Podcast

MYR 2024: The Hottest Topics in Employment Litigation

By Stephanie L. Adler-Paindiris & Stephanie E. Satterfield

July 24, 2024

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July 24, 2024

By almost any measure, 2024 is a memorable year for employment and labor law — and it's only halfway done. Our timely report, Mid-Year 2024: Now + Next, takes a closer look at the recent rules, regulations and rulings affecting employers today, the rest of the year and beyond.

Transcript

Welcome to Jackson Lewis's podcast, We get work™. Focused solely on workplace issues, it is our job to help employers develop proactive strategies, strong policies, and business-oriented solutions to cultivate an engaged, stable, and inclusive workforce. Our podcast identifies issues that influence and impact the workplace and its continuing evolution and helps answer the question on every employer's mind, how will my business be impacted?

No matter the month or year, employers can count on one thing, changes in workplace law. Having reached the midway point of the year, 2024 has proven to be no exception, with many significant changes and potential challenges ahead for employers. What follows is one of a collection of concise programs as We get work™; the podcast provides the accompanying voice of the Jackson Lewis 2024 Mid-Year Report, bringing you up-to-date legislative regulatory and litigation insights that are taking place now and what you can expect next in the second half of this year. We invite you and others at your organization to experience the report in full on JacksonLewis.com or listen to the podcast series on whichever streaming platform you turn to for compelling content. Thank you for joining.

Stephanie Adler-Paindiris
Principal and Litigation Co-Leader

We are excited to talk with you about the hottest topics in employment litigation. There have been a lot in the first half of this year. Today we're going to talk briefly about the United States Supreme Court's decision in the case of *Muldrow*, which was decided just this April [2024]. We're also going to touch upon the recently finalized regulations on the Pregnancy Worker Fairness Act, its harassment guidelines, and finally, the most recent decision that just came out, which eliminated the *Chevron* deference. So, lots to cover in this mid-year report.

Stephanie E. Satterfield

Principal and Litigation Co-Leader

Stephanie Adler-Pandiris, let's start with this: How do you predict the United States Supreme Court's decision in *Muldrow* will impact employment litigation moving forward?

ADLER-PAINDIRIS

That is an amazing question. It's also the million-dollar question. For those of you who may be not familiar with *Muldrow*, that was the decision that was issued by Justice Kagan and the Supreme Court, which basically held that a forced transfer could be an adverse employment action as long as the plaintiff could show some harm in the terms and conditions of the employment.

There was a split in the circuits with respect to what exactly constituted an adverse employment action and whether or not there needed to be tangible financial harm or whether or not it could be something short of that. And the Supreme Court very clearly held that as long as the plaintiff can show some harm, and that's in quotes, they can proceed with their Title VII case. It's been cited 51 times since April 17th when the decision was issued. And I think the case is going to have a massive impact on litigation.

There are many, many cases that have been brought by plaintiffs who are alleging a harm short of a termination, a demotion, a disciplinary suspension. And all of those cases typically were resolved on motions for summary judgment by court saying they just hadn't suffered enough harm to bring the claim. All of that has changed in two ways:

One is it's going to open the courthouse doors to many, many more types of complaints involving actions that employees find to be detrimental to their careers that fall short of these financial harms, but also in the space of diversity, equity and inclusion.

Interestingly, all nine justices agreed with the outcome, although for very different reasons. The conservative branch of the Supreme Court was really looking at this case as a way to attack diversity, equity and inclusion programs that maybe cause harm that fall short of, again, these financial tangible harms, but still alter the terms and conditions of employment. So, it's going to be very, very interesting to see how this comes out.

And just to give you an example, Stephanie, there was a case that was decided just two days ago in the Eighth Circuit, which is interesting because *Muldrow* came from the Eighth Circuit. And that was a COVID case where the plaintiff had requested an accommodation to be exempted from a COVID vaccine requirement. In that case, the healthcare organization granted that exemption, but required the employee to wear a certain name tag with a kind of a color coding that reflected that she was not vaccinated. And she was arguing that that harmed her in a way that she was segregated, she was kind of ostracized — and that was enough to show the some harm requirement.

Have you seen cases like this, Stephanie? And what's been your experience post-*Muldrow*?

SATTERFIELD

Yes, absolutely. I mean, you just hit the nail on the head. There are 51 cases citing *Muldrow* since April [2024]. That tells you how significant of a decision this is and how this is really going to change employment litigation and the landscape very significantly.

You'll recall, one of the main concerns with removing as a specific level of harm at standard from Title VII cases was this idea that the floodgates would be open to every type of claim any type of no matter how trivial a concern could be brought forward if the threshold of harm is removed or significantly reduced and it's clear that that's where this is headed right now in the short term after *Muldrow* as the lower court struggle with how to apply the new standard with balancing legitimate viable claims against this new standard that really doesn't have any kind of significant threshold of harm as a prerequisite.

The COVID case example you gave is an excellent example. In North Carolina, there was an opposite outcome in a COVID case where an employee alleged that a retailer who used a mask mandate and a vaccination bonus had violated Title VII because of his religious objections to both the mask and the vaccine. And he challenged that under *Muldrow*. The federal court in North Carolina held that there still wasn't a significant enough showing of harm. So, you still see the courts wrestling with what is the level of harm that has to be shown in order to move forward with the claim. We certainly are seeing *Muldrow* applied to transfer cases very regularly. That seems to be the easiest application where any case involving an alleged transfer is going to be enough of a harm to proceed after *Muldrow*.

ADLER-PAINDIRIS

Right after *Muldrow* was decided, the Supreme Court denied certiorari in a case in which a plaintiff was suspended pending an investigation into sexual harassment allegations about the plaintiff. And they were alleging that the suspension was due to a protected class. The Supreme Court actually denied cert in that case, but it really made me wonder. Our best practice typically in harassment cases, of course, is to remove the alleged harasser from the workplace pending an investigation. And in that case, that was held against the employer, or at least, you know, the allegation was that that affected the terms and conditions of that person's employment enough so that they could bring a Title VII claim.

You've got these clashing of rights and interests between the interest in protecting the employer in an employment setting to prevent harassment and discrimination. But then you also have *Muldrow* that basically says, if it impacts the terms and conditions in any way, as long as you can show some amount of harm. And again, that's going to be a question of fact. You can bring a claim. And I think you hit the nail on the head when you said, look, there's going to be vastly different interpretations of what "some harm" means.

And that's going to be no different than our body of law with respect to different areas of the country and how judges are viewing these claims. So, it's

going to be really, really interesting to see how that plays out. And of course, you know, just because you can show some harm and you don't get summary judgment, it may not mean that you can prove damages at trial. But of course, by the time you get to trial, you've already spent lots of money getting there. And then, of course, you're putting your hands into a jury of six people and who knows what they're going to do.

This is a really significant sea change for employers. And I think they really need to think about when they're making decisions that really could impact employees in any way, even short of suspensions, demotions, or terminations. In summary: Expect more litigation post-*Muldrow*.

SATTERFIELD

Turning topics to the EEOC's harassment guidance. The EEOC issued its final guidance updating its workplace harassment guidelines earlier this year, and also issued its final regulations on the Pregnant Workers Fairness Act earlier this year. The agency's been very busy. Stephanie, what do you see as the most controversial aspects of either the harassment guidance or the final regulations on the Pregnant Workers Fairness Act?

ADLER-PAINDIRIS

There's a lot of controversy in both. As far as the Pregnant Worker Fairness Act, there have been challenges to the abortion related accommodations. The definition of pregnancy-related conditions is quite broad in the guidance. Just recently, there was one by the US Conference of Catholic Bishops, as well as Catholic University, in two separate states. And the court did enjoin the abortion accommodation portion of the Pregnancy Worker Fairness Act in Louisiana and Mississippi. These are subject to attack and we're going to be seeing more of those in the coming days and months.

As far as the harassment guidelines, there is a lot in there that employers are kind of grappling with, with respect to things like gender identity, misgendering, things of that nature. It's really kind of a new world. Employers need to read it very carefully.

What do you think employers are going to grapple with in order to comply with these new harassment guidelines?

SATTERFIELD

In addition to the abortion requirements in both the harassment guidance and the Pregnant Workers Fairness Act final regulations, the EEOC takes the position that the employer must provide accommodations for elective abortions and that any type of harassment for elective abortions would be unlawful.

So, in addition to those provisions, which numerous states, as you mentioned, have challenged based on there being a conflict with state laws and with respect to abortions. In addition to those issues, in the harassment guidance in particular, it's interesting. The EEOC has set forth its position that employers

should not accommodate religious objections if religious objections would result in harassment based on any other protected characteristic. And the guidance specifically gives us an example, religious objections to transgender pronouns or use of restrooms. And so very clearly there, the EEOC is pointing to if an employee states that their religion prohibits them from using certain pronouns or creates a religious objection to transgender employees using certain restrooms, the EEOC states in the guidance that those religious objections do not need to be accommodated because they would create potential harassment of another protected group. So that's creating some uncertainty among employers about how to balance different employee stakeholder populations.

ADLER-PAINDIRIS

Again, it's creating this clash of interests between those who may want to assert religious objections and those who want to be in a workplace that they view as comfortable and non-harassing. And I think that kind of brings us to how courts are going to evaluate the clash of those conflicts in light of *Loper*, our most recent decision that came out, which basically reversed decades long precedent of the *Chevron* deference analysis tool to determine the intent of Congress and what statutes mean.

And, as we know with *Muldrow*, the court was very clear in saying, look, Title VII doesn't say that there has to be some significant or extra or financial impact in order to bring a claim. All you have to show is that you were treated differently in the terms and conditions of your employment. And so likewise, I think the court is going to say, look, we're not bound by the EEOC's guidance or even the regulations that the EEOC puts out or their guidance; instead, we're bound by the statute. And we as the court have the obligation under Article 3 to determine the intent of Congress. And if Congress did not delegate certain authorities to the EEOC to make these rulings, we're going to use our best judgment and our interpretive tools and figure out what it means.

So I think the *Loper* and *Relentless* decisions, which just came out a couple of days ago, which again, reversed the *Chevron* deference analysis,are going to be a game changer and is going to again, as we said with *Muldrow*, increase litigation. There's going to be a real aggressive effort to invalidate guidelines and regulations that administrative agencies pass that do not have a genesis in the statute. What do you think?

SATTERFIELD

Agreed. So far, the legal challenges against the final regulations for the Pregnant Workers Fairness Act have narrowly focused on the abortion issue and we haven't seen significant legal challenges to the final guidance on harassment. But we expect, in light of overturning *Chevron* last week, that we will see much more broad-based attacks on both the final regulations and the EEOC guidance, challenging the EEOC's ability to issue these proclamations that go far beyond the text of any statute.

So more to come on the overturning of *Chevron*. We'll have a separate podcast

on that but suffice it to say Stephanie and I have been watching some of the most significant legal challenges we've seen in employment litigation in a long time unfold this year. And we expect a very exciting second half of 2024 as we watch these issues play out in our courts.

ADLER-PAINDIRIS

I would agree. And I would just say the takeaway for employers is It's going to be very hard to predict outcomes, especially for 50-state employers, as you kind of navigate these issues throughout the country and throughout the various circuits. So, you're really going to want to focus on compliance and training and kind of the ways in which you can defend and manage decisions that your supervisors and managers are making every day.

I know that's not a great answer, but that is what we're giving you now. But we're excited to come back and kind of let you know how *Muldrow* is playing out, how *Loper* and *Relentless* are playing out, and all of the new challenges that you're going to be facing through the rest of 2024 and into 2025. Thanks so much for listening.

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