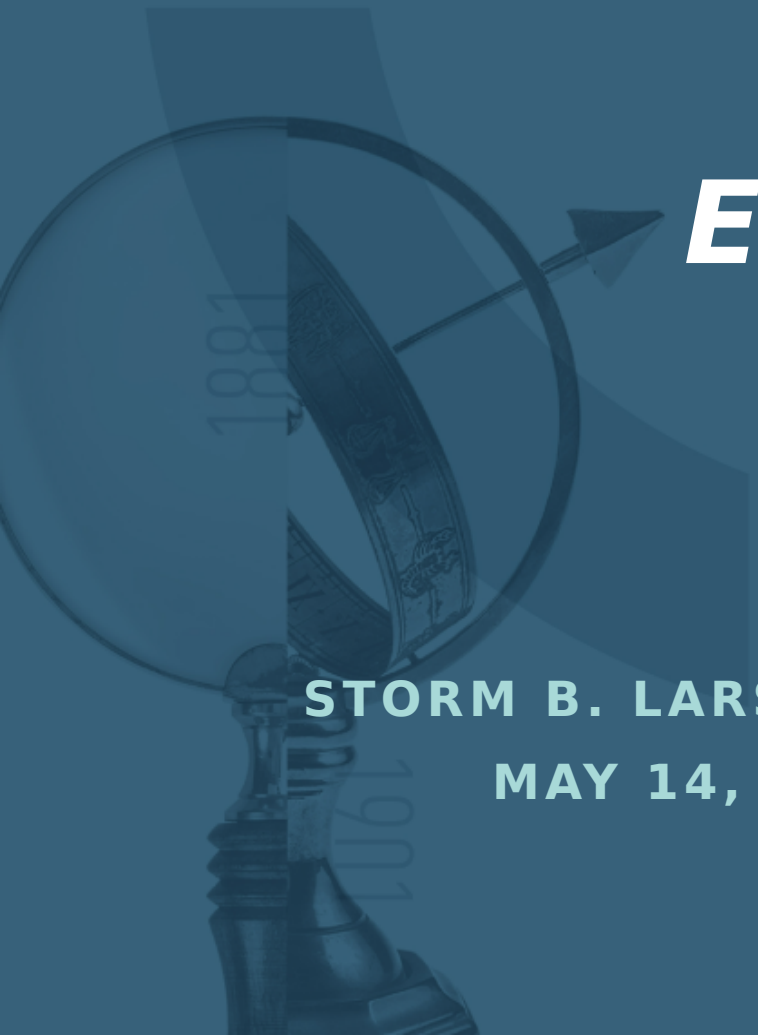


Sauk Columbia SHRM Employment Law Update May 2025

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Discrimination Cases

Notable U.S. Supreme Court Decision on Discrimination

- *Muldrow v. City of St. Louis* – employees can point to lateral transfers as discrimination if the transfer results in changes that cause “some harm” to the employee, and the employee can prove the transfer was based on a protected trait, such as race, age, or gender.

The Facts

- Jatonya Muldrow served as a plainclothes officer with the St. Louis Police Department in the specialized Intelligence Division and was assigned to work with the FBI on certain cases. Although Muldrow was by all accounts a well-performing employee, a new supervisor replaced her with a male employee.
- Muldrow was transferred to a different job with the same pay and rank. However, other aspects of her job were changed or taken away from her. For example, she was now a uniformed officer, she was assigned more mundane tasks, she no longer had access to an unmarked take-home police vehicle, and she was now required to work weekends on a rotating schedule.
- Muldrow sued and alleged that these changes constituted gender discrimination because she did not like the changes even though her pay and rank remained the same.

The Takeaways

- Moving forward, to prove discrimination under Title VII, an employee must only show that a complained-of action caused "some harm" to an employee's identifiable terms and conditions of employment. The harm does not have to be significant.
- The Muldrow decision is a relatively sweeping ruling because:
  - (1) nearly anything related to the workplace could be classified as a term or condition of employment. The courts have long held that "terms and conditions" are not limited to economic or tangible matters, and
  - (2) many actions taken by employers could be deemed to cause "some harm" to an employee.
- The Court held that if she could prove her allegations, she "was worse off several times over" with respect to certain terms and conditions of the job. This ruling is expected to make it easier for plaintiffs to prove discrimination claims and will likely lead to an increase in claims brought by employees against their employers.

Applying the New Test

- *Thomas v. JBS Green Bay, Inc.*, (7th Cir. 2024)
  - Thomas alleged that his employer, JBS Green Bay, engaged in racial discrimination in violation of Title VII when it delayed his training on a particular machine, denied his request for vacation time (while granting similar requests by other workers) and transferred him to a different shift (which impeded his parenting schedule/ responsibilities).
  - The district court, which issued its opinion before the Supreme Court's ruling in *Muldrow v. St. Louis*, (2024), dismissed Thomas's complaint for failure to allege "significant" or "material" injury. Applying *Muldrow*, the Seventh Circuit held that Thomas sufficiently stated a claim for relief because his complaint showed "some harm" concerning a term or condition of his employment.
  - *Thomas* illustrates how, in the wake of Muldrow, "some harm" with respect to terms, conditions, or privileges of employment—no matter how significant—is enough to demonstrate a required element of a Title VII claim.
  - As suggested by *Muldrow*, this case supports that a greater number of Title VII lawsuits are

Civil Offenses and Arrest and Conviction Record Discrimination

- Under the Wisconsin Fair Employment Act (WFEA) employers are severely restricted in how they can use arrest record information in the hiring process. Arrest record is defined broadly.

Oconomowoc Area School District v. Gregory L. Cota

- The Oconomowoc Area School District terminated Jeffrey and Gregory Cota because it believed they improperly retained money they received from selling District scrap metal. The District conducted its own investigation but did not determine guilt. Then, the District spoke to the prosecutor who told the District the Cotas did it and that the prosecutor were going to get a conviction. At that point, the District terminated the Cotas. There is no indication that either man was ever questioned or physically apprehended by a law enforcement authority.
- The Cotas challenged their terminations by filing a charge with the Wisconsin Equal Rights Division and contended that their terminations constituted unlawful arrest record discrimination because of the catch-all language “other offense” in the WFEA’s definition of “arrest record.”
- The Wisconsin Court of Appeals reversed the lower decision and held that the WFEA’s definition of “arrest record” only extended to offenses which were criminal and not civil in nature.
- The Wisconsin Supreme Court reversed and clarified that civil offenses can be the basis for a claim of arrest record discrimination under the WFEA, and that the District used an arrest record (the information from the prosecutor) to unlawfully terminate the Cotas.

Anderson v. Street, (7th Cir. 2024)

- Anderson worked as a hostess at Chicago restaurant, Mott Street. The restaurant's owners observed she was rude toward customers, responded to questions curtly, avoided eye contact with customers, and answered the phone without an appropriate greeting. At least once a month, she had a negative interaction with a customer that required a restaurant owner to intervene. The restaurant also received eight negative Yelp reviews about her, including one in September 2017. The restaurant terminated Anderson two days after receiving the September 2017 review.
- After her termination, Anderson brought suit, alleging sexual harassment, sex discrimination, and retaliation under Title VII. On appeal, the Seventh Circuit found that Anderson's evidence of sexual harassment—that a coworker touched her inappropriately three or four times, that one of the restaurant's owners called her a "bitch," and that another owner instructed her to wear form-fitting clothing—lacked both "frequency and severity."
- Likewise, Anderson's sex discrimination claim failed because she could not rebut the restaurant's legitimate reasons for terminating her.

Wage and Hour Law

Rounding Time: Laverenz v. Pioneer Metal Finishing, LLC

- Laverenz alleged that her employer's practice of paying employees based on software that rounded punch times to the nearest quarter hour—rather than "the raw time in and out"—unlawfully deprived them of compensation under the Fair Labor Standards Act. Laverenz moved for conditional certification of a class action for all similar employees.
- While time rounding can be appropriate under the FLSA, it is not appropriate if it favors the employer.
- There is a trend in favor of litigation against rounding practices.
- Organizations that use timekeeping software might consider moving on from rounding practices, since "raw time" can be calculated by computer. Organizations that are hesitant to do so because of cost, might be proving the potential point that the rounding practice favors the employer, which violates the FLSA.
- Organizations still using time-recording sheets, might want to shift to a more precise mention. A timesheet that shows exactly eight hours worked every single day, just doesn't pass the smell test.

What is “Retaliation”?

- Retaliation claims are generally the most common labor and employment claims. One key reason for this is because an employee is legally protected from retaliation for so many reasons.
- Here is an easy example: a company can’t retaliate against an employee for filing an EEOC claim against the company. However, retaliation claims include a wide range of protected activities. The scope of retaliation protection under Wisconsin law was the subject of a recent Wisconsin Court of Appeals decision, *Radtke v. LIRC* (2025).
- An employee claimed her employer unlawfully retaliated against her by terminating her after she requested overtime pay that she believed she was owed. The statute at issue required her to “attempt to enforce any right” under the law in order to receive legal protection from retaliation. The court concluded that merely asking an employer for overtime compensation did not constitute an “attempt to enforce any right.” Enforcement typically involves actions like filing a formal complaint or seeking government intervention.
- The employee did not file a formal complaint, which would have constituted an attempt to enforce a right, until after she was terminated. Therefore, she could not assert a retaliation claim. However, she was still able to move forward with her underlying overtime claim.

FMLA/ADA/WC

Hubbard v. Illinois State Board of Education (C.D. IL, 2024)

- Employees do not have to use “magic words” to put employers on notice that they have an FMLA-qualifying situation. The employer is supposed to recognize reasonably clear information that would indicate a serious health condition and then assist the person in getting the proper forms and understanding the FMLA process.
- However, the employee still must provide “sufficient notice” that would indicate a serious health condition.
- This was not the case when an employee called in absent for several days, simply stating “I’m sick,” “I won’t be in today” or “I’m feeling ill.” The employer counted these as unexcused absences and proceeded to discipline the employee.
- The employee then provided a late, after-the-fact request for FMLA, and filed an FMLA suit when the discipline was not rescinded. The court found that the call-in information was too vague to place the employer on notice, that an FMLA-qualifying

An Employee's Work-Related Injury May Be a Serious Health Condition and/or a Disability

- If a workplace injury is covered by both the FMLA and the ADA, then the employer may be required to hold open the employee's job even after the expiration of the FMLA. The employer will have to determine whether additional leave will reasonably accommodate the employee and will not cause undue hardship.
- A continued medical leave of absence may be a reasonable accommodation if it will assist the employee to achieve recovery and ultimately return to work.

A Worker's Compensation Injury With Serious, Long-Term Restrictions

- If the ADA applies to a worker's compensation injury, the employer must hold open the job of an employee who is temporarily unable to work unless the employer can show undue hardship.
- An employee who is determined to be "totally disabled" as the result of a worker's compensation injury must still be considered for other employment under the ADA.
- The long-term restrictions might also qualify as a serious health condition for FMLA purposes.

A Worker's Compensation Injury Causing a Temporary Impairment

- A temporary impairment probably will not qualify as a disability.
- If an employee's work-related injury is also a serious health condition, the employer may not terminate the employee during any FMLA protected time.
- If at the end of the employee's FMLA entitlement, the employee still cannot return to his/her job and the employee does not have a disability, then the employer may terminate the employment.
- During a period of leave due to a worker's compensation injury that also qualified as a serious health condition, the employee may substitute his earned paid time to supplement worker's compensation (or short-term disability) up to 100% of his regular wage.

A Worker's Compensation Injury Causing Extreme Impairment

- If restrictions are so extreme that they cannot perform any available position with or without accommodation, they might not qualify for accommodations for a disability.
- The law does not require employers to grant what are essentially indefinite leaves of absence as an accommodation. Once there is no anticipated return to work date, or leave is ongoing or undefined, an employer is generally permitted to terminate the employment relationship.
- However, the law is clear that employers cannot automatically "replace" an employee in his/her job or terminate the employee when the employee cannot return to work at the conclusion of an FMLA leave. Well before the end of an FMLA leave, an employer must be considering whether the employee's medical condition may qualify as a disability and if so, commencing the interactive process with the employee to determine the nature and anticipated duration of any further absence and other accommodations that might be needed.

Executive Orders

Executive Orders

- Executive Orders do not carry the force of law. However, they can direct federal agencies.
- For example, under Title VII, employees are protected from discrimination based on sexual orientation or gender identity per the 2020 *Bostock* decision by the U.S. Supreme Court.
- President Trump issued an executive order on “Gender Ideology Extremism” declaring that “It is the policy of the United States to recognize two sexes, male and female.”
- This does not change the law as interpreted by the U.S. Supreme Court.
- However, it could mean that the EEOC decides not to enforce gender identity discrimination cases. In practice, this might just mean that the EEOC will issue a standard Right to Sue Notice to the complainant, and the case will end up proceeding through the state and federal court system, rather than the EEOC process.
- The law doesn’t change, but the process might.

Immigration and Customs Enforcement (ICE)

- ICE agents may not enter or search the non-public areas of a business unless: (1) someone present on the property consents to the entry and search, or (2) the agents present a judicial warrant.
- For a judicial warrant to be legally valid, it must satisfy two essential requirements: first, it must bear the signature of a federal or state judge (administrative or immigration judge signatures are not sufficient), and second, it must explicitly identify the specific school location and the precise individuals or records being sought. The warrant may be highly specific to a named individual and their employment records, or it may give agents broad power to enter employer premises, block exits, and interview employees to verify identity and employment authorization.
- Employers should have a designated representative to manage investigations, and they should not encourage or facilitate any employees' exit during a raid.
- Employees who meet an ICE agent at the door may respond, "I can't give you permission to enter. Please wait here while I get my employer."
- Employers may ask for a warrant and may deny an ICE agent's entry into private spaces without a judicial warrant. If a valid warrant is presented, employers should promptly provide access as required by the language of the warrant, but they may refuse access to spaces not listed on the warrant.
- Contact legal counsel immediately if ICE arrives at your organization.

DE&I Issues In The Workplace

- President Trump issued an executive order called, “Ending Radical And Wasteful Government DE&I Programs And Preferencing.”
  - This order technically doesn’t apply to the private sector, only the executive branch of the federal government.
  - However, it encouraged businesses to eliminate DE&I programs.
  - The Order does not clearly define DE&I programs.
- The order has been challenged in court. There is currently an injunction in place blocking its enforcement, but these cases are being appealed and further reviewed in multiple courts, making it confusing to track.
- But, what does the law say about DE&I, regardless of

Going too Far

- *Duvall v. Novant Health, Inc.*, (4th Cir. 2024).
- A company rolled out a diversity, inclusion, and equity (DE&I) initiative aimed at achieving racial and gender diversity in leadership positions.
- A white man was terminated as a Senior VP and replaced with a woman of color. He sued claiming racial discrimination.
- The terminated employee won because he proved that his performance was exceptional, and he was replaced with a lower performer.

Discomfort is Not Harassment

- *Young v. Colorado D.O.C.*, (10th Cir. 2024).
- A correctional worker filed a lawsuit claiming that the mandatory DE&I training he had to participate in created a hostile work environment for him based on his race (white).
- The employee lost. The court held that he failed to adequately allege that the harassment was so severe or pervasive that it altered the terms of his employment to such an extent that it created a hostile environment based on race.

Vavra v. Honeywell International, Inc., (7th Cir. 2024).

- Honeywell’s President, Mr. Waldron, sent an email entitled “Continue to Fight for Social Justice” to all of his employees, including Charles Vavra. In the email, Mr. Waldron remarked a grand jury's decision to not indict the police officers involved in the death of a Black woman, noting that he “can only imagine how our Black colleagues are feeling” and stressing, “Racial bias is real. Don't kid yourself. Each of us has unconscious bias within us.”
- Mr. Waldron then said that the unit would “take tangible actions to make a difference,” including “listening sessions,” “upping our game when hiring, ensuring 100% of the time that the interview panel and candidates are diverse,” and “other actions.” In conclusion, he remarked, “My hands and heart are open to each of our Black, Hispanic, Asian, and LGBTQ colleagues. I stand with you.”
- That November, Honeywell's Diversity, Equity, and Inclusion office implemented an Unconscious Bias Awareness initiative. The initiative comprised mandatory, online unconscious bias training, which all Honeywell employees needed to complete by February 25, 2021. The

Vavra v. Honeywell International, Inc., (7th Cir. 2024), con't.

- Mr. Vavra never clicked the link to access the training. Between November and February, Mr. Vavra was sent automated reminders, which became daily reminders five days before the February deadline. After the deadline passed, the daily reminders continued, but Mr. Vavra still did not complete the required training. Several Honeywell individuals reached out to Mr. Vavra personally and requested that he do the training.
- Chris Maines, the Vice President of Engineering, also met with Mr. Vavra and encouraged him to complete the training, emphasizing that failing to do so would be considered insubordination.
- Mr. Vavra never completed the training and did not personally know its content. Vavra was terminated. He sued alleging retaliation.
- The court concluded that Vavra had no proven retaliation because he had not accessed the training videos and therefore had no firsthand knowledge of what they contained. The court also concluded that there was no connection between his termination and legally protected opposition activity because Honeywell had addressed all of Vavra's concerns and investigated his complaints. Honeywell's decision was based on his refusal to follow company orders.

Other Considerations

- The concepts of diversity, equity, and inclusion are legal, but that doesn’t mean they are required.
- Be careful with word choice and job titles regarding DE&I initiatives given the scrutiny of this area.
- Each organization has to assess their own risk. For example, organizations taking federal money might face additional government scrutiny.
- Another executive order eliminated affirmative action for federal contractors, but contractors might still be subject to state and local requirements regarding affirmative action initiatives.
- Importantly, affirmative action and DE&I are not interchangeable terms.

Questions?

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