

# Mid-Year 2024: Discrimination + Harassment

July 24, 2024

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



Reasoning



Status



Key implications for employers



Hosts: **Tanya A. Bovée**, Principal, and **Michael D. Thomas**, Principal and Corporate Diversity Counseling Co-Leader

## MYR 2024: Private Sector DEI Initiatives Post ‘Muldraw’ and ‘Students for Fair Admissions’

Podcast

“What should employers do? They are trying to walk this fine line. Everything has changed and

nothing has changed. DEI initiatives are getting a lot more scrutiny. But what employers should and can do has not really changed that much. Employers should focus on inclusion and wellness for all employees — and they always should have.”

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## Related readings



**EEOC Enforcement Guidance on Workplace Harassment: Covered Bases and Causation**



**EEOC Enforcement Guidance on Workplace Harassment: Impact on a Term, Condition or Privilege of Employment**



### **EEOC Enforcement Guidance on Workplace Harassment: Liability**



### **Gender Identity Protections: Transgender Harassment, Reverse Discrimination Cases Allowed by Courts**



### **U.S. Supreme Court: Alleging Discriminatory Transfer Is Sufficient Harm to Bring Title VII Claim**



## EEOC VC Samuels' Keynote at Workplace Horizons Addresses PWFA, AI, Muldrow & More



## EEOC Commissioner Andrea Lucas Discusses Workplace DEI




## AG Paxton's DEI Investigation and 10 DEI Steps to Take



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