt loss for all parents.

120 F.4<sup>th</sup> at 1336-7.

Finally, we will look at a First Circuit Court of Appeals opinion and how they treated an employee’s claims of adverse employment actions. In *Rios v. Centerra Group LLC*, (106 F.4th 101 (2024)), plaintiff was a security guard who had diabetes. He was terminated when he was found sleeping on duty. Plaintiff brought suit alleging disability discrimination, failure to accommodate, hostile work environment and retaliation under the Americans with Disabilities Act (ADA). As evidence of adverse acts that changed the terms or conditions of his employment and that made him worse off, Rios alleged that:

- 1) supervisors told him not to eat at his post
- 2) supervisors told him not to park his car in the spots near the guard rest house
- 3) supervisors told him not to use the guard rest house bedroom to change his clothes
- 4) a supervisor failed to provide him with any pointers at an off-duty practice session at a shooting range

The District Court in this case granted the employer’s motion for summary judgment. On appeal to the First Circuit, the Appellate Court quickly dismissed the plaintiff’s first three contentions as nothing more than mere admonishments, writing, “A mere admonition by a supervisor without any formal consequences is not an adverse employment action because it

does not represent any disadvantageous change in the terms or conditions of the plaintiff's employment." *Id.* at 112-3.

As to plaintiff's allegation about not being given pointers on the range as an adverse employment action, the Court held: "We cannot agree... This incident is not the stuff of federal employment law... By contrast, even though Rios identifies this "pointers" incident as disparate treatment on account of his disability, what he describes is not "some harm" that left him "worse off." *Id.* at 113.

### **Conclusion**

The *Rios* case is perhaps the most illustrative of how plaintiffs are likely to stretch the limits in terms of alleging how they were harmed. This article is intended to offer a brief sampling of what has occurred since *Muldrow* was decided. Although *Muldrow* was not favorable for employers because it lowered the threshold of proof of harm, it should be remembered that employers will not face the consequences of *Muldrow* if they simply make all employment decisions for non-pretextual reasons that are entirely unrelated to legally protected characteristics.

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