

Mid-Year 2024: Discrimination + Harassment

Article By:

Labor and Preventive Practices

The landscape of workplace discrimination and harassment continues to evolve, influenced by recent EEOC guidance and significant court rulings such as *Muldrow*. The EEOC has provided detailed frameworks on what constitutes a hostile work environment, emphasizing the impact of harassing conduct on employment terms and conditions. Meanwhile, the *Muldrow* case clarifies that discriminatory job transfers can constitute sufficient harm under Title VII, even without significant economic damage.

EEOC: Workplace harassment

Enforcement guidance issued 04.29.24

According to the EEOC, conduct based on stereotypes (whether positive, negative or neutral) is prohibited. Harassing conduct must be examined in the context of where it takes place or in the larger social context.

The Equal Employment Opportunity Commission's first updated enforcement guidance on workplace harassment in 25 years reflects several new developments concerning workplace discrimination and harassment, including U.S. Supreme Court precedent extending anti-discrimination protections to LGBTQ+ workers. While not constituting legally binding precedent, the new guidance does provide "legal analysis of standards for harassment and employer liability applicable to claims of harassment under the equal employment opportunity (EEO) statutes enforced by the Commission."

Highlights

The enforcement guidance is broken down into the three components of a harassment claim: (1) the covered bases and causation; (2) discrimination respecting a term, condition or privilege of employment; and (3) liability.

According to the EEOC, some key issues regarding the covered bases that would give rise to unlawful workplace harassment, include:

Characteristics

- Race-based harassment includes harassment based on traits or characteristics linked to a person's race such as their name, cultural dress and accent or speech pattern, as well as a person's physical characteristics, including hair style or texture.
- Sex-based harassment is recognized as including harassment based on sexual orientation and gender identity, including the expression of one's gender identity.
 - Harassment can include the intentional and repeated use of a name or pronoun inconsistent with an individual's gender identity or the denial of access to sex-segregated facilities such as bathrooms that are consistent with an individual's gender identity.

Religion

- Employers are not required to accommodate religious expression that creates, or reasonably threatens to create, a hostile work environment.

Location

- Harassment can occur with remote work as it can in the physical workplace.
- Virtual workplace, social media and similar technological advances outside the traditional workspace can still affect the terms and conditions of employment.

Retaliation

- The prohibition on retaliation extends to "retaliatory harassment," harassment suffered by the employee due to their protected activity.
- The threshold for establishing retaliatory harassment is different than that for establishing a hostile work environment as it extends to any conduct that might deter a reasonable person from engaging in protected activity.

Instant pushback

On May 13, 2024, attorneys general from 18 states filed a lawsuit in the U.S. District Court for the Eastern District of Tennessee seeking to block the enforcement of the new harassment guidance.

- Lawsuit pertains to guidance on transgender employees.
- The states allege that the EEOC lacked the power to declare existing federal laws provide the rights to transgender employees set forth in the new harassment guidance.

Key employer to-dos

- Review and update harassment policies to align with new EEOC guidance.
- Train managers and employees on recognizing and addressing harassment.
- Establish clear procedures for reporting and investigating harassment claims.

Adverse action under Title VII

Muldrow v. City of St. Louis

Decided 04.17.24

In this U.S. Supreme Court case, petitioner Jatonya Muldrow of the St. Louis Police Department argued that her eight-month transfer out of the department's Intelligence Division constituted sex discrimination within the meaning of Title VII, even though she had not suffered any economic damages resulting from the transfer.

Decision

- HELD: An employee challenging a job transfer under Title VII must show the transfer brought about some harm with respect to an identifiable term or condition of employment, but that harm need not be significant.
- While the case was about transfers, it is already being referenced broadly in discrimination cases.
- Resolves a circuit split over whether an employee challenging a job transfer under Title VII must meet a heightened threshold of harm.

Reasoning

The Court applied textual analysis, rejecting the heightened standard used by the district court:

- Title VII prohibits “discriminat[ing] against” an individual “with respect to” the “terms [or] conditions” of employment because of a protected characteristic.
- Requires a plaintiff to establish some disadvantageous change to an identifiable term or condition of employment as the term “discriminate” has been found to mean “differences in treatment that injure employees.”
- Does not require that a plaintiff establish the change was “significant,” “serious,” “substantial” or any other heightened burden.

Status

- The Court concluded that a plaintiff would still have to overcome several hurdles to establish a claim, including proving an injury that impacted a term or condition of employment and that the injury occurred because of the plaintiff’s protected characteristic.
- The Court remanded the case for a determination whether Muldrow had a meritorious Title VII claim related to her transfer.

Key implications for employers

Title VII claims

- The Court dismissed the city’s argument that eliminating a threshold showing of significant or material injury would lead to a flood of “insubstantial lawsuits.” But imagining that this ruling will not increase the number of Title VII claims that previously would have been considered too trivial is difficult.
- Whether described as “substantial harm,” “some harm” or “de minimis harm,” courts have consistently held that Title VII is not intended to reach every employment action a person may find disagreeable.

DEI programs

- *Muldrow* is silent on the matter of the potential impact on DEI programs.
- DEI challengers bringing Title VII claims must meet their burden of proving their case, which still includes a requirement of showing some harm.

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