WHEN IS DISCRIMINATION HARMFUL?

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ABSTRACT

In Muldrow v. City of St. Louis*, the Supreme Court held that Title VII does not require a plaintiff to establish material harm to prove employment discrimination. Instead, any action that is negative and affects a term, condition, or privilege of employment is sufficient if the employer took the action because of a protected trait.*

At first glance, Muldrow *appears to be a middling case focused on a technical aspect of discrimination law. This Article argues that* Muldrow *has the potential to be one of the most important modern discrimination cases. If taken to its natural conclusion it will force courts to answer a fundamental question: when is discrimination harmful? It also has the potential to upend the structure of disparate treatment law by unifying harassment and non-harassment disparate treatment doctrine.*

The case is also critical for understanding contemporary debates about textualism. Muldrow *relied on a textualist methodology. The case illustrates how textualism plays an essential role in interpreting discrimination statutes. It also illuminates textualism's limits. This conversation about textualism's deficits is especially salient given scholars' recent enthusiasm for progressive textualism.*

This Article reveals the theoretical and practical issues facing district and appellate courts as they contend with Muldrow*. It provides the first comprehensive account of the post-*Muldrow *case law. It predicts decades of chaotic case law, as well as the exciting possibility that courts might finally unify discrimination harm jurisprudence.*

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INTRODUCTION

In *Muldrow v. City of St. Louis*, the Supreme Court held that Title VII does not require a plaintiff to establish material harm to prove employment discrimination.[1] Instead, any action that is negative and affects a term, condition, or privilege of employment is sufficient, if the employer took the action because of a protected trait.[2]

At first glance, *Muldrow* appears to be a middling case focused on a technical aspect of discrimination law. This Article argues that *Muldrow* has the potential to be one of the most important modern discrimination cases. If taken to its natural conclusion, it will force courts to answer a fundamental question: when is discrimination harmful? It also has the potential to upend the structure of disparate treatment law by unifying harassment and non-harassment disparate treatment doctrine.

1. 601 U.S. 346, 347 (2024).
2. *Id.* Other Title VII prerequisites would also need to be met, such as suing an employer who falls within Title VII's coverage and exhausting the administrative process. 42 U.S.C. § 2000e-2(a) (describing when an employer violates the statute); 42 U.S.C. § 2000e-5(b), (e) (describing process of filing a charge of discrimination).

Even though President Lyndon Johnson signed Title VII into law more than sixty years ago, the courts still have not produced a theoretically or practically successful vision of what constitutes discrimination harm. This assertion seems incredible, but it is evidenced by the struggle that federal district and appellate courts are facing as they try to apply *Muldrow* to actual cases.

Muldrow answered the question of whether harm had to be material to violate Title VII, but it failed to answer two important questions. First, what counts as harm? Second, should the concept of harm be uniform across Title VII? Current doctrine is muddled, with different harm standards for harassment, non-harassment disparate treatment, and retaliation.[3]

The case also is an important one for understanding contemporary debates about textualism. *Muldrow* relied on a textualist methodology. It illustrates how textualism plays an important role in interpreting discrimination statutes. It also illustrates textualism's limits. This conversation about textualism's deficits is especially salient given scholars' recent enthusiasm for progressive textualism.[4]

During the *Muldrow* oral argument, the lawyers and Justices grappled with whether it would violate Title VII for an employer to give women pink pens and men blue pens.[5] *Muldrow* provides no definitive way for courts to answer this question. Nor did it provide guidance for how to answer more realistic questions. Does a negative evaluation given because of a protected trait count? What about constructive criticism, or placing an employee on a performance improvement plan? Federal district courts and appellate courts are struggling with these questions now and will struggle with them for decades.

In *Muldrow*, the Court failed to grapple with whether the concepts of being negative and affecting terms, conditions, or privileges contained enough substance to perform the important task of defining the metes and bounds of discrimination harm. Post-*Muldrow*, judges will need to carefully consider when statutory text provides an answer and when it does not. In

3. *See infra* Section III.B. (discussing separate strands).

4. *E.g.*, Erik Encarnacion, *Text Is Not Law*, 107 IOWA L. REV. 2027, 2034–35 (2022); Katie Eyer, *Disentangling Textualism and Originalism*, 13 CONLAWNOW 115, 129 (2022); Anuj C. Desai, *Text Is Not Enough*, 93 U. COLO. L. REV. 1, 49 (2022); Mitchell N. Berman & Guha Krishnamurthi, Bostock *Was Bogus: Textualism, Pluralism, and Title VII*, 97 NOTRE DAME L. REV. 67, 98 (2021); Marc Spindelman, Bostock*'s Paradox: Textualism, Legal Justice, and the Constitution*, 69 BUFF. L. REV. 553, 557–58 (2021); Nelson Lund, *Unleashed and Unbound: Living Textualism in* Bostock v. Clayton County, 21 FEDERALIST SOC'Y REV. 158, 167 (2020); Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 281 (2020); Cary Franklin, *Living Textualism*, 2020 SUP. CT. REV. 119, 123 (2020).

5. Transcript of Oral Argument at 14–15, Muldrow v. City of St. Louis, 601 U.S. 346 (2024) (No. 22-193).

some instances, the concept of harm rests on judgments that cannot be answered through the statutory text alone.

This is not a criticism of the statute. As emphasized throughout this Article, when Congress created Title VII robust forms of modern textualism did not exist, and textualism was not the main interpretive methodology.[6] Congress would not have expected courts to construe the text through the lens of modern textualism. Instead, Title VII's text provides broad outlines, with some areas of specificity. Reading Title VII as a text that was meant to be understood primarily through modern textualism may cause courts to miss the premise that Congress *expected* the Equal Employment Opportunity Commission (EEOC) and courts to fill in the statutory gaps through a purposivist lens and without a strong textual guide.

This Article reveals these theoretical and practical issues, highlighting the many questions facing district and appellate courts as they contend with *Muldrow*. It provides the first comprehensive account of the post-*Muldrow* case law. It predicts decades of chaotic case law.

The practical dilemmas are vast. Litigants will ask courts to review every possible negative consequence that can happen in a workplace to determine whether it meets the *Muldrow* standard. This process has already started with inconsistent results, showing that *Muldrow*'s holding does not provide enough heft to resolve many real-world problems.[7] *Muldrow* even failed to answer basic questions: whether the negative consequence must be negative to the employer or to the employee and whether it must be objectively harmful or both objectively and subjectively harmful. Textualism provides no path to answering these questions.

Most importantly, *Muldrow*'s reasoning suggests that the severe or pervasive standard may no longer be appropriate in harassment cases.[8] Although there are ways to reconcile this standard with *Muldrow*, courts already are and will continue to face questions about whether it is appropriate to continue to divide discrimination law into different theories of discrimination. Even if courts maintain the current severe or pervasive standard for harassment, litigants will peel off individual employment actions and plead them not as harassment, but as non-harassment discrimination. Thus, even if the courts maintain the harassment standard, it may be practically or partially eviscerated if litigants choose the non-harassment path.

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6. *See* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 19–20 (2006) (discussing changes in interpretive methodologies over time).

7. *See infra* Section II.

8. 601 U.S. 346, 347 (2024) (noting that the main provision of Title VII does not require materiality).

The practical contests that spawned after *Muldrow* reveal a core issue with discrimination law. Despite decades of work by scholars to define what counts as harm, the courts have not definitively answered this important question. As shown throughout this Article, textualism is not capable of providing a complete answer.

Additionally, even if a person believed that textualism provided more meaning, it is difficult, if not impossible, to untangle Title VII from its pre-textual foundations. Title VII is like an iced cake, with the layers built of non-textual cake and with a new veneer of textualist icing. Claiming Title VII as a purely textualist enterprise will require re-baking the cake.

The *Muldrow* picture is not entirely bleak. Textualism was capable of answering the materiality question, and the holding in *Muldrow* may encourage courts to unify aspects of harm doctrine that developed in separate strands of jurisprudence. Additionally, the textualist focus should encourage courts to consider 42 U.S.C. § 2000e-2(a)(2), a Title VII provision that also addresses what counts as harm under Title VII that courts have largely ignored in the disparate treatment context.[9]

Part I describes the *Muldrow* holding. Part II provides the first account of the issues *Muldrow* left unresolved and how lower courts are struggling to define harm. It provides the first comprehensive picture of the post-*Muldrow* world, including a framework for categorizing the problems facing the courts. Part III discusses the limits of textual analysis related to harm and the problem of marrying current models of textualist inquiry onto statutory regimes that the courts originally approached through other interpretive lenses. These lenses drew on the purposes of discrimination law, the expertise of the EEOC, descriptions of discrimination experienced by workers, as well as the rich scholarly literature that posits various answers to the question of what counts as harm. Part IV identifies positive paths forward post-*Muldrow*.

I. BACKGROUND

On its face, *Muldrow* offers a simple test for determining whether a consequence counts as discrimination harm.[10] This section explores the *Muldrow* opinion in detail.

In *Muldrow*, Sergeant Latonya Muldrow alleged that the St. Louis Police Department transferred her to a different unit because she was a woman and that the transfer violated Title VII.[11] Muldrow's rank and pay remained the

9. 42 U.S.C. § 2000e-2(a)(2).
10. 601 U.S. at 347.
11. *Id.* at 350.

same after her transfer, but her "responsibilities, perks, and schedule" changed.[12]

The trial court granted summary judgment in favor of the employer, finding that Muldrow could not state a claim under Title VII because the transfer was not a significant enough change to her employment.[13] This outcome was consistent with the circuit's case law at the time, and the United States Court of Appeals for the Eighth Circuit affirmed the grant of summary judgment.[14] The Supreme Court granted certiorari to explore whether harm materiality requirements imposed by lower courts were consistent with Title VII.[15]

The Court held that a plaintiff could prevail on a Title VII claim if the transfer constituted a disadvantageous change in the "terms, conditions, or privileges" of employment.[16] The Court held that a plaintiff must show "some harm," but rejected the idea that a plaintiff must prove significant harm.[17] In rejecting a materiality requirement, the Court noted, "Title VII's text nowhere establishes that high bar," Title VII harm should not be understood in a narrow, contractual sense and the statutory language does not require economic harm.[18]

The analysis in *Muldrow* started with the text of Title VII.[19] Facially, *Muldrow* appears to be a textualist opinion and to understand it, it is necessary to consider the text of the discrimination statutes. Federal employment discrimination law is primarily grounded in five statutes: Title VII, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), 42 U.S.C. § 1981 (section 1981), and the Pregnant Workers Fairness Act (PWFA).[20] Title VII is the cornerstone federal employment discrimination statute. Title VII prohibits an employer from discriminating against a worker because of race, sex, national origin, color, or religion.[21]

Under Title VII, it is an unlawful employment practice for an employer to "refuse to hire," to discharge, or "otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges

12. *Id.* at 351.
13. *Id.* at 352.
14. *Id.*
15. *Id.* at 353.
16. *Id.* at 354.
17. *Id.* at 350.
18. *Id.*
19. *Id.* at 354.
20. 42 U.S.C. § 2000e-2(a) (Title VII's primary operative provisions); 29 U.S.C. § 623(a) (same for ADEA); 42 U.S.C. § 12112(a)–(b) (same for ADA); 42 U.S.C. § 2000gg-1 (same for PWFA).
21. 42 U.S.C. § 2000e-2(a).

of employment, because of such individual's race, color, religion, sex, or national origin."[22]

Title VII also has a second subpart that makes it illegal to "limit, segregate, or classify his employees or applicants . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status" because of a protected trait.[23] This provision also further articulates cognizable discrimination harm, although the Court did not address this portion of Title VII in *Muldrow*.

The ADEA contains similar language,[24] and the ADA contains similar concepts, although not always stated in the same language.[25] Section 1981 does not use similar language; however, the courts have often used the same frameworks to analyze disparate treatment claims under section 1981 and Title VII.[26] The PWFA borrows some statutory language from the ADA, and it is the only statute that expressly uses the term "adverse action."[27] Each of these statutes also prohibit retaliation.[28]

In *Muldrow*, the Supreme Court focused on the terms "discriminate against" a person in the "terms, conditions or privileges" of employment.[29] Title VII does not define either of these terms. Unfortunately, the Court failed to acknowledge that while this text does not contain a materiality requirement, the words within Title VII do not provide a complete picture of what actions create a cognizable claim.

In *Muldrow* the Court relied heavily on its own past interpretation of Title VII's language.[30] Citing *Oncale v. Sundowner Offshore Services, Inc.*,[31] the Court held that Title VII's language required Muldrow to establish "some disadvantageous" change to an employment term or

22. 42 U.S.C. § 2000e-2(a)(1).
23. 42 U.S.C. § 2000e-2(a)(2).
24. 29 U.S.C. § 623(a).
25. 42 U.S.C. § 12112.
26. *See* Kim v. Nash Finch Co., 123 F.3d 1046, 1056 (8th Cir. 1997). *But see* Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 589 U.S. 327, 332 (2020) (holding a plaintiff is required to establish "but for" cause in section 1981 cases).
27. 42 U.S.C. § 2000gg-1. Title VII's second operative provision contains the words "adversely affect." 42 U.S.C. § 2000e-2(a)(2).
28. 42 U.S.C. § 2000e-3(a); 29 U.S.C. § 623(d); 42 U.S.C. § 12203(a); 42 U.S.C. § 2000gg-2(f). While 42 U.S.C. § 1981 and the ADEA as applied to federal employees have no expressed non-retaliation provisions, both statutes implicitly prohibit retaliation using standards similar to the expressed statutory protection. *See* CBOCS W., Inc. v. Humphries, 553 U.S. 442, 446 (2008); Gomez–Perez v. Potter, 553 U.S. 474, 479 (2008).
29. 601 U.S. 346, 354 (2024).
30. *Id.*
31. 523 U.S. 75, 80 (1998).

condition.[32] Then citing *Bostock v. Clayton County*,[33] the Court interpreted the words "discriminate against" to mean "differences in treatment that injure."[34]

The Court then returned to the statutory language to connect the two concepts noting that the "worse treatment" must affect the "terms or conditions" of employment.[35] Citing cases from the harassment context, the Court noted that "terms or conditions" do not just mean contractual terms and that the words are not confined to economic harms.[36]

The Court specifically rejected a significance requirement, reasoning that to do so added words to "the statute Congress enacted," imposed "a new requirement on a Title VII claimant," and demanded "something more" of a plaintiff "than the law as written" required.[37]

The Court then explored how requiring materiality had resulted in inconsistent outcomes, with whether harm resulted being left to the "eye of the beholder," and with the courts failing to recognize certain disadvantages as constituting cognizable harm.[38] In exploring cases decided using a materiality requirement, the Court explained how the courts "rewrote Title VII, compelling workers to make a showing that the statutory text does not require."[39]

The Court rejected applying the retaliation harm standard to discrimination cases, reasoning that the retaliation provision contains different language than the discrimination provision.[40]

Finally, the Court rejected the city's appeal to the floodgates of litigation, noting that plaintiffs would still need to establish that discrimination occurred because of a protected trait.[41] In doing so, the Court noted:

> But even supposing the City's worst predictions come true, that would be the result of the statute Congress drafted. As we noted in another Title VII decision, we will not "add words to the law" to achieve what some employers might think "a desirable result." Had

32. *Muldrow*, 601 U.S. at 354.
33. 590 U.S. 644, 681 (2020).
34. *Muldrow*, 601 U.S. at 354–55.
35. *Id.*
36. *Id.*
37. *Id.* at 355.
38. *Id.*
39. *Id.* at 356. In the retaliation context, the Court held that actions must be materially adverse and defined these words to mean that a reasonable worker would be dissuaded from complaining about discrimination. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68–69 (2006).
40. *Muldrow*, 601 U.S. at 357–58.
41. *Id.* at 358. The opinion contains one cryptic sentence: "And in addressing that issue, a court may consider whether a less harmful act is, in a given context, less suggestive of intentional discrimination." *Id.*

> Congress wanted to limit liability for job transfers to those causing a significant disadvantage, it could have done so. By contrast, this Court does not get to make that judgment.[42]

The Court then turned to the facts of the case before it. It noted that if the plaintiff's facts related to her transfer were preserved and supported, her transfer would meet Title VII's harm standard.[43] The Court vacated the judgment below and remanded the case for further proceedings, while recognizing that the plaintiff may not have fully preserved her arguments related to harm.[44]

The Court explicitly noted that *Muldrow* "changes the legal standard" in any circuit that had required that harm be significant, material, or serious.[45] The Court explicitly stated that because of the change "many cases will come out differently."[46] It then provided examples of cases that would have different results post-*Muldrow*, including an engineer who was transferred to a new job site in a wind tunnel, a person transferred to a night shift, and a transfer that resulted in less supervisory authority.[47]

Justice Alito concurred in the judgment but predicted that the standard enunciated by the Court was not helpful.[48] Justice Alito believed that the words "harm" and "injury" contained a materiality requirement and predicted that lower courts would alter the words of the legal framework but continue to reach outcomes similar to those reached pre-*Muldrow*.[49]

Justice Kavanaugh also concurred in the judgment, and his concurring opinion raises one of the knotty theoretical problems remaining for the federal courts post-*Muldrow*.[50] Justice Kavanaugh recognized that the harm of discrimination is not shown by the consequence, but rather from the act of being treated differently because of a protected trait.[51] He recognized, "[t]he discrimination is harm."[52] Justice Kavanaugh disagreed with the some harm requirement, but concurred in the judgment, noting that most plaintiffs would be able to establish some harm "whether in money, time, satisfaction, schedule, convenience, commuting costs or time, prestige,

42. *Id.* (internal citations omitted).
43. *Id.* at 359.
44. *Id.* at 359–60.
45. *Id.* at 356 n.2.
46. *Id.*
47. *Id.* at 355–56.
48. *Id.* at 362 (Alito, J., concurring). Justice Thomas also filed a concurring opinion noting that it was not clear the Eighth Circuit applied a heightened standard but agreed with the outcome because of the possibility that the appellate court did so. *Id.* at 360–62 (Thomas, J., concurring).
49. *Id.* at 363 (Alito, J., concurring).
50. *Id.* at 363 (Kavanaugh, J., concurring).
51. *Id.* at 364–65.
52. *Id.* at 365.

status, career prospects, interest level, perks, professional relationships, networking opportunities, effects on family obligations, or the like."[53] He predicted "that the Court's approach and my preferred approach will land in the same place and lead to the same result in 99 out of 100 discriminatory-transfer cases, if not in all 100."[54]

Muldrow clarifies one aspect of discrimination harm doctrine. Courts may not attach a materiality requirement in discrimination cases. While this textual approach to Title VII answers the materiality question, as the next section demonstrates, it does not resolve all harm questions raised in discrimination cases.

II. CONTESTED GROUND

Post-*Muldrow* courts are being bombarded with cases asking them to evaluate various harms under the new standard.[55] As examples, courts are being asked to consider whether the following count as harm under the discrimination statutes: negative evaluations or write-ups,[56] an evaluation of

53. *Id.*

54. *Id.*

55. Courts also are being asked to consider how and whether *Muldrow* applies to other discrimination statutes. Courts have applied the adverse action idea to section 1981 employment discrimination claims with very little discussion about whether differences in statutory language result in different coverage. *See, e.g.*, Paradoa v. Phila. Hous. Auth., 610 F. App'x 163, 166 (3d Cir. 2015); Harper v. Ga.-Pac. Corp., 67 F. Supp. 2d 909, 913 (W.D. Tenn. 1998). By its terms, section 1981 is not limited to just the employment context. In *Babb v. Wilkie*, the Supreme Court held that in ADEA federal sector cases the entire process (not just the outcome) must be free from discrimination. 589 U.S. 399 (2020). Courts are also determining whether *Muldrow* applies in the federal-sector context and to state law claims. *See* Preciado v. Recon Sec. Corp., No. EP-23-CV-00052, 2024 WL 3512081 (W.D. Tex. July 23, 2024) (state law); Mitchell v. Garland, No. 23-2412, 2024 WL 3251217 (D.D.C. July 1, 2024) (federal-sector provision of Title VII); Sharmia-Washington v. Garland, No. 23cv166, 2024 WL 4576729, at *13 n.9 (N.D. Fla. Sept. 23, 2024) (*Muldrow* does not affect federal sector). Courts are also dealing with how *Muldrow* intersects with an affirmative defense to liability for harassment. *See* Wilmoth v. Arpin Am. Moving Sys., LLC, No. 19cv19187, 2024 WL 3440218, at *9 (D.N.J. July 17, 2024) (seeming to use *Muldrow* in analyzing whether the plaintiff can establish a tangible employment action for purposes of agency affirmative defense).

56. *See* Muse v. Wash. Metro. Area Transit Auth., No. 23-cv-00407, 2024 WL 4792040, at *6 (D.D.C. Nov. 14, 2024) (listing a written warning along with other actions as meeting the standard); Newton v. Kohl's, Inc., No. 21-cv-268, 2024 WL 4986303, at *7 (D. Vt. Nov. 12, 2024) (noting that in most circumstances a written warning does not meet the standard, but it would if it put the plaintiff at risk of additional consequences); McBride v. C&C Apartment Mgmt. LLC, No. 21 Civ. 02989, 2024 WL 4403701, at *9 (S.D.N.Y. Oct. 1, 2024) (disciplinary warnings did not meet standard); Farmer v. FilmTec Corp., No. 22-cv-2974, 2024 WL 4239552, at *12 (D. Minn. Sept. 19, 2024) (does not meet standard); Riggs v. Akamai Techs., No. 23-CV-06463, 2024 WL 3347032, at *6 n.8 (S.D.N.Y. July 8, 2024) (declining to decide at this time whether a negative evaluation meets *Muldrow*).

"exceeds expectations" rather than outstanding,[57] criticism,[58] being placed on paid leave,[59] being placed on a performance improvement plan,[60] not being provided training,[61] assigning different job duties within the same job description,[62] temporarily transferring an employee to a different position while considering a permanent transfer,[63] moving offices or transferring the worker to a different workplace,[64] threatening discipline or other action,[65] and requiring a person to work alone.[66] Unsurprisingly, courts have reached various answers to these questions.[67]

Post-*Muldrow*, courts are struggling. The struggle is only apparent by reading all the cases citing *Muldrow*. From this review, three key questions emerge. What counts as negative? What counts as a term, condition, or privilege of employment? Who should be deciding these issues, how much proof is required, and which party must offer the proof?

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57. Turner v. Buttigieg, No. 23-1665, 2024 WL 4346332, at *8 (D.D.C. Sept. 30, 2024) (meets the harm standard).

58. *See* Abdelhamid v. Lane Constr. Corp., 744 F. Supp. 3d 10, 17–19 (D.D.C. 2024) (noting one incident of criticism is not sufficient, but also noting that the criticism was not linked to a protected trait); *McBride*, 2024 WL 4403701, at *8 (noting that criticism in ethnically degrading terms would meet the standard).

59. Blick v. Ann Arbor Pub. Sch. Dist., 105 F.4th 868, 886 (6th Cir. 2024) (declining to determine whether being placed on paid leave met the standard because the plaintiff did not preserve her challenge for appeal); *Newton*, 2024 WL 4986303, at *8 (finding being placed on paid leave does meet the standard); Magnuson v. Exelon Generation Co., No. 21-cv-04142, 2024 WL 4339593, at *21 (C.D. Ill. Sept. 27, 2024) (in the context of an Energy Reorganization Act claim finding being placed on paid leave does not meet *Muldrow* standard); Stepien v. Raimondo, No. 21-cv-01410, 2024 WL 4043589, at *14 (W.D. Wash. Sept. 4, 2024) (lengthy paid leave does meet standard); *see also* Ahmed v. Sch. Dist. of Hamtramck, No. 22-cv-11127, 2024 WL 4234641, at *9 (E.D. Mich. Aug. 26, 2024) (declaring there is no harm from a paid leave).

60. Anderson v. Amazon.com, Inc., No. 23-cv-8347, 2024 WL 2801986, at *11 (S.D.N.Y. May 31, 2024) (constitutes harm).

61. Milczak v. Gen. Motors, LLC, 102 F.4th 772, 787 (6th Cir. 2024) (constitutes harm); Rageh v. Univ. of N.C., No. 24-CV-336, 2024 WL 5056448, at *3 (M.D.N.C. Dec. 10, 2024) (constitutes harm).

62. Phillips v. Baxter, No. 23-1740, 2024 WL 1795859, at *3 (7th Cir. Apr. 25, 2024) (did not meet standard); DeLaughter v. Verizon Commc'ns, Inc., No. 22-cv-2370, 2024 WL 4956730, at *11 (M.D. Fla. Dec. 3, 2024) (change of work assignments is not sufficient); Rogers v. Voltron Data, Inc., No. 24-84, 2024 WL 4647644, at *5 (D.D.C. Oct. 31, 2024) (withdrawing supervisory responsibilities meets the standard).

63. Back v. Bank Hapoalim, B.M., No. 24-1064-cv, 2024 WL 4746263, at *2 (2d Cir. Nov. 12, 2024) (counts as harm when temporary transfer was to a position less powerful than prior position and where the worker had no experience).

64. *Phillips*, 2024 WL 1795859, at *3 (not sufficient); Hinkle-Moore v. DeJoy, No. 24-cv-262, 2024 WL 4303280, at *5 (S.D. Ohio Sept. 26, 2024) (not sufficient).

65. Staton v. DeJoy, No. 23-cv-03223, 2025 WL 42821, at *8 (D. Colo. Jan. 7, 2025) (threatened discipline meets the standard); Kelso v. Vilsack, No. 19-3864, 2024 WL 5159101, at *7 (D.D.C. Dec. 18, 2024) (letters listing performance issues and threatening potential termination do not meet the standard); McLoughlin v. Vill. of Southampton, No. CV 23-6586, 2024 WL 4189224, at *4 (E.D.N.Y. Sept. 13, 2024) (threat to move plaintiff to a part-time position does not count).

66. *Milczak*, 102 F.4th at 787 (constitutes harm).

67. *See supra* notes 56–66.

The courts' struggles demonstrate the limits of textualism. While the text of Title VII can answer the question of whether the statute contains a materiality requirement, it cannot fully define the contours of what counts as negative or what constitutes a term, condition, or privilege of employment.

Title VII does not define what counts as negative. Nor does it define the words "terms, conditions or privileges" of employment. Title VII also does not specify when harm occurs. Courts are adding their own value judgments to these concepts that are not driven by the statutory language. Bound up in these questions is who must prove harm and whether judges or juries should be the proper arbiters regarding what counts as harm.

In addition, *Muldrow* is at odds with retaliation harm jurisprudence and in serious tension with harassment jurisprudence. To fix this, the Court is going to need to reconcile its new textualist commitments with its non-textualist past.

A. What Counts as Negative?

In *Muldrow*, the Supreme Court held that conduct must be negative or disadvantageous to count as harm under Title VII.[68] The Court did not express any opinion on whose perspective the harm would be judged from: the perspective of the employer, an objective employee, or some combination of an objective/subjective employee? The text of Title VII provides no basis for choosing among these alternatives.

Here are examples of the way courts are reasoning to outcomes post-*Muldrow*. Notice that many of them simply repeat the *Muldrow* legal standard and then conclude that the conduct does or does not meet that standard. The outcomes thus appear to be grounded in the statutory text and a textualist methodology.

In two cases, the United States Court of Appeals for the Eleventh Circuit has held that an employee did not establish harm because the tasks the employer assigned to the plaintiff were within the employee's current job description.

In one of those cases, the plaintiff alleged that he was given more difficult tasks than other people in part because of his race.[69] The Eleventh Circuit held the plaintiff could not establish harm because the tasks were

68. Muldrow v. City of St. Louis, 601 U.S. 346, 347 (2024).

69. Murray v. Learjet, Inc., No. 23-60012-CIV, 2024 WL 1723697, at *1 (S.D. Fla. Jan. 31, 2024).

"already within his job duties," and therefore did not constitute a disadvantageous change in his employment conditions.[70]

In the other case, a female vice president alleged that she was the only female vice president and that she was asked to perform "lower-level tasks best suited for administrative assistants, which ultimately diverted her attention from her job duties."[71] The tasks included "taking notes during meetings, assembling slides, and organizing PowerPoint presentations."[72]

In a convoluted series of paragraphs, the Eleventh Circuit noted it was not clear whether the assigned duties fell within her job description.[73] It also stated that the plaintiff did not believe the tasks were within her job description.[74] The court then noted that "historically, higher percentages of women than men within the workforce have been confined to occupying clerical roles," and the plaintiff could not establish harm because she failed to "demonstrate how the tasks she was asked to perform in these high-level corporate meetings were outside the terms and conditions of her employment."[75] Thus, the Eleventh Circuit appears to reason that assigning women administrative tasks based on their sex cannot constitute sex discrimination unless the tasks are not conceivably within the employee's job description.

The Eleventh Circuit provides no reasons to support these outcomes. If a job description contains some easy tasks and other difficult tasks, it is not clear why being assigned the more difficult tasks could not be perceived as, and actually be, negative, at least in some instances. Indeed, in the retaliation context, the Supreme Court has decided that such treatment constitutes harm sufficient to establish a retaliation claim.[76] Similarly, it is not clear why distracting workers with lower skill tasks based on a protected trait would not be harmful.

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70. Murray v. Learjet, Inc., No. 24-11189, 2024 WL 4707968, at *2 (11th Cir. Nov. 7, 2024). This case should be viewed with some skepticism because the plaintiff did not respond to the defendant's motion for summary judgment and instead challenged the district court's grant of summary judgment under FED. R. CIV. P. 60(b), so the Eleventh Circuit was reviewing with favorable deference to the defendant. *Murray*, 2024 WL 4707968, at *2. Nonetheless, because this case is one of the first appellate court decisions to substantively grapple with *Muldrow*, it is worth discussing. For similarly thin reasoning see Phillips v. Baxter, No. 23-1740, 2024 WL 1795859, at *3 (7th Cir. Apr. 25, 2024) (noting that a long list of items were "temporary inconveniences"). Care should be taken when focusing on whether the plaintiff established a change in the terms, conditions, or privileges of employment. The language of Title VII does not require a change in terms, conditions, or privileges.

71. Lukie v. MetLife Grp., Inc., No. 22-10967, 2024 WL 4471109, at *5 (11th Cir. Oct. 11, 2024).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 71 (2006).

One district court characterized the harm question in a case as whether asking another employee to record the plaintiff's work and attendance constituted harm.[77] In the underlying case, the plaintiff had alleged that actions were taken against him because of race and disability.[78] The district court stated that the actions did not meet the *Muldrow* standard, because the judge concluded that the plaintiff had not shown that these inquiries "constituted a disadvantageous change in an employment term or condition."[79]

This reasoning is unsatisfactory on several levels. There is a bare statement that the conduct was not disadvantageous with no ability to determine why the judge believed this to be the case. The reasoning seems to rely purely on the judge's intuition. The judge also believed it was the plaintiff's responsibility to establish that the scrutiny was negative. Even though the case was decided at the summary judgment stage, the judge does not appear to recognize that there might be a factual question about whether a reasonable jury would consider this behavior to be negative.[80]

In another case, a judge concluded that placing a plaintiff on paid leave was not sufficient to meet the *Muldrow* standard.[81] The United States Court of Appeals for the First Circuit held, "[a] mere admonition by a supervisor without any formal consequences is not an adverse employment action because it does not represent any disadvantageous change in the terms or conditions of the plaintiff's employment."[82] The court provided no additional reasons to support the outcome.

Even cases that find that conduct meets the *Muldrow* standard present similarly thin reasoning. The United States Court of Appeals for the District of Columbia has held that being forced to take an unwanted transfer that requires a move meets the *Muldrow* standard, as does not receiving any meaningful work after the transfer.[83] The court provided no reasons to

77. Harris v. U.S. Dep't of Veterans Affs., No. 22-cv-02489, 2024 WL 3010879, at *10 (D. Kan. June 14, 2024).

78. *Id.* at *1.

79. *Id.* at *10.

80. *Id.* at *1. For equally thin reasoning, see Williams v. Memphis Light, Gas & Water, No. 23-5616, 2024 WL 3427171, at *5 (6th Cir. July 16, 2024) (discussing a number of purported harms, but finding all but one failed to meet the standard); Perry v. N.J. Dep't of Corr., No. 23-2207, 2024 WL 3384920, at *2 (3d Cir. July 12, 2024) (finding actions did not meet standard with little discussion about why).

81. Carter v. Eureka Multifamily Grp., No. 22-CV-01429, 2024 WL 2816135, at *5 (W.D. Pa. June 3, 2024).

82. Rios v. Centerra Grp. LLC, 106 F.4th 101, 112–13 (1st Cir. 2024); *see also* Bonaffini v. City Univ. of N.Y., 751 F. Supp. 3d 67, 76–78 (E.D.N.Y. 2024) (judge applying own sense of what is negative related to a professor's teaching schedule, but ultimately put aside skepticism and based outcome on other factors).

83. Van Horn v. Del Toro, No. 23-5169, 2024 WL 4381186, at *2 (D.C. Cir. Oct. 3, 2024).

support the outcome. The United States Court of Appeals for the Sixth Circuit held that a reassignment with "lack of adequate training, . . . supervisory responsibilities over difficult trade employees, . . . evening hours . . . , the position's failure to utilize his skills, and the fact he was forced to work by himself" met the *Muldrow* standard without explaining why.[84]

The United States Court of Appeals for the Seventh Circuit held that denial of a preferred vacation schedule and assigning shifts that are problematic for parents constituted harm.[85] The Seventh Circuit reasoned,

> Denial of one's preferred vacation schedule can make the vacation less pleasant—not just because it may end up off-season at the destination but also because the goal of a vacation may be to see family members who will not be available at a different time. Title VII does not permit employers to confine that pleasure to workers of particular colors; it must distribute fringe benefits equally. Likewise with the third allegation: if the employer considers family circumstances when assigning shifts, it must do so without regard to color, because inability to care for a child is a deeply felt loss for all parents.[86]

While the Seventh Circuit at least explained why it believed harm occurred, the reasoning still appears to be driven by the judges' own intuitions about harm, rather than some external textual construct. Notice too that while the Eleventh Circuit required the plaintiff to prove that the action was disadvantageous, the Seventh Circuit does not appear to place this obligation on the plaintiff, but rather draws conclusions about harm from the kinds of actions at issue.[87] In another case, the Eleventh Circuit appears to assume that being required to take paid leave as a religious accommodation could meet the *Muldrow* standard.[88] The Eighth Circuit has allowed claims to proceed past a motion to dismiss because the question of

84. Milczak v. Gen. Motors, LLC, 102 F.4th 772, 787 (6th Cir. 2024).

85. Thomas v. JBS Green Bay, Inc., 120 F.4th 1335, 1337 (7th Cir. 2024).

86. *Id.*

87. This may be driven in part by the procedural context of the case, because the Seventh Circuit was deciding harm questions at the Rule 12(b)(6) stage. *Id.*; *see also* Cole v. Grp. Health Plan, Inc., 105 F.4th 1110, 1114 (8th Cir. 2024) (noting that the harm question required further factual proof and indicating it would not be appropriate to dismiss case at Rule 12 stage); *Van Horn*, 2024 WL 4381186, at *2 (at summary judgment stage court seems willing to assume that a forced transfer to another location is negative).

88. Staple v. Sch. Bd. of Broward Cnty., No. 21-11832, 2024 WL 3263357, at *5 (11th Cir. July 2, 2024).

harm required further factual development and noted that there are often fact issues related to harm that prohibit dismissal on this element.[89]

In some cases, courts are distinguishing negative actions from those that the court characterizes as merely making an employee unhappy.[90] And, some courts will not label an action as negative if the employer later retracts the action.[91]

In determining whether an action counts as negative, some courts appear to be adding concerns about floodgates and whether courts should sit as super personnel departments. For example, in one case determining that a change in work assignment was not harmful, the judge reasoned that a contrary outcome would open the federal courts to claims that would impede the business judgment of employers and open the courts to a wide array of unfair work assignment claims.[92]

Few courts have directly explored whether the harm must be objectively harmful and about how many of the plaintiff's subjective characteristics play into the inquiry.[93] Especially tricky issues relate to decisions that most employees would consider to be neutral or positive, but some employees would consider to be negative. For example, consider an employee who wants to be transferred to a lesser paying job because that job is closer to his home.[94] The employer denies the request. If the denial is based on a protected trait, has the employee experienced a negative consequence?

The reasoning described in this section illustrates how *Muldrow*'s holding provides almost no real meaning that judges can use to reliably put actions on one side of the line or another.[95] Additionally, as the body of case law interpreting *Muldrow* grows, courts will likely need to address the growing tension within the doctrine, as courts reach different outcomes related to similar conduct. Indeed, as time passes from the release of *Muldrow*, some courts are increasingly relying on other cases to justify

89. *See Cole*, 105 F.4th at 1114.

90. DeLaughter v. Verizon Commc'ns, Inc., No. 22-cv-2370, 2024 WL 4956730, at *10–11 (M.D. Fla. Dec. 3, 2024).

91. Farmer v. FilmTec Corp., No. 22-cv-2974, 2024 WL 4239552, at *12 (D. Minn. Sept. 19, 2024) (a note placed in an employee's file does not count as an adverse action because the employer later removed it).

92. *DeLaughter*, 2024 WL 4956730 at *10.

93. Bonaffini v. City Univ. of N.Y., 751 F. Supp. 3d 67, 76 (E.D.N.Y. 2024) (suggesting in dicta that subjective harm would not be sufficient); Bennett v. Butler Cty. Bd. of Educ., No. 18-cv-01061, 2025 WL 27598, at *3 (M.D. Ala. Jan. 3, 2025) (discounting the plaintiff's subjective view).

94. *Bonaffini*, 751 F. Supp. 3d at 76 (discussing this scenario).

95. One additional problem appears in determining whether actions are negative. Some courts have failed to consider whether an action that on its own would not be sufficient to be a negative change can be combined with other actions to create the required level of negativity. *See, e.g.*, Kelso v. Vilsack, No. 19-3864, 2024 WL 5159101, at *7 (D.D.C. Dec. 18, 2024) (noting that letters of reprimand are not negative, but failing to consider them in the broader context of alleged actions).

outcomes, rather than independently using the statutory text or the language of *Muldrow* to independently determine an outcome.[96]

Importantly, courts have not considered the language of the second main operative provision of Title VII which makes it illegal for an employer to "limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of" the individual's protected trait.[97]

Here are the kinds of questions that need to be resolved. Is harm defined by the employer's perspective, some external objective perspective, or some combination of objective and subjective perspectives? How many of the characteristics of a particular workplace or a particular worker should play a role in the inquiry? Can a worker prevail if most reasonable workers would consider the outcome to be neutral or positive? Unfortunately, the answer to these questions cannot be determined by looking at the statutory language. And, as discussed in more detail below, these issues are intertwined with whether the plaintiff must establish harm and whether judges or juries are the proper arbiters of whether the threshold is met.

B. Terms, Conditions, or Privileges

Under *Muldrow*, there must be a disadvantage in the terms, conditions, or privileges of employment. None of the federal discrimination statutes define what the words "terms, conditions, or privileges" of employment mean.

Muldrow provides little context for these words. Holding that the transfer counted, the Court simply noted that the transfer dealt with the what, when and where of the plaintiff's work.[98] It is not clear from *Muldrow* whether the Court was only using these words to describe why transfers count or whether the Court was providing the start of a definition for other conduct that counts. Stated another way, is everything that affects the what, when or where of work something that counts as a term, condition or privilege of employment?

In the post-*Muldrow* world, courts have held that many actions affect terms, conditions, or privileges, including negative evaluations or write-ups, an evaluation of "exceeds expectations" rather than outstanding, criticism, being placed on paid leave, being placed under a performance improvement

96. Waite v. Honolulu Liquor Comm'n, No. 23-00356, 2024 WL 4851600, at *4 (D. Haw. Nov. 21, 2024) (citing other cases for outcome that suspension with pay constitutes harm).

97. 42 U.S.C. § 2000e-2(a)(2).

98. 601 U.S. 346, 354 (2024).

plan, not being provided training, assigning different job duties within the same job description, threatening discipline or other action, and requiring a person to work alone.[99]

The current case law does not provide a robust discussion of why these actions count.[100] When courts do explain their reasoning to include an action, they sometimes refer to the "what, when, where" construct from *Muldrow*.[101] For example, one court held that denying a telework request on one occasion meets the threshold because it is a decision about when the plaintiff works.[102]

As described in the prior section, courts also have held that a wide swath of conduct does not affect a "term, condition, or privilege" of employment.[103] When courts declare that an action does not count as a "term, condition, or privilege" the reasoning often is very thin and simply recites the *Muldrow* holding.

For example, in one case the United States Court of Appeals for the First Circuit provided the following reasoning: "A mere admonition by a supervisor without any formal consequences is not an adverse employment action because it does not represent any disadvantageous change in the terms or conditions of the plaintiff's employment."[104] The court did not explain why this sentence was correct. Instead, it simply cited the legal standard and concluded it was not met.

In one case, a plaintiff alleged that her employer took away one of her work assignments because of a protected trait.[105] The trial court granted summary judgment in the employer's favor, finding that removal of that task did not constitute a term, condition, or privilege of employment.[106] The court reasoned that these words "do real work and have real meaning" and that they limit the injuries that can result in liability.[107]

The opinion provides an example of how empty some of the reasoning related to terms, conditions, or privileges can be. After noting that the

99. *See supra* notes 56–66.

100. *See, e.g.*, Turner v. Buttigieg, No. 23-1665, 2024 WL 4346332, at *8 (D.D.C. Sept. 30, 2024) (reasoning that a lower evaluation negatively affected the plaintiff's work environment); Staton v. DeJoy, No. 23-cv-03223, 2025 WL 42821, at *8 (D. Colo. Jan. 7, 2025) (indicating there was a change in the plaintiff's work environment).

101. 601 U.S. at 354.

102. Dixon v. Blinken, No. 22-2357, 2024 WL 4144105, at *3 (D.D.C. Sept. 11, 2024).

103. *See supra* notes 56–66.

104. Rios v. Centerra Grp. LLC, 106 F.4th 101, 112–13 (1st Cir. 2024); *see also* Kelso v. Vilsack, No. 19-3864, 2024 WL 5159101, at *7 (D.D.C. Dec. 18, 2024) (noting that letters of reprimand do not affect the what, when and where of a plaintiff's work).

105. Qashu v. Blinken, No. 22-cv-01077, 2024 WL 3521592, at *5 (D.D.C. July 24, 2024).

106. *Id.* at *5–6.

107. *Id.* at *5.

plaintiff liked her work assignment on the ocean acidification team, the court indicated:

> No record evidence supports the notion that it was either a term or a condition of her employment at State. She was not hired on specifically to do that work. Nor was she assigned a role at State as a dedicated ocean acidification researcher. Nor still does record evidence support the notion that she was informally considered to be integral to the office's ocean acidification work. In sum, although ocean acidification was a matter that she worked on, and which she greatly enjoyed, it was not a term or condition of her employment at State. [108]

Post-*Muldrow*, courts also have struggled with when an action affects the terms, conditions, or privileges of employment occurs. This question arises in a number of contexts.

For example, if an employer tells an employee it is going to transfer her, there will clearly be a change in the conditions of that worker's employment after the transfer. But, when does the change occur and when is it negative? Does it occur at the time the employer communicates the decision or when the transfer happens? If an employer subjects an employee to a negative action but then later compensates the employee for the harm, did the employee still experience harm?

The United States Courts of Appeals for the District of Columbia has held that an announced transfer counts as harm, even if the transfer did not occur because the plaintiff retired rather than accept the transfer.[109] It held that discrimination happens at the time the employer provides notice of the discriminatory act to the worker.[110]

The United States Court of Appeals for the Seventh Circuit has held that deferred training counts as harm under *Muldrow* because it "can mean deferred promotions or deferred raises."[111] However, what this language elides is whether the deferred training counts on its own or only because it could result in future harm. The Seventh Circuit's language leaves open the possibility that deferred training may not count if there is no potential of other negative action attached.

Courts are struggling with how to address warning and disciplinary write-ups. Some of the courts appear to view these as having the potential to impact a term, condition, or privilege of employment, but as not causing

108. *Id.* at *6 (internal citations omitted).
109. Van Horn v. Del Toro, No. 23-5169, 2024 WL 4381186, at *3 (D.C. Cir. Oct. 3, 2024).
110. *Id.*
111. Thomas v. JBS Green Bay, Inc., 120 F.4th 1335, 1337 (7th Cir. 2024).

such an impact on their own. For example, in one case a plaintiff alleged that her employer issued disciplinary documents related to her job performances.[112] The court reasoned that these did not yet affect the plaintiff's terms or conditions of employment because the disciplinary documents were never placed in the plaintiff's personnel file and had not caused any other consequences.[113]

One court found that it did not violate the terms or conditions of a plaintiff's current job when the plaintiff's current supervisor allegedly discouraged her from applying for a new position for which the supervisor was the hiring manager.[114] The reasoning was that to count as harm, the decision had to impact plaintiff's current employment.[115] When courts have explored questions of harm, they have not grappled with Supreme Court precedent that holds that an action does not need to be completed during the period of the plaintiff's employment to be harmful.[116]

In one case, a plaintiff alleged that an employer extended her introductory period in a job because of her disability.[117] The United States Court of Appeals for the Third Circuit held that while this extension "did pause the accrual of [the plaintiff's] paid time off," this did not constitute harm because the employer restored the paid time off after the employee completed the initial introductory period.[118] In the same case, the court held that a decision to eliminate the plaintiff's position did not constitute harm because it did not ripen into harm until the plaintiff's termination.[119] While the plaintiff could challenge her termination, the court held she could not separately challenge the decision to eliminate her position.[120]

112. Leite v. Sch. Dist. of Phila., No. 22-306, 2024 WL 3606319, at *7 (E.D. Pa. July 30, 2024).

113. *Id.* at *8.

114. Brown v. Wormuth, No. CV-21-00477-TUC-RM, 2024 WL 3553112, at *6 (D. Ariz. July 26, 2024).

115. *Id. But see* Hishon v. King & Spalding, 467 U.S. 69, 74–75 (1984) (holding that consideration for future promotion to partner was part of the terms and conditions of the position as associate).

116. *Hishon*, 467 U.S. at 77 (noting that pension benefits are terms, conditions, or privileges of employment even if they are received after employment ends).

117. Goodwin v. Univ. of Pa., No. 23-3211, 2024 WL 4678877, at *3 (3d Cir. Nov. 5, 2024).

118. *Id.*

119. *Id.*

120. *Id.* The courts also are exploring claims of constructive transfer. Pearson v. Kan. Dep't of Corr., No. 23-2288, 2024 WL 4948884, at *8 (D. Kan. Dec. 3, 2024) (discussing whether a plaintiff could prevail on a constructive involuntary transfer claim post-*Muldrow*). The Supreme Court has held that constructive changes to the terms, conditions, or privileges of employment are actionable; however, the Court has examined this issue in the context of constructive discharge and has not fully explained the contours of this concept. *See* Pa. State Police v. Suders, 542 U.S. 129, 143, (2004).

C. Who Must Prove and Who Decides?

The answer to many of the harm questions may depend on who must prove the harm and who gets to decide whether an action meets the statutory standard. Using a hypothetical is useful in explaining these ideas. Assume an employee receives a disciplinary notice in her file and claims that a supervisor issued the notice because of a protected trait. If the employer challenges whether the disciplinary notice is sufficient harm, courts may confront several proof questions.

The first issue is whether the judge can assume harm based on the alleged action or whether the plaintiff must affirmatively show some disadvantage.[121] The proof question is especially fraught in the context of motions to dismiss. For example, in the disciplinary write up context, can the plaintiff survive a motion to dismiss if her complaint states that she received a disciplinary write up or must her complaint also state in more detail actual and possible negative consequences?

The courts are inconsistent on this issue. One court has noted that it must assume possible negative consequences from a disciplinary write-up because (at the motion to dismiss stage) the court did not yet understand the employer's disciplinary system.[122] Other judges have reached the opposite conclusion and granted motions to dismiss, assuming that disciplinary write-ups do not constitute harm.[123] In another case, the judge granted a motion to dismiss because the plaintiff's complaint did not provide additional information about how expressions of concern about the plaintiff's performance negatively affected the terms, conditions, or privileges of employment.[124]

A second issue relates to whether the judge or a jury should determine harm. Under each of the federal discrimination statutes, a plaintiff has a right to jury trial under certain circumstances.[125] The Federal Rules of Civil

121. Bennett v. Butler Cty. Bd. of Educ., No. 18-cv-01061, 2025 WL 27598, at *3 (M.D. Ala. Jan. 3, 2025) (indicating that plaintiff must present actual evidence of "some injury" and must satisfy reasonable person standard).

122. Lowry v. Hwaseung Auto. USA, LLC, No. 23-cv-524, 2024 WL 4194313, at *8 (M.D. Ala. Sept. 13, 2024).

123. McLoughlin v. Vill. of Southampton, No. CV 23-6586, 2024 WL 4189224, at *3 (E.D.N.Y. Sept. 13, 2024).

124. Batchelor v. City of Wilson, 747 F. Supp. 3d 845, 863 (E.D.N.C. 2024). There is the possibility that some actions will necessarily require additional allegations, if no negative consequence could be presumed on their face. *See, e.g.*, MacDougall v. Rhuling, No. 24-CV-0989, 2024 WL 3993213, at *8 (E.D. Pa. Aug. 28, 2024) (noting the allegation that the plaintiff was given a different computer system would need additional information to determine if it was negative).

125. 42 U.S.C. § 1981a(c); 29 U.S.C. § 626(c). Plaintiffs are not entitled to a jury trial in all instances. For example, a jury trial is not available for disparate impact claims under Title VII. 42 U.S.C.

Procedure explicitly cabin judges' ability to grant motions to dismiss and summary judgment. Under Rule 12(b)(6), a court must accept as true facts and inferences in favor of the non-moving party.[126] Rule 56(a) provides that summary judgment is only appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[127] When considering a motion for summary judgment, a federal court is required to "view all facts and draw all reasonable inferences in favor of the nonmoving party."[128] The Supreme Court has explained that summary judgment is only appropriate when "a reasonable jury could [not] return a verdict for the nonmoving party."[129]

To date, courts that have found conduct not to constitute harm have not seriously grappled with how much the plaintiff must do to establish harm and whether judges or juries should be making decisions about harm.[130]

III. THE LIMITS OF TEXTUALISM

Muldrow reveals the limits of textualism within the federal discrimination law context. The text can answer whether Congress required materiality, but it does not answer all important questions about harm.[131]

This Article argues that Congress did not design the text of the federal discrimination statutes to be capable of answering all questions that arise. Instead, some of the answers will depend on the complex interplay of many factors including the statutory text, precedent, the work of the EEOC, knowledge gained from seeing inequality in the workplace, and the work of scholars and others who help to illuminate and label harm. Ultimately, the harm standard under Title VII will be defined both by the language of Title VII and the value judgments that judges make about what constitutes harm.

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§ 1981a(a), (c). The ADEA's federal sector provision does not provide a jury trial. Lehman v. Nakshian, 453 U.S. 156, 168 (1981); Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 357 (2013).

126. FED. R. CIV. P. 12(b)(6); Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510 n.1 (2002).

127. FED. R. CIV. P. 56(a).

128. Crawford v. Metro. Gov't of Nashville & Davidson Cty., 555 U.S. 271, 274 n.1 (2009).

129. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

130. *See, e.g.*, McLoughlin v. Vill. of Southampton, No. CV 23-6586, 2024 WL 4189224, at *3 (E.D.N.Y. Sept. 13, 2024) (simply declaring that disciplinary write up was not sufficient).

131. There is debate about whether statutory interpretation and statutory construction are synonymous. *See, e.g.*, Frederick Schauer, *Constructing Interpretation*, 101 B.U. L. REV. 103, 111 (2021) (recognizing the debate and arguing that in some circumstances the two are merged); *see also* Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65 (2010) (discussing differences between interpretation and construction); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010) (same). Some readers may prefer to understand the critiques raised in this Article as related to construction, rather than interpretation. This does not change the main idea that textualism plays a limited role in determining the outcome in these cases.

This conversation is especially important at this time, as some scholars advocate for progressive textualism.

Additionally, it is nearly impossible to untangle Title VII from its pre-textual history. To reiterate the cake analogy from earlier, if Title VII is a cake, its layers are built with non-textualist reasoning. In recent decades, the Court added a textualist icing. Claiming Title VII as a purely or even largely textualist enterprise will require re-baking the cake.

This section explores textualism as a methodology, demonstrates how discrimination harm jurisprudence has historically not relied primarily on textualism, and illustrates the limits of textualism in answering two questions post-*Muldrow*.

Post-*Muldrow* courts will struggle with how *Muldrow* intersects with the wider body of caselaw related to discrimination harm. This section situates *Muldrow* within this broader environment and explains the separate threads of harm-related ideas that developed in the context of discrimination, retaliation, and harassment. It also demonstrates how discrimination harm jurisprudence developed haphazardly, starting with a purposivist base, with more recent cases taking a more textualist path, and no attempt to reconcile the inconsistencies between the interpretive methodologies or the different strands of case law. Additionally, the reasoning in *Muldrow* itself demonstrates how little of a guide the text of Title VII provides when deciding what harm is sufficient to violate the statute.

A. Textualism

When judges interpret statutes, they often invoke one or more interpretive methodologies, such as textualism,[132] intentionalism,[133] and

132. *See generally* Anita S. Krishnakumar, *Textualism in Practice,* 74 DUKE L.J. 573 (2024) (discussing tensions within textualism); John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287 (2010) (exploring move from first generation to second generation textualism); Philip P. Frickey, *Faithful Interpretation*, 73 WASH. U. L.Q. 1085 (1995) (analyzing the role of linguistics in textualism and legal interpretation); Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749 (1995) (analyzing the impact of hypertextualism on the *Chevron* doctrine); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) (evaluating the new textualism movement); *see also* Molot, *supra* note 6, at 3 (arguing that some of the purported differences among the methodologies may be illusory).

133. *See generally* T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988) (describing various statutory interpretation techniques); John F. Manning, *What Divides Textualists from Purposivists?* 106 COLUM. L. REV. 70, 75–76 (2006) [hereinafter Manning, *What Divides Textualists from Purposivists?*] (describing the division between textualism and intentionalism and purposivism); John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 424 (2005) (analyzing the role of legislative intent in textualism and intentionalism).

purposivism,[134] among others.[135] Judges often assert that one goal of statutory interpretation is to find the plain meaning of a statute.[136] This search often begins with the text of the statute.[137] One method of statutory interpretation—textualism—elevates the text of the statute as a primary source of statutory meaning.[138]

There are varying forms of textualism, some of which eschew the use of legislative history as a valid source for statutory meaning.[139] To determine meaning, a textualist methodology often relies on the dictionary meaning of words, whether the words are terms of art, the grammatical structure of a statute, and how the words fit within the overall context of the statute.[140] Even within textualism there are debates about what meaning should govern when the language of the statute appears to conflict with the accepted public meaning of that language at the time Congress enacted the statute.[141] The metes and bounds of textualism are not always consistent. As Tara Leigh Grove has noted,

> Some textualist opinions apply a more formal textualism, focusing on the surrounding text and structure (semantic context) and declining to consider past public understandings (social context) or the practical consequences of a decision. Other textualist opinions endorse a more flexible textualism that looks beyond semantic

134. *See, e.g.*, Richard H. Fallon, Jr., *The Statutory Interpretation Muddle*, 114 NW. U. L. REV. 269, 278–79 (2019) (characterizing the statutory interpretation debate as between textualists and purposivists); Manning, *What Divides Textualists from Purposivists?*, *supra* note 133, at 75 (discussing textualism and purposivism).

135. *See, e.g.*, Francisco J. Urbina, *Reasons for Interpretation*, 124 COLUM. L. REV. 1661, 1669 (2024) (noting that what "matters in practice are the alternatives for choice and action, not how they are categorized"); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1987) (discussing dynamic statutory interpretation); William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661, 662–66 (1982) (discussing common-law interpretation).

136. *See, e.g.*, Yates v. United States, 574 U.S. 528, 537 (2015) (discussing "ordinary meaning"); Household Credit Servs., Inc. v. Pfennig, 541 U.S. 232, 239 (2004) (discussing "plain meaning").

137. *See e.g.*, *Yates*, 574 U.S. at 537; *Household Credit*, 541 U.S. at 239.

138. *See* Grove, *supra* note 4, at 272. For critiques of textualism, see, for example, Abbe R. Gluck, *Justice Scalia's Unfinished Business in Statutory Interpretation: Where Textualism's Formalism Gave Up*, 92 NOTRE DAME L. REV. 2053, 2076 (2017) and Victoria Nourse, *Textualism 3.0: Statutory Interpretation After Justice Scalia*, 70 ALA. L. REV. 667, 668–69 (2019).

139. *See, e.g.*, William N. Eskridge, Jr., Brian G. Slocum & Kevin Tobia, *Textualism's Defining Moment*, 123 COLUM. L. REV. 1611 (2023) (describing points of disagreement in textualism); Grove, *supra* note 4, at 267 (describing different strains of textualism); Eskridge, *supra* note 132, at 623 (discussing new textualism).

140. Manning*, supra* note 132, at 1309–10 n.101.

141. *See generally* Bostock v. Clayton Cnty., 590 U.S. 644 (2020) (demonstrating the majority and dissenting opinions disagree about how to construe text of Title VII). *See also* Tara Leigh Grove, *Testing Textualism's "Ordinary Meaning*,*"* 90 GEO. WASH. L. REV. 1053, 1058 (2022) (articulating varying definitions of ordinary meaning).

> context to social and policy context as well as practical consequences.[142]

In *Bostock v. Clayton County*, the Supreme Court ostensibly relied on textualist reasoning to hold that Title VII prohibits discrimination because of sexual orientation and gender identity.[143] Given *Bostock*'s claimed reliance on textualism, the case has received a flurry of attention from scholars and other commentators about what the case means for this theory of statutory interpretation.

Some have noted that *Bostock* illustrates textualism's political neutrality, while others have noted that the three *Bostock* opinions demonstrate "that textualism is no more capable of providing a neutral truthmaker or of cabining the influence of evolving social values than any other leading method of statutory interpretation."[144] After *Bostock*, several scholars have understandably expressed interest in a new strain of textualism—progressive textualism.[145]

Muldrow is likely to draw similar enthusiasm. After all, *Muldrow* presents a pro-plaintiff outcome that relies on textualist methodology. However, as discussed throughout this Article, textualism provides, at best, only a partial answer to what counts as harm under federal discrimination law.

The prior section addressed how courts are struggling to implement *Muldrow* and highlighted some of the questions textualism cannot answer. The text of the discrimination statutes does not define what counts as negative or what counts as a "term, condition, or privilege." The text of the discrimination statutes cannot answer whether judges should evaluate these concepts from the perspective of an objective reasonable person or through a combined objective and subjective inquiry. The text of the discrimination statutes does not provide the courts with guidance about how much of a particular worker's individual circumstances should be used in determining objective harm.

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142. Grove, *supra* note 141, at 1066. Fortunately, for purposes of this Article, it is not necessary to distinguish varying forms of textualism.

143. *See Bostock*, 590 U.S. 644 (demonstrating that the majority and dissenting opinions disagree about how to construe text of Title VII); *see also* Grove, *supra* note 141, at 1067–70 (discussing the debate among the Justices in *Bostock* related to textualism).

144. Franklin, *supra* note 4, at 123 (discussing claims of textualism's neutrality and disagreeing with those claims).

145. *See supra* note 4 (noting articles that discuss progressive textualism). There is also a strain of scholarship seeking to capture how people understand statutory language. *See* Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Ordinary Meaning and Ordinary People*, 171 U. PA. L. REV. 365, 429–30 (2023); James A. Macleod, *Finding Original Public Meaning*, 56 GA. L. REV. 1 (2021).

Muldrow does not address whether threats of future action meet the standard or whether employers can retract actions and escape liability. Whether and how definitively the text of Title VII answers these questions may depend on whether courts rely solely on 42 U.S.C. § 2000e-2(a)(1) or whether courts also turn to § 2000e-2(a)(2), which provides broader harm language.

B. The History of Harm Jurisprudence

As discussed throughout this Article, part of the doctrinal mess relates to the way in which discrimination law unfolded across multiple eras of statutory interpretation without grappling with a core idea in discrimination law: When is discrimination harmful? For decades, courts have been distracted by the materiality question and materiality doctrine has precluded courts from exploring the full possibilities of what constitutes harm.

The following sections describe how the courts interpreted the discrimination statutes in the 1970s and into the 1980s using techniques that are different than modern strands of textualism. The courts tended to view discrimination through different theoretical lenses, separating harassment from other kinds of disparate treatment and treating retaliation differently than discrimination.

Part of the struggle courts will face post-*Muldrow* is whether, and how, to reconcile these disparate strands. Additionally, courts will need to reconcile how these early decisions did not rely primarily on a textualist methodology. When modern courts apply textualism to the discrimination statutes, they are often applying that textualist icing to a cake that was created from a more fluid, purposivist methodology that relied on the EEOC and other sources of information to define the reach of the statutes.

1. *The* McDonnell Douglas *Path*

In the 1970s and 1980s, the Supreme Court made an important choice about discrimination law. Instead of describing discrimination as one or two claims derived from a central statutory text, the Court instead described multiple evidentiary theories for proving discrimination, without fully describing how these evidentiary theories connected to the text or how they fit together.[146] The harm question the Supreme Court ultimately addressed in *Muldrow* derived in part from one of these frameworks.

146. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66–67 (1986) (describing harassment theory); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–06 (1973) (describing an optional evidentiary

Courts do not typically use the text of the federal discrimination statutes to analyze disparate treatment claims when the plaintiff relies on circumstantial evidence. Instead, they primarily rely on the *McDonnell Douglas* three-part burden-shifting framework. The *McDonnell Douglas* framework plays an important role in the *Muldrow* story.

The *McDonnell Douglas* case involved a plaintiff's claim that his employer refused to rehire him because of his race and in retaliation for civil rights activity.[147] The Supreme Court issued its opinion in *McDonnell Douglas* in 1973, well before the rise of modern textualism. To a modern reader, the opinion is striking because it contains only fleeting references to the text of Title VII, most of them referring simply to the fact that the plaintiff asserted claims under those statutory provisions and had met the statute's administrative exhaustion requirements.[148] The lack of a textualist philosophy is best illustrated by the fact that the Court provided the statutory text, not in the main text of the opinion, but rather in a footnote.[149]

Instead of relying on the text of Title VII, the Court created a three-part, burden-shifting framework that came to be known as the *McDonnell Douglas* test. Under the framework, the plaintiff first establishes a prima facie case, which creates a rebuttable presumption of discrimination.[150] Next, the employer articulates a legitimate, non-discriminatory reason for its actions.[151] If the defendant does this, the plaintiff may establish discrimination by showing that the employer's reason is pretextual or by providing other evidence of discrimination.[152]

This framework is now a central fixture of employment discrimination jurisprudence and itself spawned decades of confusion.[153] Mercifully, a full account of *McDonnell Douglas* is not necessary for this Article. Instead, it is possible to focus on how the *McDonnell Douglas* framework eventually led to the question the Supreme Court faced in *Muldrow*.

In the *McDonnell Douglas* fact scenario, the Supreme Court articulated the third step of the prima facie case to require that "despite his qualifications, [plaintiff] was rejected."[154] When lower courts first applied

path for analyzing some disparate treatment claims); Griggs v. Duke Power Co., 401 U.S. 424, 430–32 (1971) (describing disparate impact).

147. *McDonnell Douglas*, 411 U.S. at 796.

148. *Id.* at 793–94, 796, 798.

149. *Id.* at 796 n.4.

150. *Id.* at 802.

151. *Id.*

152. *Id.* at 804.

153. *See generally* SANDRA SPERINO, MCDONNELL DOUGLAS: THE MOST IMPORTANT CASE IN EMPLOYMENT DISCRIMINATION LAW (2024) (ebook) (describing the case, its aftermath, and the attendant confusion).

154. *McDonnell Douglas*, 411 U.S. at 802.

the *McDonnell Douglas* test, they often inserted the challenged employment action into the analysis.[155] So, for example, in the third prong a plaintiff might be required to prove that she was denied a promotion or that she was not hired. As the courts began applying *McDonnell Douglas* to different fact scenarios, they began to create a shorthand for the possible kinds of negative actions from which a litigant might seek relief.

Courts often state the third factor as requiring the plaintiff to show that she was subjected to an "adverse employment action."[156] The words "adverse action" do not appear in the text of the discrimination statutes.[157] Instead, Title VII refers to specific actions that are prohibited (to "fail or refuse to hire or to discharge any individual")[158] or "otherwise to discriminate against any individual with respect to his compensation," or the "terms, conditions, or privileges of employment."[159]

In the disparate treatment context, the courts largely ignored the second main operative provision of Title VII which makes it illegal for an employer to "limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of" the individual's protected trait.[160]

Over time, courts began to infuse the court-created adverse action concept with meaning. The actions specifically mentioned in the text counted as adverse actions. In *Hishon v. King & Spalding*, the Supreme Court held that awarding law firm partnerships was an adverse action under Title VII.[161] Even though the determination of who should be a partner may not be an employment decision, *eligibility* for promotion to a partner was a "term, condition, or privilege" of employment granted to those hired as associates.[162]

Circuits often appended a materiality requirement to actions that would otherwise fall within the more general language of "terms, conditions, or privileges."[163] There was wide variation across circuits and even among panels within circuits regarding what counted as an adverse action and how

155. *See, e.g.*, Farber v. Arrow Co., No. 82 Civ. 7563, 1986 WL 10731, at *1 (S.D.N.Y. Sept. 24, 1986); Citron v. Jackson State Univ., 456 F. Supp. 3, 11 (S.D. Miss. 1977) (noting that the plaintiff complained of several different employment actions and analyzing them).

156. Bejar v. Dep't of Veterans Affs., 683 F. App'x 656, 658 (10th Cir. 2017).

157. 42 U.S.C. § 2000e-2(a)(1).

158. *Id.*

159. *Id.*

160. 42 U.S.C. § 2000e-2(a)(2).

161. 467 U.S. 69 (1984).

162. *Id.* at 76.

163. *See* Muldrow v. City of St. Louis, 601 U.S. 346, 353 (2024) (noting circuit split about materiality requirements).

to define the concept.[164] As one court noted, "[d]ivergent authority, nationwide, obscures the parameters of adverse employment action."[165]

Some courts held that negative evaluations, threats of termination, and denying an employee a lateral transfer do not rise to the level of actionable discrimination, even if the employee's protected trait played a negative role in the decision.[166] However, other courts held that those actions could form the basis of a discrimination claim.[167]

The materiality requirement had always been in tension with language in Supreme Court opinions about the reach of discrimination law. On numerous occasions, the Supreme Court has reiterated that federal discrimination statutes are designed to "strike at the entire spectrum" of discriminatory conduct.[168] The Court repeatedly stated that "Title VII tolerates no . . . discrimination, subtle or otherwise."[169]

Additionally, as noted in *Muldrow*, the materiality doctrine developed through the concept of adverse action lacked a statutory source. Post-*Muldrow*, courts will need to consider whether to retain the words "adverse action," which do not appear in the discrimination statutes.[170]

2. The Retaliation Path

Post-*Muldrow*, the discrimination harm standard is in significant tension with the retaliation harm standard.[171] Some of the federal discrimination

164. Hiatt v. Colo. Seminary, 858 F.3d 1307, 1316 (10th Cir. 2017) (using the word "significant" to describe the kind of change required).

165. Nelson v. Univ. of Me. Sys., 923 F. Supp. 275, 281 (D. Me. 1996). The adverse action doctrine under the ADA was not coterminous with the adverse action doctrine developed under Title VII. *See* Hoffman v. Caterpillar, Inc., 256 F.3d 568, 574–75 (7th Cir. 2001).

166. *See, e.g.*, Alvarado v. Tex. Rangers, 492 F.3d 605, 612 (5th Cir. 2007) (lateral transfers are not actionable); Taylor v. N.Y.C. Dep't of Educ., No. 11-CV-3582, 2012 WL 5989874, at *7 (E.D.N.Y. Nov. 30, 2012) (being rated as having unsatisfactory performance not sufficient to constitute an adverse action); Myers v. Md. Auto. Ins. Fund, No. 09-3391, 2010 WL 3120070, at *1 (D. Md. Aug. 9, 2010) (threatening to fire a worker not actionable).

167. *See* Collins v. Illinois, 830 F.2d 692, 703 (7th Cir. 1987) (finding an adverse action occurred when employer moved employee's office to undesirable location); Czekalski v. Peters, 475 F.3d 360, 364 (D.C. Cir. 2007) (noting that some lateral transfers do constitute adverse actions).

168. *See, e.g.*, Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986); City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 708 n.13 (1978) (quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971)).

169. Price Waterhouse v. Hopkins, 490 U.S. 228, 243 (1989); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280–81 n.8 (1976); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 348 n.31 (1977); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973).

170. *See, e.g.*, 42 U.S.C. § 2000e-2(a)(1)–(2) (Title VII's operative language). *But see* 42 U.S.C. § 2000gg-1(5) (using adverse action language in the PWFA).

171. *See* Juarez v. Midwest Div. - OPRMC, LLC, No. 23-2417, 2024 WL 4679220, at *7 n.8 (D. Kan. Nov. 5, 2024) (noting that the textualist approach in *Muldrow* is in tension with the retaliation harm standard).

statutes have separate retaliation provisions.[172] Courts developed distinct strands of harm jurisprudence for the discrimination and retaliation contexts. Confusingly, courts used the term "adverse action," or something similar, to describe the harm required in both contexts, even though the courts defined those terms differently.

The Title VII retaliation provision prohibits employers from "discriminat[ing] against" workers because they engaged in certain protected conduct.[173] The Supreme Court rejected the idea that retaliation must be related to the "terms, conditions, or privileges of employment."[174] It reasoned that while Title VII's discrimination provisions contained this language, Congress chose not to include these words in the retaliation provision.[175]

The Supreme Court noted the term "discriminate against" meant "distinctions or differences in treatment that injure protected individuals."[176] The Court claimed to draw this definition from two prior cases and a dictionary, but it did not explain how it arrived at this definition from these sources.[177]

The Supreme Court then interpreted the terms "discriminate against" in the retaliation provision and held that retaliation must be "materially adverse" to be cognizable.[178] The Court reasoned that the statute required distinctions between what it called significant and trivial harms.[179] An employee presents an actionable claim if the negative consequence would dissuade a reasonable person from complaining about the alleged discrimination. Actionable conduct must rise above "normally petty slights, minor annoyances, and simple lack of good manners."[180]

The Supreme Court stated that the reasonable person standard was an objective one. However, the Supreme Court later provided examples that suggest that the objective standard also includes some of the circumstances of the plaintiff. The Court indicated as follows:

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172. 42 U.S.C. § 2000e-3(a); 29 U.S.C. § 623(d); 42 U.S.C. § 12203(a); 42 U.S.C. § 2000gg-2(f). While 42 U.S.C. § 1981 and the ADEA as applied to federal employees have no expressed non-retaliation provisions, both statutes implicitly prohibit retaliation using standards similar to the expressed statutory protection. *See* CBOCS W., Inc. v. Humphries, 553 U.S. 442 (2008); Gomez-Perez v. Potter, 553 U.S. 474 (2008).

173. 42 U.S.C. § 2000e-3(a).

174. *See* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67 (2006).

175. *Id.* at 62–63.

176. *Id.* at 59.

177. *Id.* at 59–60.

178. *Id.* at 67–68.

179. *Id.* at 68.

180. *Id.*

> We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school-age children. A supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination.[181]

The Court did not explain how the materiality requirement or the objective requirement stemmed from Title VII's language. Instead, it justified these requirements based on circuit case law, its own case law, general notions of administrability, and what it declared as serving the underlying purpose of the retaliation provision.[182]

The Court held that reassignment of a worker to a job with significantly more onerous duties was materially adverse treatment even though the reassignment resulted in no loss of wages or other tangible benefits.[183] Likewise, the plaintiff could maintain a retaliation claim for her suspension without pay, even though the employer eventually awarded her backpay.[184]

After *Burlington Northern*, the lower courts had difficulty reconciling the adverse action standards in discrimination and retaliation cases. In some pre-*Muldrow* instances, an action that would not be cognizable in the discrimination context, would be sufficient in the retaliation context.[185]

Recall that *Muldrow* interpreted the "discriminate against" language in Title VII to reject a materiality standard, but did not convincingly explain how this reading fit with its earlier reading of the same language in the

181. *Id.* at 69 (internal citations omitted).
182. *Id.* at 68–70.
183. *Id.* at 70–72.
184. *Id.* at 71–72.
185. *See, e.g.*, Vega v. Hempstead Union Free Sch. Dist., 801 F.3d 72, 92 (2d Cir. 2015) (holding a poor performance review can count as an adverse action for purposes of retaliation). In the discrimination context, some courts held that excessive scrutiny alone is not an adverse action. In the retaliation context, some courts held excessive scrutiny can be an adverse action. Corrado v. N.Y. State Unified Ct. Sys., No. CV 2012-1748, 2014 WL 4626234, at *12 (E.D.N.Y. Sept. 15, 2014) (discussing cases).

retaliation context to require materiality.[186] In *Muldrow*, the Supreme Court simply noted that it adopted a materiality standard in the retaliation context for "reasons peculiar to the retaliation context."[187]

Post-*Muldrow*, courts will have difficulty reconciling the two cases. On the one hand, retaliation is broader than discrimination in that the Court has emphasized that Congress used the words "terms, conditions, or privileges" in the discrimination provision, but not in the retaliation provision. On the other, the Court has now interpreted the same language "discriminates against" to require materiality in the retaliation context, but not in the discrimination context.

3. The Sexual Harassment Path

The federal courts did not develop their current harm jurisprudence in a linear fashion. During the 1970s and 1980s, when the courts were adding the term "adverse action" to disparate treatment claims, they were also developing the concept of harassment. In doing so, they created another thread of doctrine relevant to the current harm threshold.[188]

In 1986, in *Meritor Savings Bank, FSB v. Vinson*, the Court recognized that harassment is cognizable under Title VII.[189] In *Meritor*, the Supreme Court discussed whether the words "terms, conditions, or privileges of employment" encompass sexual harassment.[190] The *Meritor* opinion relied partially on textualism but also illustrates the limits of a textual approach.

In *Meritor*, the employer had argued that the plaintiff could not state a claim under Title VII unless the harm was economic in character.[191] The Court rejected this argument, noting that the text of the statute did not limit the required harm to harm that is economic in nature.[192] The Court held, "[t]he phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment."[193] The Court continued, "we agree, that a plaintiff may establish a violation of Title VII by proving that

186. Muldrow v. City of St. Louis, 601 U.S. 346, 357–59 (2024).

187. *Id.* at 357.

188. For an excellent article describing the history of sexual harassment doctrine, see Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1685 (1998). *See also* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 752 (1998) (explaining how sexual harassment drew from scholarship); Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691 (1997) (arguing that sexual harassment doctrine is undertheorized).

189. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986).

190. *Id.* at 64–67.

191. *Id.* at 64.

192. *Id.*

193. *Id.* (internal citations omitted).

discrimination based on sex has created a hostile or abusive work environment."[194]

Three aspects of *Meritor* are particularly important post-*Muldrow*. First, the opinion is not a fully textualist opinion. The Court did not use the statutory language to define the level of harm required to prevail under the harassment theory. Instead, it held that harassment must be "sufficiently severe or pervasive 'to alter the conditions of the victim's employment.'"[195] It drew this standard from EEOC Guidelines and from existing appellate and district court caselaw.[196] Thus, *Meritor* illustrates how harm doctrine in the harassment context is a mix of textualism and other methods of statutory interpretation. The severe or pervasive doctrine does not derive primarily from the language of Title VII.

Second, *Meritor* is unclear about whether severe or pervasive is a materiality requirement. Post-*Muldrow*, it will be necessary to reconcile *Meritor* and *Muldrow*. On its face, "severe or pervasive" seems to be a materiality standard. Language in *Meritor* both supports and undermines this idea. For example, the Court cited another case for the idea that "'mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee' would not affect the conditions of employment to sufficiently significant degree to violate Title VII."[197] This quote suggests the harm does not exist because it is not significant, an argument rejected in *Muldrow*.

However, other language in *Meritor* suggests that conduct does not affect the "terms, conditions, or privileges" of employment until it is "severe or pervasive."[198] In other words, severe or pervasive is not a materiality requirement, but rather part of the definition of what makes conduct alter the "terms, conditions, or privileges" of employment.

Finally, *Meritor* contains a sentence that will become particularly important post-*Muldrow*. The Court cited EEOC Guidelines for the idea that conduct violates Title VII if it "has the *purpose or effect* of unreasonably interfering with an individual's work performance."[199] The severe or pervasive doctrine has largely focused on the effect of the harassing conduct, but *Meritor* recognized that conduct may also violate the law if its purpose is to interfere with an individual's work performance. Post-

194. *Id.* at 66.
195. *Id.* (quoting Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971)).
196. *Id.* at 64–67.
197. *Id.* at 67 (quoting *Rogers*, 454 F.2d at 238).
198. *Id.*
199. *Id.* at 65 (citing 29 C.F.R. § 1604.11(a)(3) (1985)) (emphasis added).

Muldrow, courts will need to determine whether both purposes and effects can lead to liability.

The contours of the harassment proof structure continued to develop over the next decade. In 1993, in *Harris v. Forklift Systems, Inc.*, the Supreme Court held that a plaintiff alleging harassment need not allege psychological injury, but would be required to establish that she subjectively believed the environment to be hostile or abusive and that the environment would be so viewed by an objective person.[200] Thus, the Court introduced a harm standard that requires both that the worker subjectively perceive an environment in a particular way and also that a reasonable person would perceive it to be so.

Notice that this addition of a combined subjective/objective standard is not dictated by the statutory language, rather the Court added it to the statute.[201] The Court's reasoning is contained within one paragraph and is not fully convincing.

Here is how the Court justified the objective prong: "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview."[202] The Court provided no citation for this assertion.

For the subjective prong, the Court noted that if the worker did not subjectively perceive the conduct as abusive, then the employee has not experienced a change in the terms, conditions, or privileges of employment.[203] As discussed in the earlier section, courts are using similar reasoning post-*Muldrow*. They are making judgment calls about what is negative or what is a term, condition or privilege of employment with no or very little support for these intuitions.

The Court also created a non-exclusive list of ideas to consider in determining whether conduct is severe or pervasive: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[204] A factfinder can also consider the psychological effect of the conduct on the plaintiff.[205] There

200. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–22 (1993).

201. Similarly, the Court added a complex agency doctrine to harassment cases that is only derived from the statutory text in a tangential way. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761–62 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 791 (1998). This Article will not explore the intersection of *Muldrow* with the tangible employment action doctrine, but the author anticipates that courts will also struggle with this intersection.

202. *Harris*, 510 U.S. at 21.

203. *Id.* at 21–22.

204. *Id.* at 23.

205. *Id.*

are no citations for why these questions might be important to determining whether conduct constitutes cognizable harm under Title VII.

Like *Meritor*, *Harris* also contains language suggesting that the "severe or pervasive" standard is a materiality requirement. The Court indicated that uttering one epithet that results in an employee being offended "does not sufficiently affect the conditions of employment to implicate Title VII."[206]

Neither *Meritor* nor *Harris* presented the question of the lowest level of conduct sufficient to meet the severe or pervasive standard and courts have not been able to consistently draw this line. *Meritor* and the post-*Meritor* chaos provide a roadmap for what is likely to occur post-*Muldrow*.

The Supreme Court did not draw the severe or pervasive standard from the text of the statute; nor did the Court sufficiently explain why severe or pervasive was the touchstone for altering the conditions of a victim's employment. Since the Supreme Court's decisions in *Meritor* and *Harris*, the courts have tried to determine what is sufficient to be "severe or pervasive" and what is not, developing a complex set of rules and standards for what counts and what does not.[207] One line of cases covers when slurs and epithets are sufficient to establish harassment.

Examples are helpful. In *Boyer-Liberto v. Fontainebleau Corp.*, a worker filed a racial harassment claim submitting evidence her supervisor called her "porch monkey" twice.[208] Although the judge did "not question that the term is highly offensive to African Africans," the judge found the isolated comments did not count as harassment under federal law.[209] The judge used the "severe or pervasive" doctrine to grant summary judgment for the employer.

The worker in *Boyer-Liberto*, appealed the case to the United States Court of Appeals for the Fourth Circuit. While the three-judge panel noted that the use of term "porch monkey" was "racially derogatory and highly offensive," it upheld the grant of summary judgment.[210] The statements

206. *Id.* at 21.

207. *See* Elizabeth C. Tippett, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229, 241–43 (2018) (discussing severe or pervasive doctrine). *See generally* Judith J. Johnson, *License to Harass Women: Requiring Hostile Environment Sexual Harassment to Be "Severe or Pervasive" Discriminates Among "Terms and Conditions" of Employment*, 62 MD. L. REV. 85 (2003) (same); Schultz, *supra* note 188, at 1692 (discussing early development of sexual harassment law).

208. Boyer-Liberto v. Fontainebleau Corp., No. 12-212, 2013 WL 1413031, at *3 (D. Md. Apr. 4, 2013), *vacated on reh'g en banc*, 786 F.3d 264 (4th Cir. 2015). The supervisor denied making the comments. Throughout this Article, I refer to the evidence submitted by the parties. Often, the employer contests the plaintiff's evidence. I am not making any claims about whether discrimination did or did not occur in a particular case, just whether the evidence might be sufficient for a factfinder to find discrimination.

209. *Id.*

210. Boyer-Liberto v. Fontainebleau Corp., 752 F.3d 350, 356, 360 (4th Cir. 2014), *vacated on reh'g en banc*, 786 F.3d 264 (4th Cir. 2015).

could not constitute harassment because the plaintiff only asserted her supervisor called her "porch monkey" twice.[211]

The full Fourth Circuit "en banc" court reversed. It held that a reasonable jury could find that the worker was subjected to racial harassment.[212] The court noted that "no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet."[213]

Multiple judges looked at this same set of facts. To many of the judges, the facts could never constitute harassment because they were not severe or pervasive enough to state a claim under the statute. To other judges, even a single use of the racial epithet would be severe enough. There are other cases from different circuits involving use of the porch monkey epithet. At times judges allow the cases to proceed. Other times they do not.[214]

Indeed, it is difficult to predict the outcome of harassment cases involving racist or sexist slurs or epithets.[215] There is contradictory case law about whether the single use of an epithet is ever sufficient to establish harassment.[216]

Post-*Muldrow*, courts will need to grapple with the tensions between the "severe or pervasive" materiality requirement in harassment doctrine and the holding in *Muldrow* that Title VII does not require materiality. The harassment jurisprudence also illuminates several other issues. The early Title VII case law is not driven by textualism, and the harm standard for harassment cases is only derived from the text of Title VII in a limited way. The severe or pervasive test with its objective and subjective components is

211. *Id.* at 357.

212. Boyer-Liberto v. Fontainebleau Corp., 786 F.3d 264, 285 (4th Cir. 2015) (en banc).

213. *Id.* at 280 (quoting Spriggs v. Diamond Auto Glass, 242 F.3d 179, 185 (4th Cir. 2001)).

214. *See e.g.*, Curry v. SBC Commc'ns, Inc., 669 F. Supp. 2d 805, 835 (E.D. Mich. 2009) (noting the use of epithet alone would not create a hostile environment, but it could be added to other factors to allow claim to proceed); Cargo v. Kan. City S. Ry. Co., No. 05-2010, 2012 WL 4596757, at *7 (W.D. La. Oct. 1, 2012) (holding that isolated use of racial slurs does not constitute racial harassment).

215. *See* Baker v. FedEx Ground Package Sys., Inc., 278 F. App'x 322, 329 (5th Cir. 2008) (wanting to work with people not like the plaintiff and that "whites rule" were not sufficient to state a claim for racial harassment); Harrington v. Disney Reg'l Ent., Inc., 276 F. App'x 863, 876 (11th Cir. 2007) (conduct not pervasive when worker presented evidence that supervisor referred to her as "ghetto" and a manager referred to other African-American employees as monkeys); Barrow v. Ga. Pac. Corp., 144 F. App'x 54, 57 (11th Cir. 2005) (finding that harassment was not severe or pervasive when a worker presented evidence that he saw the rebel flag on tool boxes and hard hats, the letters "KKK" scrawled in to places, and a noose in another employee's locker and that a supervisor called him "n[*****]" three times and repeatedly called him boy); Holt v. Roadway Package Sys., Inc., 506 F. Supp. 2d 194, 204 (W.D.N.Y. 2007) (evidence that independent contractors and manager referred to plaintiff as "boy" and "porch monkey" and used term "n[*****]-rigged" not sufficient to be severe or pervasive).

216. *Compare* Wyre v. Bollinger Shipyards, Inc., No. 14-1759, 2015 WL 222327, at *5 (E.D. La. Jan. 14, 2015) (compiling cases that hold a single epithet is not sufficient), *with* Jasmin v. N.J. Econ. Dev. Auth., No. 16-1002, 2018 WL 3617955, at *10 (D.N.J. July 30, 2018) (collecting cases that a single epithet is sufficient).

not derived from the text of Title VII. What counts, at some level, is what courts think should count. This same issue is already plaguing appellate and district courts post-*Muldrow*.

C. The Move from Purposivism to Textualism

The limits of textualism in defining discrimination harm become evident as soon as judges started to apply *Muldrow*. This Article does not claim that the text or textualism is useless or plays no role in answering discrimination questions. Indeed, in *Muldrow* itself, textualism could answer the limited question about whether Title VII requires materiality. Unfortunately, the statute provides little to no guidance on what counts as negative or disadvantageous, what counts as a "term, condition, or privilege of employment," and when harm occurs.

This is not a criticism of the statute. As emphasized throughout this Article, when Congress created Title VII, robust forms of modern textualism did not exist, and textualism was not the main interpretive methodology.[217] Congress would not have expected courts to construe the text through the lens of modern textualism. Instead, Title VII's text provides broad outlines, with some areas of specificity. At the time, the best understanding would have been that the EEOC would help to illuminate the statute's meaning, and the courts would use a purposivist lens to interpret the statute.

Reading Title VII as a text that was meant to be understood primarily through modern textualism may cause courts to miss the foundational concept that Congress would have expected the EEOC and courts to fill in the statutory gaps. Even for those who eschew this view of Title VII, grappling with the limits of textualism is important. "[C]areful drafting will never entirely eliminate statutory ambiguity and legislators always will have to rely upon administrators and judges to interpret their enactments."[218]

The early history of Title VII jurisprudence illustrates this concept, as well as textualism's limits in cabining judicial discretion. Again, this is not to argue that textualism plays no role. Text can both expand and limit the statutory possibilities and a textualist methodology can illuminate these contours. Placing the text of the discrimination statutes within the broader historical context may be helpful in seeing the limits of textualism in the harm context.

Two examples are helpful: disparate impact and sexual harassment. The Supreme Court set forth the basic idea of disparate impact in a 1971 case,

217. Molot, *supra* note 6, at 19–20 (discussing changes in interpretive methodologies over time).
218. *Id.* at 53–54.

Griggs v. Duke Power Co.[219] In *Griggs*, the employer had a history of segregating employees based on race prior to Title VII's effective date. This pre-Title VII segregation was not at issue in *Griggs*. Instead, the Court assumed that the employer no longer intended to discriminate against black employees and applicants based on their race.

The Court scrutinized two qualification requirements the employer used: a high school diploma and a passing score on aptitude tests. The Court of Appeals held that since the employer implemented the requirements in good faith, they did not constitute discrimination because of race. The Supreme Court reversed, holding that Title VII does not require intent. Instead, the Court held that the statute prohibits "employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."[220]

Griggs illustrates the non-textualist foundations of Title VII jurisprudence. The opinion barely focused on the text of Title VII, with the text relegated to a footnote.[221] The opinion detailed the employer's actions and how they affected black employees.[222] The opinion recounted the purpose of Title VII is "to achieve equality of employment opportunities," as well as to "remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[223] The Court relied on the history of educational discrimination based on race,[224] input from the Equal Employment Opportunity Commission,[225] and the legislative history of Title VII.[226]

Sexual harassment jurisprudence followed a similar trajectory. As discussed in more detail earlier, the text of Title VII does not definitively answer the question of whether harassment is illegal. The "severe or pervasive" concept comes from the Supreme Court's opinion in *Meritor Savings Bank, FSB v. Vinson*, in which the Court recognized that harassment is cognizable under Title VII.[227] While part of the opinion is textualist, the Court also drew this standard from EEOC Guidelines and from existing

219. 401 U.S. 424 (1971).

220. *Id.* at 432. In subsequent cases, the Court clarified and modified the disparate impact model. In 1991, Congress added a framework for disparate impact into Title VII. 42 U.S.C. § 2000e-2(k). The Court held that a different disparate impact model applies to the ADEA. *See* Smith v. City of Jackson 544 U.S. 228, 240 (2005) (discussing how ADEA disparate impact claims differ from Title VII claims).

221. *Griggs*, 401 U.S. at 426 n.1.

222. *Id.* at 426–29.

223. *Id.* at 429–30.

224. *Id.* at 430.

225. *Id.* at 433–34.

226. *Id.* at 433–36.

227. 477 U.S. 57, 63 (1986).

appellate and district court caselaw.[228] *Meritor* is a mix of textualism and other methods of statutory interpretation. As discussed earlier, after stating that Title VII does not limit harm to economic harm, the emerging severe or pervasive doctrine does not draw from the language of Title VII.

Both *Griggs* and *Meritor* demonstrate that Title VII is not primarily a statute that the Court has interpreted through the lens of textualism. Instead, these cases illustrate an earlier understanding about the relationship between the courts, Congress, and administrative agencies. As I have argued in other work, when Congress enacted Title VII, textualism was not the prevailing interpretive method.[229] Instead, courts often relied on a more purposivist driven approach to statutes. This is the approach that Congress would have expected.

This history creates a number of challenges post-*Muldrow*. Take for example the hypothetical that kept arising in the *Muldrow* oral argument: whether a plaintiff could prevail on a claim of discrimination if an employer gave pink pens to female employees and gave blue pens to male employees.

The framework provided in *Muldrow*'s majority opinion provides no way to definitively answer this question. Indeed, it seems that some judges may reason that receiving a different colored pen is not negative. Some judges may reason that even if it is negative, it does not affect a "term, condition, or privilege" of employment. Some judges could find that giving different pens based on sex would depend on what the pens meant in the context of the particular workplace. Other judges might find that the only purpose of handing out different pens would be to make distinctions based on sex and that a reasonable worker could establish that doing so stigmatized workers because of sex. All of these outcomes are possible post-*Muldrow*.

Or take a more complicated real-world scenario. Imagine a company designates a woman as a high potential candidate for promotion to an executive position. The company starts to investigate whether the person has the skills and talents to become an executive. The company does this through a variety of mechanisms. It does a 360-degree review of the candidate. It has an outside company use an AI tool to evaluate the candidate's likelihood of moving to a new town because the company values executives who are able to move. It also relies on a battery of psychological tests to evaluate the candidates.

The company is not ready to make a choice about who it will promote to the executive position, but it is likely to do so in two years. Let's say the

228. *Id.* at 64–67.
229. Sandra F. Sperino, Bostock *and the Forgotten EEOC*, 103 TEX. L. REV. 141, 152 (2024).

results of the 360-degree review are overwhelmingly positive, except that two male subordinates rate the woman poorly and indicate that she is too soft and not aggressive enough. The AI tool gives a moderate moveability score, indicating that there is about a 50-50 chance that the woman will move for a promotion. There is some evidence supporting the claim that the AI tool associated being a woman with not be able to move. The psychological tests reveal that the worker is facing competing demands of being a mother and a worker. All of this information is sitting in a personnel file. Could the worker file a Title VII claim for sex discrimination and establish harm?

Notice that the words of *Muldrow* do not help to answer these questions. The 360-degree review is overwhelmingly positive, but it looks like the negative comments might be driven by gender stereotypes. Is this review negative or disadvantageous? A similar concern underlies the score provided by the AI tool. And, whether the results of the psychological test are negative or positive depends on how the employer responds to them.

Do these items affect a term, condition, or privilege of employment? Some people might argue that they have the potential to affect a term, condition, or privilege in the future, but have not caused harm yet. Others will argue that just the differences in potential outcomes driven by sex would be enough.

The answer is likely to depend on value judgments informed by precedent, knowledge gained from seeing inequality in the workplace, the work of the EEOC, and the work of scholars and others who help to illuminate and label harm.

How judges answer this question will not be based solely on the text of the discrimination statutes. Indeed, in at least some instances, the harm jurisprudence post-*Muldrow* will need to rely on a similarly broad methodology as relied on in the disparate impact and harassment contexts. Part of the outcome will depend on how the judge (or jury, if harm is ultimately a question of fact) understands what counts as harm.

IV. THE BIG PICTURE POST-MULDROW

The post-*Muldrow* world is one of both promise and problems. While *Muldrow* does not provide all answers related to harm, it will result in a more unified discrimination harm doctrine than existed pre-*Muldrow*. Additionally, *Muldrow* will force courts to address whether the harm threshold differs in non-harassment disparate treatment cases, retaliation cases, and harassment cases. The possibility that *Muldrow* might encourage a more unified harm jurisprudence in discrimination law is intriguing.

Ultimately, the harm jurisprudence in discrimination cases has been stifled by the non-textualist materiality requirement. *Muldrow* is worth celebrating in the sense that it removes this concept that has muddled discrimination jurisprudence. Without the distraction of materiality, courts will need to return to the core statutory issues: what counts as negative, what counts as terms, conditions or privileges, and who gets to decide these questions. This section maps out possibilities for those larger debates and highlights textualism's inability to answer all of them.

A. Eliminating Some Inter-Circuit Issues

Prior to *Muldrow*, the circuits used different definitions for what counted as adverse actions. For example, prior to *Muldrow*, there was a circuit split about whether lateral transfers could ever count as harm, even if the employer used a protected trait in determining whether to transfer an employee.[230] At the very least, *Muldrow* answers the lateral transfer question.

Courts will likely land on similarly uniform outcomes related to at least some employment actions, although determining where uniformity will emerge is difficult to determine at this time.

B. Jettisoning "Adverse Action"

District and appellate courts should consider whether jettisoning the words "adverse action" to focus more on the words of the statutes would help this effort.[231] As discussed above, the courts appended the words "adverse action" to the *McDonnell Douglas* test. While *Muldrow* made it clear that Title VII discrimination claims do not require the plaintiff to establish materiality, it did not address whether it was appropriate to continue to use the words "adverse action."

Post-*Muldrow*, many courts have continued to use the words "adverse action" when describing the *McDonnell Douglas* test.[232] *Muldrow* does not address this particular issue directly, and the Supreme Court has used the

230. Muldrow v. City of St. Louis, 601 U.S. 346, 353 (2024).

231. As noted earlier, the PWFA uses the words "adverse action." 42 U.S.C. § 2000gg-1.

232. *See, e.g.*, Dixon v. Blinken, No. 22-2357, 2024 WL 4144105, at *2 (D.D.C. Sept. 11, 2024) (noting that the Supreme Court recently clarified the adverse action definition). *But see* Juarez v. Midwest Div. - OPRMC, LLC, No. 23-2417, 2024 WL 4679220, at *6 (D. Kan. Nov. 5, 2024) (noting that the concept of adverse action and the doctrine developed under it are not helpful post-*Muldrow*).

words "adverse action" in the past.[233] However, *Muldrow* repeatedly noted that the courts should not be adding words to Title VII.[234]

Striking the words "adverse action" from discrimination jurisprudence and replacing them with the statutory language would be consistent with *Muldrow* and would confer other benefits. The words "adverse action" are not in Title VII, and the adverse action idea is weighted with decades of old meaning, some of which is inconsistent with *Muldrow*.

Eliminating the words "adverse action" would reinforce the larger point that judges should not be adding words to statutes. Practically, judges would be less apt to cite old case law that is called into question by *Muldrow*.

This may seem like an unnecessary change because it could be argued that the word adverse is interchangeable with negative or disadvantageous. This may be correct as a matter of English usage, but this intuition does not transfer completely to the adverse action construct created by the courts. Materiality was a central concept in adverse action doctrine. In other words, under that doctrine, some actions that were negative and affected a term, condition or privilege of employment would not be counted as an adverse action. The language shift should encourage courts to focus more on the statutory language and less on court-created doctrines related to materiality.

C. Unifying Harm Doctrine

One of the most interesting theoretical and practical aspects of *Muldrow* is whether it will encourage courts to unify discrimination harm doctrine.[235] As discussed in Sections III.B.2 and 3, the Supreme Court separately developed harm jurisprudence related to retaliation and harassment. And, as discussed throughout this Article, in the disparate treatment context the courts have never seriously grappled with the harm threshold provided in 42 U.S.C. § 2000e-2(a)(2).

It seems untenable for the Court to maintain at least one of the distinctions between retaliation harm and discrimination harm. Recall that in the retaliation context, the Court interpreted the words "discriminate against" to impose a materiality requirement, and in *Muldrow* it interpreted those same words as rejecting a materiality requirement. The courts should reconcile this inconsistency by removing the retaliation materiality requirement.

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233. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 345 (2013); Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009).

234. *Muldrow*, 601 U.S. at 355–56, 358.

235. This is not the only problematic split in work law. *See, e.g.*, Marion Crain & Pauline T. Kim, *A Holistic Approach to Teaching Work Law*, 58 ST. LOUIS U. L.J. 7, 8 (2013) (arguing that it is a mistake to conceive of work law as divided into labor law, discrimination law, and employment law).

This does not mean that retaliation harm and discrimination harm will be completely uniform. The Supreme Court has held that because Title VII's retaliation provision does not contain the words "terms, conditions, or privileges" that the retaliation provision is broader in this sense than the discrimination provision.[236] In examining this issue, courts must be careful to remember that Title VII contains two operative provisions, and the second provision is not coterminous with the first one.[237]

Muldrow also will force courts to grapple with how and whether it intersects with harassment doctrine. As discussed in more detail in Section III.B.3, harassment doctrine currently requires a plaintiff to establish that she was subjected to conduct that was "severe or pervasive." Given that harassment and discrimination derive from the same statutory language, courts need to resolve the seeming tension between this standard and the no materiality holding in *Muldrow*.

Additionally, harassment doctrine has often served as a catchall cause of action for all of the conduct that did not meet the materiality requirements that courts imposed prior to *Muldrow*. Now, litigants are seeking relief for these actions either separately under a disparate treatment theory or under both disparate treatment and harassment theories. Thus, whether courts change the severe or pervasive standard, *Muldrow* will still profoundly affect harassment caselaw.

An example is helpful here. Imagine a woman alleges that an employer did the following because of her sex: A supervisor gave the woman secretarial tasks, even though her job description did not entail secretarial tasks. The supervisor reprimanded her in writing in ways that suggested he held her to different standards because of her sex. The supervisor stated that "women should not work in supervisory positions and should stay home and take care of their husbands."

Pre-*Muldrow*, each of these issues would be aggregated into a hostile work environment theory of sex-based harassment and evaluated under the severe or pervasive standard. Post-*Muldrow*, litigants are arguing that the actions and comments either individually or cumulatively constitute a cognizable action and that the plaintiff should be able to recover for the harm caused by each action or comment either individually or cumulatively without proceeding through the harassment framework.

Some plaintiffs are also arguing that they can proceed under both frameworks, having courts evaluate what happened to them under both a disparate treatment framework and a harassment framework. Other

236. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 63 (2006).

237. 42 U.S.C. § 2000e-2(a)(2). The ADA's primary language is more detailed than Title VII's main operative language. 42 U.S.C. § 12112.

plaintiffs are arguing that *Muldrow* requires courts to jettison the "severe or pervasive" standard because it is a materiality standard.[238]

These moves have significant theoretical and practical implications for the field of discrimination law. Harassment and non-harassment disparate treatment theories of discrimination originally derive from the same provisions of Title VII.[239] Without a satisfactory explanation, the Supreme Court divided non-harassment disparate treatment from harassment law, applying different frameworks to each theory of discrimination. This dichotomy has never made practical or theoretical sense and has made discrimination law harder than it needs to be.

Let's return to our earlier example. Pre-*Muldrow* courts tended to evaluate the conduct and comment under a proof structure created just for harassment. The courts also tended to call harassment a "claim" and to treat that "claim" separately from the "claim" of non-harassment disparate treatment. In addition, the courts also developed a separate agency doctrine for harassment and a separate way of determining when a plaintiff was required to submit a Charge of Discrimination to the EEOC.[240]

This dichotomy has never made much sense. It is not clear how two theories of discrimination could derive from the same statutory language yet have such different proof structures. This dichotomy led to strange situations in which courts feel compelled to reason through every conceivable proof structure, even for facts that clearly suggest an employer may have taken actions because of a protected trait. And, it has resulted in the "slicing and dicing" of facts into disparate treatment facts and harassment facts with courts improperly dividing facts among the theories and failing to see the bigger picture that all of the conduct and comments might be connected.[241]

Muldrow raises the exciting possibility that courts will bring together non-harassment disparate treatment and harassment under a unified theory and proof structure or structures. There is a strong textualist argument that the two theories should be more connected given that they derive from the same statutory text.

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238. *See* Zuniga v. City of Dallas, No. 23-CV-2308-D, 2024 WL 2734956, at *3 n.3 (N.D. Tex. May 28, 2024).

239. 42 U.S.C. § 2000e-2(a)(1). By citing this provision, the author is not expressing any opinion about whether harassment also derives from 42 U.S.C. § 2000e-2(a)(2).

240. *See* National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 115 (2002) (explaining the continuing violation doctrine for harassment claims); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998) (describing agency doctrine); Faragher v. City of Boca Raton, 524 U.S. 775, 791 (1998) (same).

241. Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577, 581 (2001).

However, textualism will only provide part of the answer. As discussed earlier, harassment doctrine does not derive solely from the text of Title VII. The concept of harassment is consistent with the text of Title VII, but recognizing this relies on understanding how inequality happens in both theory and practice.

At the very least courts will need to grapple with whether the severe or pervasive standard in harassment law constitutes a materiality requirement and if so, whether it is consistent with *Muldrow*.

There are textualist arguments on both sides. One interpretation applies *Muldrow* to harassment. Title VII imposes no materiality requirement whether the underlying theory is harassment or non-harassment disparate treatment. Another line of reasoning would draw on *Meritor* and find that conduct does not reach the level of constituting a term, condition, or privilege of employment until it is severe or pervasive.[242]

As these issues play out in the federal courts, both courts and litigants will also face the difficult task of determining whether items that used to be aggregated under the harassment theory can now be disaggregated into a non-harassment discrimination theory. For example, imagine a supervisor tells a woman twice that he will never promote women because he thinks they should be at home. These comments would traditionally be evaluated under a hostile environment theory. It is not clear now whether the comments either individually or cumulatively can be pursued as individual harms under *Muldrow*.

Relatedly, courts will need to grapple with a problem that has plagued discrimination jurisprudence. Post-*Muldrow*, some courts are dividing each alleged action into separate claims and then separately evaluating whether each action constitutes discrimination.[243] However, if a plaintiff is subjected to a series of negative actions because of a protected trait, discrimination law allows a plaintiff to prevail on the combined negative effects.[244]

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242. *See* McNeal v. City of Blue Ash, 117 F.4th 887, 904 (6th Cir. 2024); *see also* Hansley v. DeJoy, No. 23-1426, 2024 WL 4947275, at *2 (4th Cir. Dec. 3, 2024) (in dicta stating that harassment and disparate treatment require different elements post-*Muldrow*); Navarro v. Hollywood Imports Ltd., No. 23-61772-CIV, 2024 WL 5263832, at *5 (S.D. Fla. Nov. 13, 2024) (noting that the court would apply separate test for harassment post-*Muldrow*). *But see* Juarez v. Midwest Div. - OPRMC, LLC, No. 23-2417, 2024 WL 4679220, at *6 (D. Kan. Nov. 5, 2024) (appearing to apply *Muldrow* rather than severe or pervasive standard to harassment).

243. *See, e.g.*, O'Brien v. Autozoners, LLC, No. 23-793, 2024 WL 4838867, at *8 (E.D. La. Nov. 20, 2024) (considering each alleged action separately); McLoughlin v. Vill. of Southampton, No. CV 23-6586, 2024 WL 4189224, at *4 (E.D.N.Y. Sept. 13, 2024) (same, but then explaining in a cursory way that the events taken together also would not be viable while also doubting such aggregation should occur).

244. *See generally* Zimmer, *supra* note 241 (discussing how courts tend to disaggregate facts in discrimination cases to avoid seeing larger pattern).

Although *Muldrow* is likely to cause some initial confusion in this area, it is ultimately a net positive for discrimination law for courts to grapple with these underlying tensions. And, as discussed in more detail below, these questions will lead courts to try to better understand what constitutes discrimination harm and why.[245]

D. Defining Terms, Conditions and Privileges

Even though Title VII has used the words "terms, conditions, or privileges" since 1964, courts have paid little attention to these words. This is largely because the materiality question has played the central role in harm inquiries.

The Supreme Court case law in this area is sparse. In *Hishon v. King & Spalding*, the Court held that consideration for partner was part of the terms and conditions of an associate's employment.[246] In another case, the Court noted that terms and conditions includes "actions that affect employment or alter workplace conditions."[247] It also indicated that in understanding Title VII's coverage, courts should look to Title VII's second operative provision which also prohibits employers from taking actions that deprive or tend to deprive employment opportunities or otherwise adversely affect the person's status as an employee.[248]

Most of the Court's discussion of these words have been in the harassment context. The Court has sent mixed messages in this area. On the one hand, the Court has stated that federal discrimination statutes are designed to "strike at the entire spectrum" of discriminatory conduct.[249] However, in some cases, the Court has stated that harassment must be "extreme" to constitute harassment and that the standards for judging harassment must be demanding to ensure that Title VII does not become a general civility code.[250] As discussed throughout this Article, it is not clear how these statements mesh with *Muldrow*.

The Supreme Court has indicated that in interpreting the words "terms, conditions, or privileges" in Title VII, it is appropriate to use labor law to

245. Courts also may be asked to determine whether actions that count as harm on their own can be aggregated into the harassment claim. *McNeal*, 117 F.4th at 903 (discrete actions may be included in harassment claim if they contributed to it).

246. 467 U.S. 69, 77 (1984).

247. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 54 (2006).

248. *Id.* at 54.

249. *See, e.g.*, Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986); City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 708 n.13 (1978) (quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971)).

250. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998).

"shed light" on the meaning of Title VII.[251] To date, courts have not mined the extensive case law related to terms, conditions, or privileges of employment that exists from the labor law and other contexts. Under the National Labor Relations Act, employers and unions must collectively bargain with respect to "wages, hours, and other terms and conditions of employment."[252] In these cases, courts have held that the terms and conditions of employment include all sorts of employer actions including: the price of food at vending machines and in the company cafeteria;[253] rules concerning employee discipline, smoking and dress;[254] and the level of heat in the workplace.[255]

In the discrimination context, employers will likely try to argue that many actions do not affect the terms or conditions of employment.[256] Yet, employers should exercise caution in making these arguments because employers have reasons to want courts to define these terms broadly in the context of at-will employment and arbitration agreements.

At-will employment describes the rules that generally govern employment in the United States. At-will employment exists unless a contract or a specific law protects an employee. Under this doctrine, an employer has the power to make employment decisions affecting the terms or conditions of employment for a good reason, a bad reason, or no reason at all. Employer handbooks commonly use this "terms or conditions" language to communicate that the employer governs the environment and circumstances of an employee's work.[257]

In the arbitration context, employers often enter into agreements requiring employees to arbitrate all disputes related to the "terms and conditions" of the worker's employment.[258] These arbitration provisions are often construed broadly, so that almost any work-related dispute is covered.

As courts construe the meaning of *Muldrow*, they will need to grapple with whether the text of Title VII is a separate and distinct source of

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251. *Hishon*, 467 U.S. at 76 n.8.

252. Ford Motor Co. v. N.L.R.B., 571 F.2d 993, 997 (7th Cir. 1978).

253. *Id.* at 1000.

254. S.S. Kresge Co. v. N.L.R.B., 416 F.2d 1225, 1229–1230 (6th Cir. 1969).

255. N.L.R.B. v. Wash. Aluminum Co., 370 U.S. 9, 9 (1962).

256. *E.g.*, Williams v. Memphis Light, Gas & Water, No. 23-5616, 2024 WL 3427171, at *5 (6th Cir. July 16, 2024) (accepting argument that conduct related to a retirement party was not a term or condition, but noting that some social activities could be).

257. *See, e.g.*, *Swarthmore Employee Handbook*, https://www.swarthmore.edu/human-resources/employee-handbook [https://perma.cc/L9EC-M7M8] (noting that the handbook supersedes any prior communications related to the terms and conditions of work).

258. Haggerty v. SSA Containers, Inc., No. CV 19-6437, 2020 WL 11613656, at *2 (C.D. Cal. Jan. 16, 2020) (citing to arbitration agreement that applied to the disputes arising from the "terms and conditions" of employment); *see also* Vanhorn v. Locklear Auto. Grp., Inc., No. 15-cv-467, 2015 WL 4470320, at *1 (N.D. Ala. July 22, 2015) (using similar language).

meaning for these words or whether Congress intended to integrate the discrimination statutes with the rest of labor and employment law jurisprudence.

The more difficult questions in this space relate to when a term, condition or privilege is affected, especially in the context of threatened harm. This issue is intertwined with the harm inquiry, to which we now turn.

E. Grappling with Harm

Muldrow may also spur courts to resolve theoretical and practical issues related to discrimination harm. Even though Title VII was enacted in 1964, courts have not fully grappled with what constitutes harm under the statute. The pink pen/blue pen hypothetical raised at oral argument in *Muldrow* provides a way to explore these issues.

To answer the pink pen/blue pen question, it will be necessary to determine the answer to many practical questions. Does the harm need to be viewed as harmful to a reasonable worker? Does the worker also need to experience harm subjectively? Notice that the statutory text does not answer any of these questions. To answer them, courts will need to explore extra-statutory sources.

Who gets to decide the answer to the harm question? Should judges determine this as a matter of law? When a jury trial is available, should juries answer this question? Does the plaintiff need to present evidence of harm or can judges and factfinders draw on their own intuitions about what constitutes harm?

The answer to the pink pen/blue pen question may also differ depending on whether harm is context specific. Is giving pink pens to female employees and blue pens to male employees always harmful or does it only constitute harm in certain circumstances, such as where the employer uses the pens to signal differences in status? Some might even argue that there is no scenario under which the blue pens and pink pens could lead to a viable claim.

Answering harm questions post-*Muldrow* will ultimately depend on how judges conceive of discrimination at a practical and theoretical level. There is a rich literature focusing on different models of discrimination including anticlassification, antisubordination, and stereotyping.[259]

259. Stephanie Bornstein, *Antidiscriminatory Algorithms*, 70 ALA. L. REV. 519, 540 (2018); Bradley A. Areheart, *The Anticlassification Turn in Employment Discrimination Law*, 63 ALA. L. REV. 955, 994 (2012); Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 9–11 (2003); Reva B. Siegel, *Equality*

Under an anticlassification approach, discrimination is harmful because it differentiates between people because of a protected trait. The goal is to treat people in different protected classes the same, with no regard for the protected trait. This concept of anti-discrimination law is highlighted in Justice Kavanaugh's concurring opinion in *Muldrow*. Justice Kavanaugh recognized that the harm of discrimination is not shown by the consequence, but rather from the act of being treated differently because of a protected trait.[260] He noted, "The discrimination is harm."[261]

In contrast, the antisubordination approach views discrimination "as actions that perpetuate social hierarchy and the oppression of historically disadvantaged groups."[262] "Antisubordination theory recognizes that the law must consider how members of protected classes are situated differently within society based on the historical context of the social-status subordination of racial minorities and women."[263]

Some scholars view stereotyping as worthy of separate theoretical treatment.[264] When a statute prohibits stereotyping, it prohibits a person from being judged related to other people within the protected class or ideas of how people in a protected class should behave. Professor Bornstein describes the differences in the three approaches as follows:

> Anticlassification requires that we treat Woman A and Man B the same, and antisubordination requires that we ensure that All Women are not disadvantaged as compared to All Men. But antistereotyping also requires that we treat Woman A as an individual and not make work-related judgments about her as compared to All Women.[265]

In addition to these broad theoretical approaches, the scholarly literature, the EEOC, and case law have identified ways workers can experience differential treatment. As discussed throughout this Article workers may prove discrimination through multiple avenues including frameworks for disparate treatment, harassment, and disparate impact.

Scholars have added to these ideas about how discrimination occurs by discussing negligent discrimination, reckless discrimination, structural bias,

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Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown, 117 HARV. L. REV. 1470, 1470–76 (2004). Even these categories are not sufficient to capture discrimination that relates to work. Peggie R. Smith, *Separate Identities: Black Women, Work, and Title VII*, 14 HARV. WOMEN'S L.J. 21, 24 (1991) (arguing that discrimination law only covers a limited concept of inequality).

260. Muldrow v. City of St. Louis, 601 U.S. 346, 365 (2024) (Kavanaugh, J., concurring).
261. *Id.*
262. Bornstein, *supra* note 259, at 541.
263. *Id.*
264. *Id.* at 544.
265. *Id.*

and unconscious bias.[266] A rich, scholarly literature explicitly or implicitly criticizes overreliance on models that frame discrimination as individual animus that manifests at specific moments when decisions are made. This literature highlights how decisions happen over time and are affected by organizational structures and choices.[267] The literature discusses how stereotyping,[268] intersectional discrimination,[269] and unconscious bias might impact outcomes.[270]

266. *See* David Simson, *Fool Me Once, Shame on You; Fool Me Twice, Shame on You Again: How Disparate Treatment Doctrine Perpetuates Racial Hierarchy*, 56 HOUS. L. REV. 1033 *passim* (2019); Naomi Cahn, June Carbone & Nancy Levit, *Gender and the Tournament: Reinventing Antidiscrimination Law in an Age of Inequality*, 96 TEX. L. REV. 425, 425–26 (2018); Stephanie Bornstein, *Reckless Discrimination*, 105 CALIF. L. REV. 1055, 1055–56 (2017); Stephanie Bornstein, *Unifying Antidiscrimination Law Through Stereotype Theory*, 20 LEWIS & CLARK L. REV. 919, 919–20 (2016) [hereinafter Bornstein, *Unifying Antidiscrimination Law*]; Kevin Woodson, *Derivative Racial Discrimination*, 12 STAN. J. C.R. & C.L. 335, 337 (2016); W. Jonathan Cardi, *The Role of Negligence Duty Analysis in Employment Discrimination Cases*, 75 OHIO ST. L.J. 1129, 1130 (2014); Richard Thompson Ford, *Bias in the Air: Rethinking Employment Discrimination Law*, 66 STAN. L. REV. 1381, 1381 (2014); Minna J. Kotkin, *Diversity and Discrimination: A Look at Complex Bias*, 50 WM. & MARY L. REV. 1439, 1439–40 (2009); Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1926–30, 1956–60 (2009); Samuel R. Bagenstos, *Implicit Bias, "Science," and Antidiscrimination Law*, 1 HARV. L. & POL'Y REV. 477, 480 (2007); R. Richard Banks, Jennifer L. Eberhardt & Lee Ross, *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CALIF. L. REV. 1169, 1170 (2006); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 946 (2006); Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374, 374 (2007); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 969 (2006); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1490, 1510 (2005); Tristin K. Green, *Work Culture and Discrimination*, 93 CALIF. L. REV. 623, 625–26, 640 (2005); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action*,*"* 94 CALIF. L. REV. 1063, 1064 (2006); Martha Chamallas, *Structuralist and Cultural Domination Theories Meet Title VII: Some Contemporary Influences*, 92 MICH. L. REV. 2370, 2371–72 (1994); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 899 (1993); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323–24 (1987).

267. Catherine Albiston & Tristin K. Green, *Social Closure Discrimination*, 39 BERKELEY J. EMP. & LAB. L. 1, 2 (2018); Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849, 850 (2007); Green, *supra* note 266, at 625–26; Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1262 (2000) (discussing how work structure pressures employees to behave in certain ways to perform a work identity). *But see* Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 2–3 (2006) (questioning whether discrimination law can and should be fully responsive to structural discrimination).

268. Bornstein, *Unifying Antidiscrimination Law*, *supra* note 266, at 925.

269. Devon W. Carbado & Cheryl I. Harris, Essay, *Intersectionality at 30: Mapping the Margins of Anti-Essentialism, Intersectionality, and Dominance Theory*, 132 HARV. L. REV. 2193, 2202 (2019); Kotkin, *supra* note 266, at 1439–40; Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139–40, 158.

270. Lawrence, *supra* note 266, at 322.

Professors Pauline Kim, Stephanie Bornstein, Orly Lobel, and others are leading the discussion about how algorithms might discriminate.[271] Professor Kim's work addresses potential harms at the group level that may affect individual workers. For example, if an employer uses targeted advertising to solicit workers and the algorithm it, or an intermediary, uses disproportionately advertises to a particular race or sex, can a worker establish harm under Title VII?[272]

There is also scholarship about how employees perceive actions that happen to them. A body of anecdotal evidence and social science research confirms that employees are receiving messages about their place and values in an organization through actions like employee evaluations, opportunities to work on high-prestige projects, informal feedback, and networking opportunities. Although this literature is too vast to completely canvas within this Article, even looking at a small sample of work related to sex discrimination illustrates these ideas.

Women continue to report discrimination happening in a variety of ways. In group settings, their opinions are ignored or undervalued.[273] Women's authority is often questioned or met with hostility.[274] Women face a double bind of being penalized for failing to be assertive, yet risk social sanction for being too assertive.[275] In fields where group work is required, male co-workers may collaborate with male co-workers more often than with female co-workers.[276] Women in male-dominated fields often report feeling socially ostracized.[277]

The point of this discussion is not to land at a particular outcome post-*Muldrow*, but to show that while the text of Title VII answered the materiality question, it is not capable of answering all harm questions.

Consider the problem of algorithmic discrimination. Imagine a company claims that it can sift through employer data and identify the workers who are likely to be able to move in the future.[278] The employer values

271. Pauline T. Kim, *Data-Driven Discrimination at Work*, 58 WM. & MARY L. REV. 857, 883–92 (2017) (discussing intentional discrimination, record errors, statistical bias, structural disadvantage, and classification bias); Pauline T. Kim, *Manipulating Opportunity*, 106 VA. L. REV. 867, 868 (2020) [hereinafter Kim, *Manipulating Opportunity*] (discussing how online intermediaries affect work opportunities).

272. Kim, *Manipulating Opportunity*, *supra* note 271, at 920–30 (discussing how online intermediaries affect work opportunities).

273. Lucy M. Stark, *Exposing Hostile Environments for Female Graduate Students in Academic Science Laboratories: The* McDonnell Douglas *Burden-Shifting Framework as a Paradigm for Analyzing the "Women in Science" Problem*, 31 HARV. J.L. & GENDER 101, 137–38 (2008).

274. *Id.* at 137–38.

275. *Id.* at 140.

276. *Id.* at 143.

277. *Id.* at 138–39.

278. Bornstein, *supra* note 259, at 552.

employees who are willing to relocate for jobs. If the program ends up placing women in the unlikely to move category and men in the likely to move category based on aggregate data about men and women, Professor Bornstein posits that the algorithm is acting in a way that is similar to traditional stereotyping claims.[279] However, if an employer uses the algorithm to assign a moveability score and places the score in an employee's file, it is not clear whether this action would constitute harm under *Muldrow*.

CONCLUSION

Muldrow has the potential to be a path-breaking case that forces courts to grapple with a fundamental question of discrimination law: When is discrimination harmful? The case also will require courts to examine the current dichotomy between harassment and non-harassment disparate treatment.

In answering the questions left open after *Muldrow*, courts are quickly reaching the limits of textualism. While textualism could answer the question of whether Title VII requires harm to be material, it provides little guidance about when conduct is negative or affects a term, condition or privilege of employment. Answering these questions will require courts to mine other sources of statutory meaning.

279. *Id.*