

Adverse action after <u>Muldrow v. City of St. Louis</u>, 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?

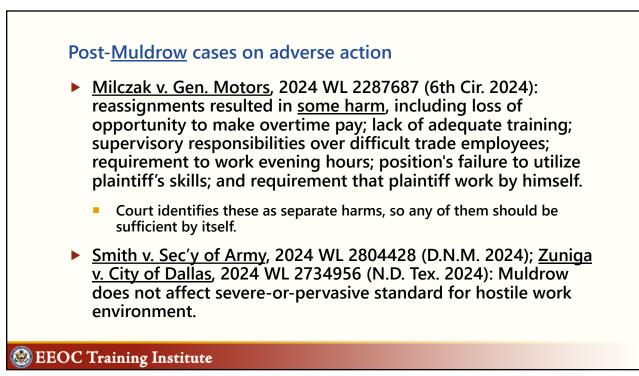
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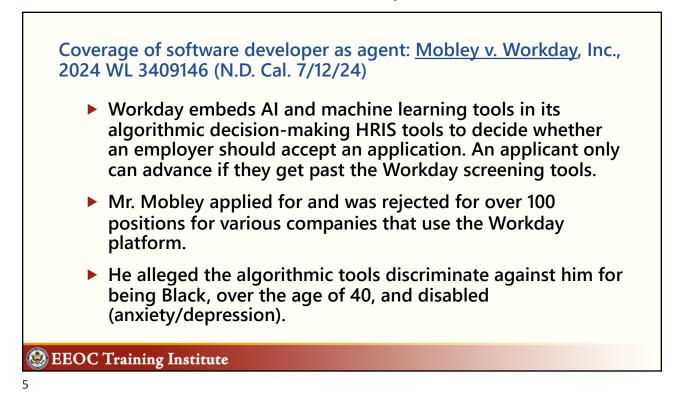
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<u>Muldrow v. City of St. Louis</u>, 144 S. Ct. 967 (2024) –
Supreme Court
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- "To make out a Title VII discrimination claim, a transferee must show some harm respecting an identifiable term or condition 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.

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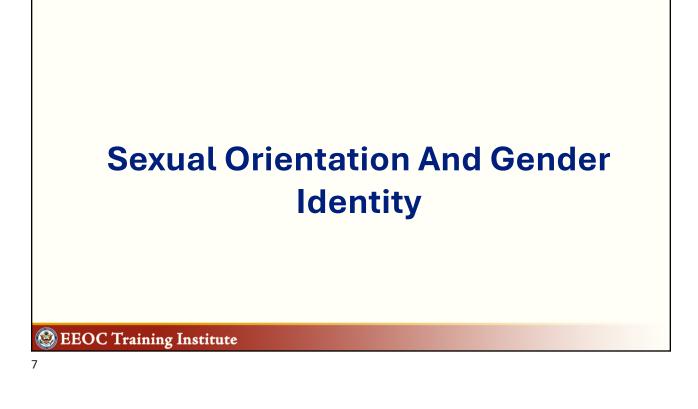




EEOC Amicus Brief: <u>Mobley v. Workday, Inc.</u>, 2024 WL 3409146 (N.D. Cal. July 12, 2024)

- 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.

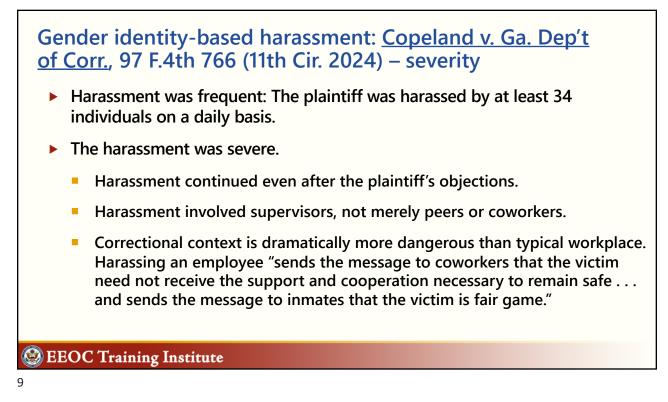
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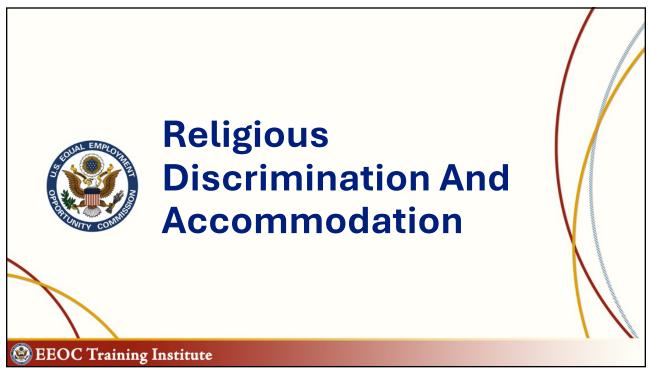


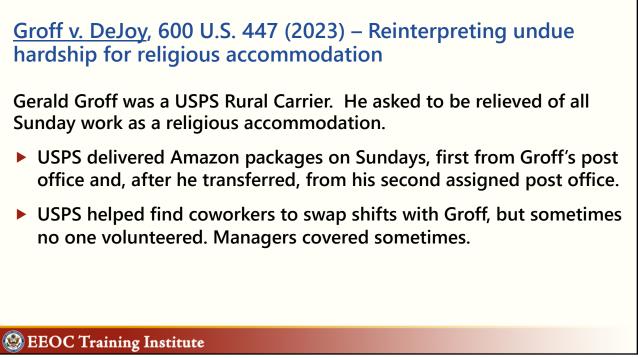
Gender-identity based hostile work environment: <u>Copeland v.</u> <u>Ga. Dep't of Corr.</u>, 97 F.4th 766 (11th Cir. 2024) - Facts

- 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.

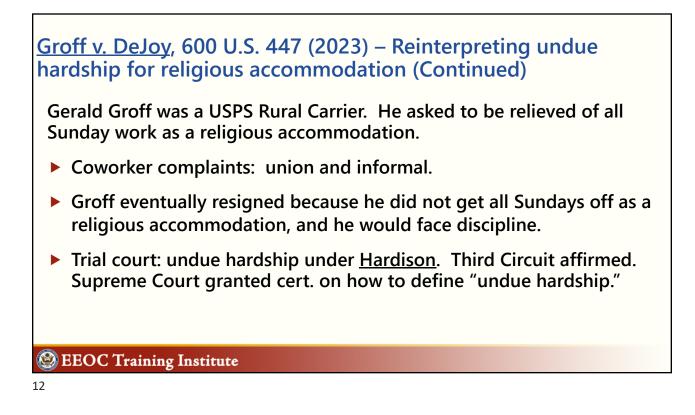
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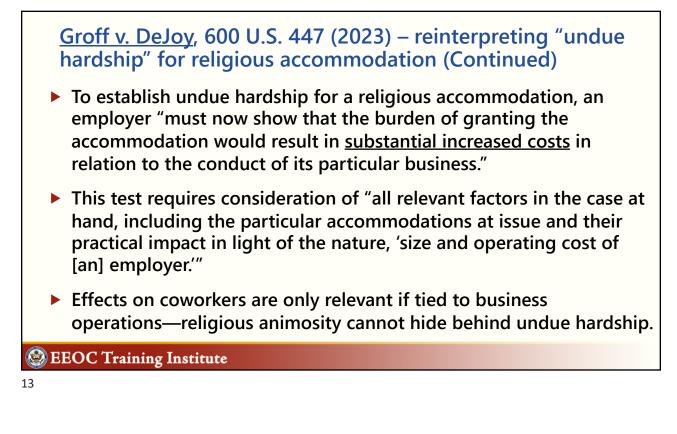


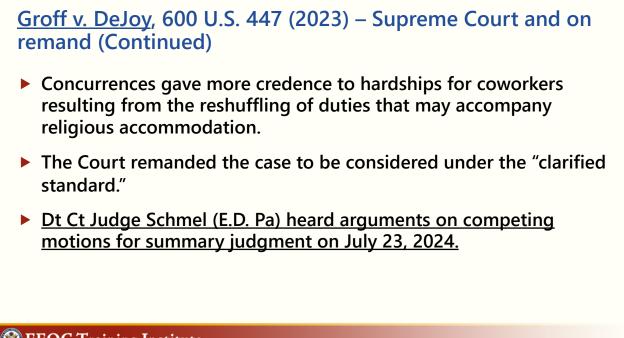




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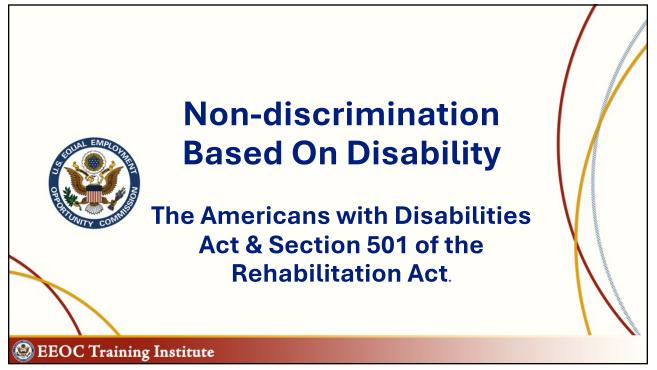
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<u>Kluge v. Brownsburg Cmty. Sch. Corp.</u>, 2024 WL 1885848 (S.D. Ind. 2024)(applying <u>Groff</u>)

- 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 <u>Hardison</u>. 7th Cir affirmed but then vacated and remanded to trial court to reconsider under <u>Groff</u> in July 2023.
- Dt. Ct. entered <u>new final judgment</u> finding that the accommodation posed an undue hardship because "it actually resulted in <u>substantial student harm</u>, and an <u>unreasonable risk of liability</u>, 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.

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"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.
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- 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, <u>following</u> <u>the passage of the ADA Amendments Act, an impairment need not be</u> <u>"permanent or long-term" to qualify as a disability</u>.

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ECC 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."

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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. <u>See Brown v. Roanoke</u> <u>Rehab. & Healthcare C</u>tr., 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. <u>See Cupi v. Carle Bromenn</u> <u>Med. Ctr.</u>, No. 1:21-cv-01286, 2022 WL 138632 (C.D. III. 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. <u>See Bobnar v. AstraZeneca</u>, 672 F. Supp. 3d 475 (N.D. Ohio 2023).

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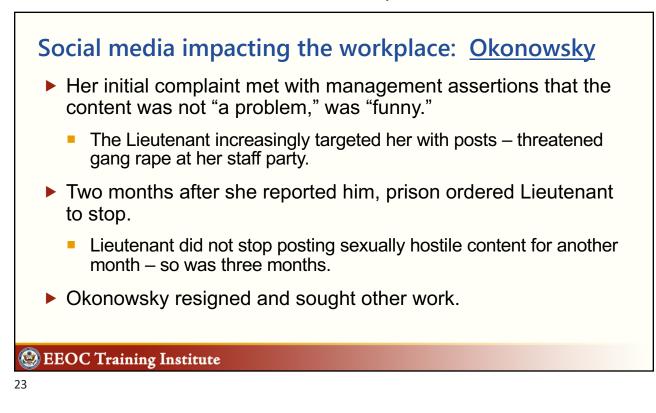


Social Media Impacting The Workplace

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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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."

