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EEO Hot Topics and Legal Law Updates

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1

Adverse action after Muldrow v. City of St. Louis, 144 S. Ct. 967 (2024)

Title VII makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . .sex." §2000e–2(a)(1).

- "The words 'discriminate against' refer to 'differences in treatment that injure employees."
- How serious must the consequences be to show injury?

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2

Muldrow v. City of St. Louis, 144 S. Ct. 967 (2024) – Supreme Court

- "To make out a Title VII discrimination claim, a transferee must show some harm respecting an identifiable term or condition of employment." Do not read "significant" into the statute.
- Even without a pay cut or cut in rank, Ms. Muldrow's lateral transfer met this test:
  - She was transferred from a specialized division with major investigations to supervising patrol officers and admin work.
  - Her schedule became less regular, requiring weekend work.
  - She lost use the take-home car.

Post-Muldrow cases on adverse action

- Milczak v. Gen. Motors, 2024 WL 2287687 (6th Cir. 2024): reassignments resulted in some harm, including loss of opportunity to make overtime pay; lack of adequate training; supervisory responsibilities over difficult trade employees; requirement to work evening hours; position's failure to utilize plaintiff's skills; and requirement that plaintiff work by himself.
  - Court identifies these as separate harms, so any of them should be sufficient by itself.
- Smith v. Sec'y of Army, 2024 WL 2804428 (D.N.M. 2024); Zuniga v. City of Dallas, 2024 WL 2734956 (N.D. Tex. 2024): Muldrow does not affect severe-or-pervasive standard for hostile work environment.

Coverage of software developer as agent: Mobley v. Workday, Inc., 2024 WL 3409146 (N.D. Cal. 7/12/24)

- Workday embeds AI and machine learning tools in its algorithmic decision-making HRIS tools to decide whether an employer should accept an application. An applicant only can advance if they get past the Workday screening tools.
- Mr. Mobley applied for and was rejected for over 100 positions for various companies that use the Workday platform.
- He alleged the algorithmic tools discriminate against him for being Black, over the age of 40, and disabled (anxiety/depression).

EEOC Amicus Brief: Mobley v. Workday, Inc., 2024 WL 3409146 (N.D. Cal. July 12, 2024)

- The EEOC' amicus brief in the trial court.
- The EEOC argued that Workday is covered by Title VII as an agent of the employer and as an employment agency, among other ways.
- Court denied dismissal of Mobley's first amended complaint because Mobley plausibly alleged that Workday is covered by the EEO laws an agent of a covered employer.
  - The EEO statutes define "employer" as including "any agent."
  - Workday's software is not under sufficient control of the customers (the employers) to make coverage of Workday as an agent redundant of coverage of the employers themselves.

Sexual Orientation And Gender Identity

7

Gender-identity based hostile work environment: Copeland v. Ga. Dep't of Corr., 97 F.4th 766 (11th Cir. 2024) - Facts

- Transgender male sergeant at medium-security prison alleged that he was subjected to unlawful harassment based on gender identity.
  - Coworkers ended radio transmissions to him with "ma'am" so that the whole institution could hear it three or four times a day.
  - Jokes about transgender people in front of inmates; a prison nurse refusing to call him "sir"; comments by supervisors about his gender.
  - An officer told the plaintiff she was offended when the plaintiff corrected colleagues who called him "ma'am" because she was "proud to be a woman." She pushed the plaintiff a few days later, and as he walked to his car, circled around him while carrying a pistol.

8

Gender identity-based harassment: Copeland v. Ga. Dep't of Corr., 97 F.4th 766 (11th Cir. 2024) – severity

- Harassment was frequent: The plaintiff was harassed by at least 34 individuals on a daily basis.
- The harassment was severe.
  - Harassment continued even after the plaintiff's objections.
  - Harassment involved supervisors, not merely peers or coworkers.
  - Correctional context is dramatically more dangerous than typical workplace. Harassing an employee "sends the message to coworkers that the victim need not receive the support and cooperation necessary to remain safe . . . and sends the message to inmates that the victim is fair game."

9

Religious Discrimination And Accommodation

10

Groff v. DeJoy, 600 U.S. 447 (2023) – Reinterpreting undue hardship for religious accommodation

Gerald Groff was a USPS Rural Carrier. He asked to be relieved of all Sunday work as a religious accommodation.

- USPS delivered Amazon packages on Sundays, first from Groff's post office and, after he transferred, from his second assigned post office.
- USPS helped find coworkers to swap shifts with Groff, but sometimes no one volunteered. Managers covered sometimes.

Groff v. DeJoy, 600 U.S. 447 (2023) – Reinterpreting undue hardship for religious accommodation (Continued)

Gerald Groff was a USPS Rural Carrier. He asked to be relieved of all Sunday work as a religious accommodation.

- Coworker complaints: union and informal.
- Groff eventually resigned because he did not get all Sundays off as a religious accommodation, and he would face discipline.
- Trial court: undue hardship under Hardison. Third Circuit affirmed. Supreme Court granted cert. on how to define "undue hardship."

Groff v. DeJoy, 600 U.S. 447 (2023) – reinterpreting "undue hardship" for religious accommodation (Continued)

- To establish undue hardship for a religious accommodation, an employer "must now show that the burden of granting the accommodation would result in substantial increased costs in relation to the conduct of its particular business."
- This test requires consideration of "all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, 'size and operating cost of [an] employer.'"
- Effects on coworkers are only relevant if tied to business operations—religious animosity cannot hide behind undue hardship.

Groff v. DeJoy, 600 U.S. 447 (2023) – Supreme Court and on remand (Continued)

- Concurrences gave more credence to hardships for coworkers resulting from the reshuffling of duties that may accompany religious accommodation.
- The Court remanded the case to be considered under the "clarified standard."
- Dt Ct Judge Schmel (E.D. Pa) heard arguments on competing motions for summary judgment on July 23, 2024.

Kluge v. Brownsburg Cmty. Sch. Corp., 2024 WL 1885848 (S.D. Ind. 2024)(applying Groff)

- High school music teacher asked to call all students by last names as accommodation to policy requiring use of preferred names. School granted but then rescinded; it caused problems for students and teaching.
- Kluge sued. Dt. Ct. ruled for school, finding undue hardship under Hardison. 7th Cir affirmed but then vacated and remanded to trial court to reconsider under Groff in July 2023.
- Dt. Ct. entered new final judgment finding that the accommodation posed an undue hardship because "it actually resulted in substantial student harm, and an unreasonable risk of liability, each sharply contradicting the school's legally entitled mission to foster a supportive environment for all."
- On appeal again to 7th Cir.; Kluge's brief + amici filed July 22, 2024.

15

Non-discrimination Based On Disability

The Americans with Disabilities Act & Section 501 of the Rehabilitation Act.

16

"Substantially limited in a major life activity"

- Some courts do not apply amended ADA standards for definition of actual disability regarding "substantial limitation."
  - Limitations need not be permanent, long-term, severe, or significantly restricting; and usually do not require scientific/medical/statistical analyses;
  - MLAs include major bodily functions;
  - Benefits of mitigating measures should not be considered; and
  - Episodic or in remission conditions are substantially limiting if they would be substantially limiting when active.

Definition of disability: Mueck v. La Grange Acquisitions, 75 F.4th 469 (5th Cir. 2023)

- Defendant terminated plaintiff with alcohol use disorder because some of his substance use disorder classes conflicted with his scheduled shifts, and he could not reliably find coverage.
- District court granted summary judgment to the defendant in part based on finding that plaintiff failed to provide sufficient evidence to show that alcohol use disorder was an ADA disability.
- Fifth Circuit held that the district court erred in this part of its decision, expressly acknowledging, for the first time, that, following the passage of the ADA Amendments Act, an impairment need not be "permanent or long-term" to qualify as a disability.

EEOC Amicus brief - Sutherland v. Peterson's Oil Service, Inc. (No. 24-1431 1st Cir.) (7/29/24)

- EEOC amicus brief to 1st circuit contested trial court decision that Sutherland's torn meniscus (injured knee) was not "substantially limiting" because corrected by surgery (therefore not permanent). Duration: 7 months.
- "The touchstone of the inquiry is whether the impairment is substantially limiting, not whether it was "temporary." 29 C.F.R. § 1630.2(j)(1)(ii); Mancini, 909 F.3d at 40-41. Impairment duration is only one relevant factor, and although "[i]mpairments that last only for a short period of time are typically not covered, … they may be covered if sufficiently severe."
- Evidence of "burning" knee pain "that prevented him from squatting, kneeling at work and needing to take breaks or stop work entirely."

State of Law re: COVID-19

- District courts have adopted EEOC position that a person with COVID-19 or Long COVID may have an actual disability. See Brown v. Roanoke Rehab. & Healthcare Ctr., 586 F. Supp. 3d 1171 (M.D. Ala. 2022).
- BUT asymptomatic COVID-19 or COVID-19 causing mild symptoms that resolve quickly (similar to those of the common cold or flu), with no other consequences, not an ADA disability. See Cupi v. Carle Bromenn Med. Ctr., No. 1:21-cv-01286, 2022 WL 138632 (C.D. Ill. Jan. 14, 2022).
- Being unvaccinated for COVID-19 does not constitute a disability (either "actual" or "regarded as"). See Kerkering v. Nike, Inc., 2023 WL 5018003 (D. Or. May 30, 2023), report and recommendation adopted, 2023 WL 4864423 (D. Or. July 31, 2023).
- Questions about vaccination history are not disability-related inquiries. See Bobnar v. AstraZeneca, 672 F. Supp. 3d 475 (N.D. Ohio 2023).

Harassment

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21

Social Media Impacting The Workplace

Okonowsky v. Garland, No. 23-55404 (9th Cir. July 25, 2024)

- A staff psychologist in a federal prison, Lindsay Okonwsky, filed a Title VII sex harassment claim alleging that the Bureau of Prisons failed to take adequate measures to address a sexually hostile work environment.
- Prison safety official, a Lieutenant, with whom Okonowsky worked, had professional disagreements and frustrations with her.
- He set up an anonymous Instagram account followed by more than 100 prison employees, including sexually hostile content against women and against the "prison psychologist" in particular. Instagram "suggested" Okonowsky view the account. She did so.

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22

Social media impacting the workplace: Okonowsky

- Her initial complaint met with management assertions that the content was not "a problem," was "funny."
  - The Lieutenant increasingly targeted her with posts – threatened gang rape at her staff party.
- Two months after she reported him, prison ordered Lieutenant to stop.
  - Lieutenant did not stop posting sexually hostile content for another month – so was three months.
- Okonowsky resigned and sought other work.

Okonowsky – Social Media Impacting The Workplace Ninth Circuit Holding

"We reject the notion that only conduct that occurs inside the physical workplace can be actionable, especially in light of the ubiquity of social media and the ready use of it to harass and bully both inside and outside of the physical workplace."

LaPuebla v. Majorkas, Aug. 20, 2024

- 9th Circ. Revives CBP Officer's Facebook Harassment Suit
- LaPuebla v. Majorkas, No. 16520. 9th Circuit, Aug. 20th.
- The Ninth Circuit revived a suit Tuesday from a U.S. Customs and Border Protection officer who alleged his colleagues mocked his sexuality in a private Facebook group, saying the case needs another look following a recent ruling that off-duty social media posts can create a hostile work environment. In a split decision, the majority reversed summary judgment for the agency in Reynald LaPuebla's Title VII harassment suit, after finding the case should be considered in the context of its recent ruling in Okonowsky v. Garland .
- "Because neither the district court nor the parties had the benefit of Okonowsky when considering or briefing the summary judgment motion, we remand so the district court can apply Okonowsky's holdings in the first instance," the panel said.

Frequency/Pervasiveness: Lutz v. LexJax, Inc., No. 3:2021cv00936 - Document 94 (M.D. Fla. July 30, 2024).

- Car salesman subjected to antisemitic slurs by coworker in presence of supervisor. 5 to 10 antisemitic conversations in 2019. In addition, there were at least 3 severe incidents.
- Court recited examples of frequency: ". . the 11th Circuit "treated 15 instances of harassment in 4 months as 'not infrequent,'' more than 10 specific instances in 2 months as 'frequent,' and five instances over an 11-month period as 'too infrequent[.]'"
- "Wherever this boundary may lie, a reasonable jury could find that Lutz's alleged harassment surpassed it..."