

A hand in a dark suit jacket is shown from the wrist up, pointing upwards with the index finger. The years 2021, 2022, 2023, 2024, and 2025 are overlaid on the hand, with 2024 being the largest and most prominent. The background is a blurred outdoor scene with trees and a bright sky.

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WORKPLACE 2024

TODAY'S AGENDA

Kristen Smith – (12:00PM-12:05PM)

- Introduction

Natalie Vogel – (12:05PM-12:15PM)

- EEOC Releases New Guidance on Workplace Harassment

Nick Jacobson – (12:15 PM-12:25PM)

- U.S. Supreme Court Broadens Definition of Adverse Employment Action in Discrimination Cases

Tom Eron – (12:25PM-12:35PM)

- The NLRB General Counsel's Aggressive Agenda

Kristen Smith – (12:35PM - 12:45PM)

- Questions

EEOC Releases New Guidance on Workplace Harassment



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EEOC Enforcement Guidance on Harassment in the Workplace

- Published April 29, 2024
- Effective immediately
- Supersedes previous EEOC guidance on harassment
 - Last published guidance was 1999
- Not legally binding
 - Serves as a resource for employers, employees, federal and state agencies that investigate, adjudicate or litigate claims of workplace harassment

3 Overall Prongs

- Covered Bases and Causation
 - Focuses on whether conduct was based on the individual's legally protected characteristic
- Harassment Resulting in Discrimination With Respect to a Term, Condition, or Privilege of Employment
 - For workplace harassment to be unlawful, it must affect a “term, condition, or privilege of employment.”
- Liability
 - Liability based on hostile work environment depends on status of harasser

Title VII Protected Classes

- Race
- Color
- Religion
- Sex (including sexual orientation, gender identity, and pregnancy, childbirth, or related medical conditions)
- National origin
- Disability
- Age (40 or older)
- Genetic information (including family medical history)

Harassment with Respect to a Term, Condition, or Privilege of Employment

- Quid Pro Quo
 - An explicit change to the terms or conditions of employment that is linked to harassment based on a protected characteristic
- Hostile Work Environment
 - Conduct that constructively changes the terms or conditions of employment
 - Exists when harassment is so severe *or* pervasive that a reasonable person in the employee's position would find the situation to be abusive
 - In New York, harassing conduct must rise above threshold of petty slights or trivial inconveniences

Recent and Developing Areas of Workplace Harassment

- Sexual Orientation and Gender Identity
- Pregnancy, Childbirth, or Related Medical Conditions
- Remote Work

Harassment Based on Sexual Orientation and Gender Identity

- Outing, or disclosure of an individual's sexual orientation or gender identity without permission;
- Harassing conduct because an individual does not present in a manner that would stereotypically be associated with that person's sex;
- Misgendering, or repeated and intentional use of a name or pronoun inconsistent with an individual's known gender identity; and
- Denial of access to a bathroom or other sex-segregated facility consistent with the individual's gender identity.

Pregnancy, Childbirth, or Related Medical Conditions

- Workplace harassment can arise from topics such as:
 - Changes in physical appearance due to pregnancy;
 - Lactation;
 - Morning sickness;
 - Using or not using contraception; or
 - Deciding to have or not have an abortion.

Example No. 13 in EEOC Guidance

- An employee is experiencing morning sickness, so her employer accommodates her limitations with a hybrid telework schedule
- Colleagues complain that pregnant women always get special perks and privileges
- Accuse employee of getting pregnant “just so she can kick back, relax at home on the couch, and collect a paycheck.”
- When the pregnant employee asks to be considered for a new client, a coworker states, “if the employee is so sick that she cannot come into the office, how can she be well enough to work on such an important account?”

Remote Work

- Harassment may occur in a context outside an employee's regular workplace.
- Extends to harassment through:
 - Email
 - Instant messaging
 - Videoconferencing
 - Social media accounts
 - Other equivalent services

Examples of Remote Work Harassment

- Sexist comments made during a video meeting;
- Ageist or ableist comments typed in a group chat;
- Racist imagery that is visible in an employee's workspace while the employee participates in a video meeting; or
- Sexual comments made during a video meeting about a bed being near an employee's video image.

More Resources

- Summary of the Guidance's Key Provisions
- FAQs for Employees: Harassment at Work
- Fact Sheet for Small Businesses

Muldrow v. City of St. Louis: U.S. Supreme Court Broadens Definition of Adverse Employment Action in Discrimination Cases



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Muldrow v. City of St. Louis

- Sergeant Jatonya Muldrow worked in the Intelligence Division of the St. Louis Police Department
- She was characterized by the outgoing commander as a “workhorse” and the one sergeant he could count on
- In that role, she:
 - Investigated public corruption and human trafficking
 - Oversaw the Gang and Gun Crimes Units
 - Was deputized as an FBI Task Force Officer allowing her to pursue investigations outside St. Louis
 - Had an unmarked take-home vehicle

Sergeant Muldrow's Transfer

- New intelligence commander requested the transfer of Sergeant Muldrow, replacing her with a male employee
- Prior to the transfer, he referred to Sergeant Muldrow as “Mrs.” rather than Sergeant
- Later testified that he felt the other employee “seemed a better fit” for the position’s “very dangerous” work

Sergeant Muldrow's New Position

- Sergeant Muldrow was transferred to a new position in the uniformed division
- Supervised day-to-day activities of neighborhood patrol officers
- Her rank and pay remained the same, however she;
 - Lost her FBI status and take-home vehicle;
 - No longer worked with high-ranking members on important investigations;
 - Worked an irregular schedule that often included weekends

District Court Decision

- Sergeant Muldrow sued under Title VII alleging that she was unlawfully transferred due to her sex
- District Court found that transfer did not constitute an adverse action and granted City of St. Louis summary judgment
- Applied the predominating standard at the time: transfer must constitute a **significant change** that creates a **material disadvantage**
 - Almost all courts except for the D.C. Circuit followed this standard

District Court Decision Cont'd

- District Court found that Sergeant Muldrow had not shown that transfer was a **significant change** causing a **material disadvantage** because:
 - No change in salary or rank
 - Loss of FBI credentials did not harm her career prospects
 - She continued to have supervisory responsibilities
 - The loss of the vehicle and schedule changes were not significant changes

Eighth Circuit Decision

- Also applied significant change/material disadvantage standard and upheld decision
- Echoed District Court's reasoning and found that Sergeant Muldrow had only demonstrated "minor changes" in working conditions
- Did not address schedule changes or loss of vehicle because of procedural issues

Supreme Court Decision

- Found that the significant change/material disadvantage standard was improper
- Title VII prohibits discrimination with respect to the terms and conditions of employment
 - Involuntary transfers usually involve changes to terms and conditions of employment, often to the employee's detriment (hence, why they are not voluntary)
 - Applying an elevated standard for transfers requiring "significant" changes to terms and conditions of employment improperly adds words to statute
- New standard: transferee must demonstrate "**some harm** respecting an **identifiable** term or condition of employment" (emphasis added)

Application of New Test

- Supreme Court held Sergeant Muldrow’s allegations “if properly preserved and supported,” met the “some harm” to an “identifiable” term or condition standard “with room to spare”
 - New position was less prestigious and important
 - Schedule became less regular and required weekend work
 - Lost take-home vehicle
- What does this mean for Sergeant Muldrow?
 - Remanded to Eighth Circuit to resolve procedural disputes and issue a decision applying the new standard

How does this effect employers moving forward?

- Transfers much more likely to be found to constitute adverse actions
 - Need to be considered more like terminations when evaluating potential exposure to discrimination claims
 - Includes decisions NOT to transfer an employee
- Could this standard be applied to other actions? Unfavorable assignment of shifts or job duties?
- In New York, not as significant of a change to our way of thinking:
 - Second Circuit applied prior test more liberally than some other Circuits
 - New York Human Rights Law amended in 2019 adopted more liberal construction of adverse action standard

The NLRB General Counsel's Aggressive Agenda (cont'd): Initiative to Further Expand Remedies Against Employers”



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General Counsel Memoranda

- Statements of the enforcement position of the NLRB General Counsel
- Not law, but positions that will be advocated in pending or future cases
- Affords the opportunity for the NLRB to revisit the law through decisions
- Affects both unionized employers and non-union employers

GC 21-06 and 21-07: Remedies (Sept. 8, 2021 and Sept.15, 2021)

Requires Regions to seek the “full panoply” of remedies available to ensure victims of unlawful conduct are made whole.

- Unlawful Firings: consequential damages, front pay, liquidated back pay
- Firings of Undocumented Workers: compensation for work performed, sponsorship of work authorizations, other remedies
- Unlawful Conduct During an Organizing Drive: access, reimbursement of organizational costs, reading/publication of notice, discovery clauses, extended posting periods, distribution of notices to supervisors/managers, training, hiring applicant of the union’s choice
- Unlawful Failure to Bargain: bargaining schedules, progress reports, extended insulation periods, reinstatement of proposals, reimbursement of bargaining expenses, mediation



Thryv, Inc., 372 NLRB No. 22 (Dec. 13, 2022) – Consequential Damages

- The Board will order compensation for all direct or foreseeable pecuniary harms suffered as a result of the respondent's unfair labor practice.
- Examples: Out of pocket health care costs, cost of cleaning clothes or providing new toolboxes where unlawful reassignments caused damage, loss of car or home, increased transportation or child care costs, interest or late fees on credit card payments and losses from early retirement withdrawals.
- Dissent: This standard would permit recovery for any losses indirectly caused by an unfair labor practice, regardless of how long the chain of causation may stretch from unfair labor practice to loss, whenever the loss is found to be foreseeable -- speculative damages beyond the Board's remedial authority.

GC 24-04: Securing Full Remedies for All Victims of Unlawful Conduct (April 8, 2024)

Requires Regions to “seek full make-whole remedies for all employees harmed as a result of an unlawful work rule or contract term.”



Work Rules

- ***Stericycle, Inc.*, 372 NLRB No. 113 (2023)**
 - A new test to determine whether a rule or policy unlawfully impacts employees' Section 7 rights:
 - 1. The NLRB General Counsel must prove that a challenged rule has a “reasonable tendency to chill” employees’ exercise of their Section 7 rights.
 - Analyzed from the perspective of a “reasonable” employee who is economically dependent on the employer, and who also contemplates engaging in protected concerted activity.
 - if an employee could reasonably interpret the rule to have a coercive meaning, the General Counsel will carry her burden, even if a contrary, noncoercive interpretation of the rule is also reasonable.
 - If proven, then the rule is **presumptively unlawful**.

Work Rules

- ***Stericycle, Inc.*, 372 NLRB No. 113 (2023)**
 - A new test to determine whether a rule or policy unlawfully impacts employees' Section 7 rights:
 - Employer can rebut the presumption by proving that—
 - (A) the rule advances legitimate and substantial business interests; ***and***
 - (B) the “legitimate and substantial business interest” cannot be achieved with a more narrowly-tailored rule.
- **Takeaway:** *Stericycle* puts a high premium on well-written, clearly drafted policies that address legitimate employer interests.

Work Rules

Examples:

Policy on Proprietary & Confidential Information includes a provision prohibiting photographing or recording, through any means, the Company's operations, systems, presentations, communications, voicemails, personnel or meetings.

ALJ: Presumptively unlawful under *Stericycle*

- employees would reasonably understand the rule to prohibit them from documenting hazardous working conditions or unsafe equipment
- employees would reasonably understand the rule to prohibit recording or photographing written or verbal communications which document inconsistent application of Employer's rules.

Work Rules

Examples:

Employees are expected to protect the assets of the Corporation and use them efficiently to advance the interests of the Corporation. Those assets include tangible assets and intangible assets, such as confidential information.

Examples of confidential information include nonpublic information about the Corporation's plans, earnings, financial forecasts, business forecasts, discoveries, competitive bids, and technologies.

ALJ: Presumptively unlawful under Stericycle

“Plans” could reasonably be read to include “employee benefit plans,” the disclosure of which would be protected under Section 7.

Work Rules

Other Concerns:

- (1) the rule was promulgated in response to union activity; or
- (2) the rule has been applied to restrict the exercise of Section 7 rights.

GC 24-04: Securing Full Remedies for All Victims

Regions to “seek full make-whole remedies for all employees harmed as a result of an unlawful work rule or contract term.”

§8(a)(1) violation for overly broad rule/policy

Old Remedy: expunge work rule; expunge discipline for charging party (inc. potential backpay)

New Remedy: expunge work rule/policy; review all applications of the rule/policy during 6 months before Charge and expunge/remedy discipline for all affected employees.

Effectively creates a **class action remedy**, not authorized by the NLRA

Questions?



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New York Employment Law: The Essential Guide

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Thank You

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