THE AMBIGUITY OF *MULDROW V. CITY OF ST. LOUIS*'S SOME-HARM REQUIREMENT

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ABSTRACT

The United States Supreme Court's unanimous decision in *Muldrow v. City of St. Louis* rejected the "significant harm" requirement for Title VII disparate treatment claims and replaced it with a requirement that the claimant prove only "some harm" regarding an identifiable term or condition of employment. While this ruling sought to benefit employees by reducing their burden of proof, this Note argues that the Court ultimately complicated the standard.

By failing to define some harm or provide clear guidelines for its application, the new standard is similarly ambiguous to the one it replaced. Consequently, lower courts have struggled with its interpretation, leading to inconsistent rulings and varied application across Title VII claims. This lack of precedent and uniformity creates unnecessary difficulty for employees seeking protection from discrimination and employers navigating lawful employment decisions. To resolve this ambiguity, this Note advocates for the implementation of a more established judicial test, specifically exploring standards like the objective and subjective test and the reasonableness standard, to provide the clarity and precedential guidance that is needed to stabilize lower court application and fulfill Title VII's purpose of protecting employees from workplace discrimination.

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INTRODUCTION

The Supreme Court's recent *Muldrow v. City of St. Louis*[1] decision has generated significant confusion among lower courts and prominent legal scholars. The case considers the required elements in Title VII, which is a federal law prohibiting employment discrimination based on the employee's membership in a protected class.[2] Disparate treatment is one of the categories under Title VII, which requires an intentional "adverse employment action" by an employer because of an employee's membership in a protected class.[3] The Court rejected the requirement of "significant harm" in Title VII disparate treatment claims and applied "some harm" in its place.[4] This ruling appropriately sought to benefit employees facing discrimination in the workplace by reducing their burden of proof; however, it unnecessarily complicated the harm requirement. Consequently, lower courts have struggled with interpreting the decision and have

1. 601 U.S. 346 (2024).
2. 42 U.S.C. § 2000e-2(a).
3. Kassner v. Second Ave. Delicatessen, Inc., 496 F.3d 229, 238 (2d Cir. 2007).
4. *Muldrow*, 601 U.S. at 350.

applied it variably, while employers are unsure how to navigate the unclear standard.

This Note first discusses the background of discrimination laws in the United States, which led to Congress enacting Title VII of the Civil Rights Act of 1964. Second, it gives an overview of the various claims a plaintiff may bring under Title VII and the split among circuit courts regarding Title VII's harm requirement before *Muldrow*. Next, this Note delineates *Muldrow*'s 9–0 ruling, which held that the Title VII harm requirement for sex-based discrimination only requires a claimant to prove some harm, along with three Justices' separate opinions.

This Note argues that some harm is ambiguous and that lower courts have applied it unevenly. While the new test helps plaintiffs by making it easier to prove discrimination claims, the standard is similarly ambiguous compared to the alternative significant harm test. Therefore, the standard for harm in disparate treatment claims remains difficult for courts to apply and has resulted in inconsistent lower court decisions. Finally, this Note considers multiple alternative tests that may help courts apply the statute more uniformly, allowing for even-handed protection of employees throughout the court system and more clarity for employers.

I. BACKGROUND

A. History of Discrimination Laws

In 1963, Martin Luther King Jr. led the March on Washington, which comprised more than 250,000 individuals demanding racial equality in America.[5] This event, in part, initiated the passage of what we now know as the Civil Rights Act of 1964.[6] In 1964, after debating for more than 530 hours, the Senate passed the bill in a 73–27 vote.[7] Two weeks later, the House passed the bill, and President Lyndon B. Johnson signed it into law.[8] Title VII of the Act established anti-discrimination rights in employment settings based on "race, color, religion, sex, [and] national origin"[9] and created the Equal Employment Opportunity Commission (EEOC).[10] While the EEOC did not yet have enforcement power, it could help the adverse parties reach conciliation agreements and could "recommend to the Department of Justice that it bring pattern and practice lawsuits."[11] The federal government allocated $2.25 million to the EEOC[12] (approximately

5. Ginger Christ, *Celebrating 60 Years: A Visual History of Title VII of the Civil Rights Act*, HRDIVE (July 2, 2024), https://www.hrdive.com/news/celebrating-60-years-of-title-vii-of-the-civil-rights-act/720381/.
6. *Id.*
7. *Id.*
8. *Id.*
9. 42 U.S.C. § 2000e-2(b).
10. Christ, *supra* note 5.
11. *EEOC History: 1964 – 1969*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/history/eeoc-history-1964-1969 (last visited Nov. 24, 2025).
12. Christ, *supra* note 5.

$22.5 million today),[13] and expected approximately 2,000 Title VII claims within the first year.[14] Instead, the agency saw over 8,800 claims by employees within the first year, demonstrating the importance and necessity of the new law.[15] In 1965, President Johnson extended Title VII authority to federal contractors and required the EEOC to defer to the Department of Labor in circumstances where those cases required enforcement action.[16]

Over the past sixty years, multiple amendments have reshaped Title VII.[17] In 1972, the Equal Employment Opportunity Act authorized the EEOC to bring enforcement actions in court against nongovernment respondents,[18] while the Pregnancy Discrimination Act, established in 1978, extended Title VII protections to discrimination based on pregnancy and other medical conditions.[19] In 1991, President George H. W. Bush extended Title VII to protect congressional and high-ranking appointees, to allow jury trial requests, and to allow claimants to recover compensatory and punitive damages.[20] More recently, President Barack Obama signed an Act in 2009, which overturned the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*[21] and determined that every paycheck related to discriminatory compensation constitutes a separate violation.[22]

B. Title VII Claims and Application

Title VII addresses employment discrimination claims based on an individual's membership in a protected class.[23] Title VII's prohibition on discrimination in employment encompasses a variety of claims: disparate treatment, disparate impact, hostile work environment, and retaliation.[24] Disparate treatment, the claim brought in *Muldrow*, applies when an employer intentionally treats an employee worse because of their

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13. *Inflation Calculator*, FEDERAL RESERVE BANK OF MINNEAPOLIS, https://www.minneapolisfed.org/about-us/monetary-policy/inflation-calculator (last visited Nov. 24, 2025).
14. Christ, *supra* note 5.
15. *Id.*
16. *Id.*
17. *Id.*
18. U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 11.
19. Christ, *supra* note 5.
20. *Id.* (regarding the Civil Rights Act of 1991).
21. 550 U.S. 618 (2007).
22. Christ, *supra* note 5 (concerning the Lilly Ledbetter Fair Pay Act).
23. 42 U.S.C. § 2000e-2(a). Title VII specifically applies to employers that employ fifteen or more individuals for at least a twenty-week period within the current or prior calendar year. Additionally, all federal, state, and local government agencies that meet the above threshold are governed by Title VII. Finally, any employment agency or labor organization that refers individuals to employers is also governed by Title VII. 42 U.S.C. § 2000e(b). State and local jurisdictions may apply laws that extend beyond Title VII protection for employees. Some examples of these laws are New York's prohibition of unemployment discrimination, a Florida county's prohibition of discrimination based on political beliefs, and Michigan's prohibition of height or weight discrimination. N.Y. EXEC. LAW § 296(1) et seq. (Consol. 2025); Broward County, Florida Administrative Code Sec. 14.265(d) (Supp. 27 2025); MICH. COMP. LAWS § 37.2202 (2025). Therefore, beyond the federal Title VII requirements, additional elements of proving a discrimination claim vary between jurisdictions; however, this paper will only focus on the federal requirements and applications.
24. 42 U.S.C. § 2000e-2(a).

membership in a protected class.[25] Disparate impact claims are applicable when an employer's treatment is non-intentional but nonetheless has a discriminatory effect on employees of a protected class.[26] Hostile work environment claims arise when offensive sexual conduct is "severe enough or sufficiently pervasive to create a work environment that was hostile or abusive to [the] plaintiff."[27] Finally, a retaliation claim arises when an employer takes adverse action against an employee because the employee opposed any employment practice made unlawful under Title VII.[28]

C. How to Bring a Title VII Claim

There are several jurisdictional requirements to establish federal jurisdiction over a Title VII claim.[29] First, a claimant must timely file a complaint with the EEOC,[30] claiming discrimination based on their membership in a protected class against their employer.[31] The claim must be written, signed, and verified by an individual "authorized by law to administer oaths and take acknowledgements."[32] These steps notify the employer of the filed charge and initiate an EEOC investigation.[33] The investigation is fact-intensive and may include interviews of the employer and witnesses and the gathering of related documents.[34]

If the EEOC investigates the charge and finds a discriminatory employment action, the agency will issue a "Letter of Determination" to the claimant and employer, explaining the Commission's determination.[35] Then, the EEOC will work with both parties to find a temporary solution, requiring the parties to waive their right to litigate.[36] If a solution cannot be agreed upon, then the EEOC will determine whether the agency will take the case to court.[37] If they choose not to do so, then it will issue the claimant a right-to-sue letter, and the claimant is left in the same position as if the EEOC did not find discrimination and may take private action.[38]

25. Anita M. Alessandra, *When Doctrines Collide: Disparate Treatment, Disparate Impact, and* Watson v. Fort Worth Bank & Trust, 137 U. PA. L. REV. 1755, 1755–56.

26. *Id.* at 1756.

27. Lyle v. Warner Bros. Television Prods., 132 P.3d 211, 215 (Cal. 2006).

28. 42 U.S.C. § 2000e-3(a).

29. 42 U.S.C. § 2000e-5(b); Farr v. PG&E, No. 21-cv-08099-JSW, 2022 U.S. Dist. LEXIS 73415, at *5 (N.D. Cal. Apr. 21, 2022).

30. *Time Limits for Filing a Complaint*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/youth/time-limits-filing-complaint (last visited Nov. 20, 2024) ("In some cases, you only have 180 days to report discrimination to us. You have 300 days if your complaint also is covered by a state or local anti-discrimination law.").

31. *See Farr*, 2022 U.S. Dist. LEXIS 73415 at *5.

32. Prince v. Fla., Dep't of Corr., No. 6:15-cv-1855-Orl-22KRS, 2017 U.S. Dist. LEXIS 222538, at *8 (M.D. Fla. June 27, 2017).

33. *Id.*

34. *Frequently Asked Questions*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/youth/frequently-asked-questions (last visited Nov. 20, 2024).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

If the EEOC decides, at any point, not to pursue the claim, the claimant has ninety days from receipt of the right-to-sue letter to file a private action.[39] The private action must be within the scope of the initial EEOC claim, because the EEOC must have had the first opportunity to resolve the issue outside of court.[40] However, the law provides an exception when claims are "reasonably related" to the original EEOC complaint and can be "expected to grow out of an EEOC investigation of the charges."[41] Finally, the Title VII claim may only name the employer as a defendant, not an individual employee.[42]

D. How to Prevail in a Title VII Disparate Treatment Claim

A prima facie case of disparate treatment requires the plaintiff to prove they were subjected to an "adverse employment action" by their employer because of their membership in a protected class.[43] Courts have defined "adverse employment action" as a "materially adverse change in the terms and conditions of employment."[44] However, this element is the basis of the circuit court split and the ultimate need for the Supreme Court's decision in *Muldrow*, because some courts stated that significant harm was needed to prove adverse employment action, while other courts determined that any harm was sufficient.[45]

A plaintiff may prove the "because of" causal connection between the adverse action and discrimination through direct or circumstantial evidence.[46] Direct evidence provides a clear connection between the discrimination and the adverse action, without any need for assumptions.[47] When there is no direct connection between the adverse action and the employer's discriminatory intent,[48] circumstantial evidence of causation requires the court to apply the *McDonnell Douglas Corp. v. Green*[49] burden-shifting evidentiary framework.[50] The first step in this framework requires the claimant to establish a prima facie case.[51] The burden then shifts to the employer to present a "legitimate, nondiscriminatory reason" for the

39. Bailey v. Metro. Council, No. 19-cv-1024, 2020 U.S. Dist. LEXIS 71827, at *13 (D. Minn. Feb. 19, 2020). If the claim is not timely filed, then the claim will be dismissed. *Id.*

40. Penn-Hilbert v. Lehigh Cnty. Prison, 32 Pa. D. & C.5th 416, 430–31.

41. Earl v. Jewel Food Stores, Inc., No. 18 C 8279, 2020 U.S. Dist. LEXIS 143565, at *9 (N.D. Ill. Aug. 11, 2020).

42. Dearth v. Collins, 441 F.3d 931, 933 (11th Cir. 2006).

43. Kassner v. Second Ave. Delicatessen, Inc., 496 F.3d 229, 238 (2d Cir. 2007).

44. *Id.* (internal quotation marks omitted).

45. *See* McCoy v. City of Shreveport, 492 F.3d 551, 559–61 (5th Cir. 2007); Storey v. Burns Int'l Sec. Servs., 390 F.3d 760, 761, 763–64 (3d Cir. 2004); Jin v. Metro. Life Ins. Co., 310 F.3d 84, 87, 89–90, 93 (2d Cir. 2002).

46. Coghlan v. Am. Seafoods Co., 413 F.3d 1090, 1094–95 (9th Cir. 2005).

47. *Id.* at 1095.

48. *Id.* at 1094–95.

49. 411 U.S. 792 (1973).

50. *Id.* at 802–03; Tynes v. Fla. Dep't of Juv. Just., 88 F.4th 939, 941 (11th Cir. 2023) (stating that the *McDonnell Douglas* framework is an evidentiary tool, not a requirement).

51. *McDonnell Douglas Corp.*, 411 U.S. at 802.

action at issue.[52] Finally, the burden shifts back to the plaintiff, who must show that the employer's reasoning was a pretext for discrimination.[53]

E. Circuit Court Splits

While prior to *Muldrow*, the Supreme Court decided three major cases[54] that sought to clarify the Title VII standard, circuit courts continued to disagree about how to interpret the Title VII harm requirement. In the 1986 *Meritor Savings Bank, FSB v. Vinson*[55] decision, the Supreme Court clarified that non-economic or intangible harm, such as sexual harassment, was protected under Title VII.[56] Additionally, in 1998, in *Oncale v. Sundowner Offshore Services*,[57] the Supreme Court held that the harm must have a "disadvantageous" impact on the employment term or condition, and did not include an additional qualifier like significant or material.[58] Finally, in 2020, *Bostock v. Clayton County*[59] defined "discriminate against" to plainly mean to "treat[] a person worse."[60]

Multiple circuit courts correctly applied the pre-*Muldrow* harm standard, including the D.C. Circuit and the Sixth and Ninth Circuits.[61] Generally, these courts held that any employment action taken against an employee based on their membership in a protected class was sufficient to prove Title VII discrimination.[62] Despite the three Supreme Court clarifications, some circuit courts continued to impose a heightened harm standard. Specifically, the Fifth Circuit held that only major employment decisions—like termination, demotion, or refusal to hire—could succeed under Title VII.[63] The Third Circuit required the employment decision to be "serious and tangible," but did not limit the claim to those adverse actions enumerated in the Fifth Circuit's decisions.[64] The Second Circuit did not require economic harm but did require a "tangible employment action" like work reassignment.[65]

This enduring circuit court split created a legal environment in which a discriminatory action could be dismissed in one circuit but would be actionable in another. Ultimately, the Eighth Circuit incorrectly required

52. *Id.*
53. *Id.* at 804.
54. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 73 (1986); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998); Bostock v. Clayton Cnty., 590 U.S. 644, 683 (2020).
55. 477 U.S. 57 (1986).
56. *Id.* at 64, 66.
57. 523 U.S. 75 (1998).
58. *Id.* at 80.
59. 590 U.S. 644 (2020).
60. *Id.* at 658.
61. *See* Ortiz-Diaz v. U.S. Dep't of Hous. & Urb. Dev., 867 F.3d 70, 74–75 (D.C. Cir. 2017); Threat v. City of Cleveland, 6 F.4th 672, 678–679 (6th Cir. 2021); Maner v. Dignity Health, 9 F.4th 1114, 1122 (9th Cir. 2021).
62. *See Ortiz-Diaz*, 867 F.3d at 74–75; *Threat*, 6 F.4th at 678–679; *Maner*, 9 F.4th at 1122.
63. McCoy v. City of Shreveport, 492 F.3d 551, 559 (5th Cir. 2007).
64. Storey v. Burns Int'l Sec. Servs., 390 F.3d 760, 764 (3d Cir. 2004) (quoting Cardenas v. Massey, 269 F.3d 251, 263 (3d Cir. 2001)).
65. Jin v. Metro. Life Ins. Co., 310 F.3d 84, 92 (2d Cir. 2002).

Muldrow to prove material and substantial harm, and improperly dismissed an otherwise actionable discrimination claim.[66]

II. *MULDROW V. CITY OF ST. LOUIS*

A. Facts

The plaintiff, Jatonya Clayborn Muldrow, was a sergeant with the St. Louis Police Department.[67] She was transferred within the department from the Intelligence Division to the Department's Fifth District and subsequently sued the City of St. Louis under Title VII.[68] She alleged that the transfer was based on her sex and changed the conditions of her employment, which constituted sex-based discrimination under Title VII.[69]

Although she maintained the same rank and pay in her new position, she pointed to other differences in the terms and conditions of her employment, which she argued amounted to actionable harm.[70] First, she went from working with Intelligence Division officials to lower-ranked neighborhood patrol officers.[71] Her new position no longer offered her FBI status or a work car.[72] Additionally, her schedule changed from a standard forty-hour work week to working irregular hours, including weekends.[73] The harms she identified included a lower-prestige job with less prestigious assignments and networking opportunities, less desirable hours, and the loss of a work vehicle.[74]

B. Procedural History

Muldrow filed her claim in the United States District Court for the Eastern District of Missouri in 2019, and the court granted summary judgment to the city.[75] The court held that her working conditions were not significantly different such that she experienced actionable harm under Title VII.[76] To reach this conclusion, the court pointed to her unchanged salary and rank,[77] and disagreed that the loss of networking opportunities, her changed schedule, and lack of work vehicle were sufficient harm.[78] On appeal, the Eighth Circuit affirmed, restating that the change in her job

66. *See* Muldrow v. City of St. Louis, 601 U.S. 346, 352–53 (2024).
67. *Id.* at 350.
68. *Id.* at 351.
69. *Id.* at 351–52.
70. *See id.*
71. *Id.* at 351.
72. *Id.*
73. *Id.*
74. *Id.* at 351–52.
75. Muldrow v. City of St. Louis, No. 4:18-CV-02150-AGF, 2020 U.S. Dist. LEXIS 166560, at *48 (E.D. Mo. Sep. 11, 2020).
76. *Id*. at *22.
77. *Id*.
78. *Id.* at *28, *32–33.

conditions did not constitute significant harm.[79] The Supreme Court granted certiorari and heard her case in October 2023.[80]

C. Majority Opinion

Authored by Justice Kagan, the Supreme Court unanimously rejected the significant harm standard in Title VII discrimination cases and adopted the some-harm standard.[81] This decision was based on the text of Title VII, which makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[82] The Court focused on the statutory term, "discriminate against," relying on *Bostock*'s definition that it means "treat worse."[83] The Court reasoned that the statute does not specify the severity of harm, which makes significant harm an unnecessarily high burden to prove.[84]

In defending the Eighth Circuit's significant harm requirement, the city first invoked the interpretive canon of *ejusdem generis*.[85] Under this canon, if a general statutory phrase follows an enumerated list, then the phrase should be interpreted to only include things of a similar nature to those included in the list.[86] The city argued that *ejusdem generis* should apply to Title VII's "otherwise . . . discriminate against" phrase, therefore limiting it to the preceding list of actions that cause significant harm.[87] The Court quickly dismissed this argument, determining that there is "sufficient basis to unite the provision's several parts" as the statute itself provides a shared trait between the enumerated and general types of prohibited discrimination: employment action.[88]

The city next suggested that the significant harm requirement that the Court applied to retaliation claims in *Burlington Northern & Santa Fe Railway v. White*[89] should similarly apply to Muldrow's disparate treatment claim.[90] In *Burlington*, after the plaintiff complained to company officials about her boss's sexist comments, she was removed from her preferred tasks at work.[91] While *Burlington* concluded that Title VII's purpose was only to protect against "employer actions serious enough to 'dissuade[] a reasonable worker from making or supporting a charge of

79. Muldrow v. City of St. Louis, 30 F.4th 680, 690 (8th Cir. 2022).
80. Muldrow v. City of St. Louis, 601 U.S. 346, 353 (2024).
81. *Id*. at 354–55, 360.
82. *Id*. at 354 (quoting 42 U.S.C. § 2000e–2(a)(1)).
83. *Id.* at 347 (quoting *Bostock*, 590 U.S. at 681).
84. *Id.* at 355.
85. *Id.* at 356.
86. *Id.*
87. *Id.* at 356–57 (citing 42 U.S.C. § 2000e–2(a)(1)).
88. *Id.* at 357.
89. 548 U.S. 53 (2006).
90. *Muldrow*, 601 U.S. at 357.
91. *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 58 (alteration in original).

discrimination,'" the *Muldrow* Court disagreed with this reasoning.[92] Instead, the Court redirected the analysis to the text of the statute, deeming the *Burlington* decision "extra-textual,"[93] and stated that Title VII does not differentiate levels of harm.[94]

Third, the city contended that lowering the harm requirement below significant harm would overwhelm lower courts with discrimination suits.[95] The Court disagreed, reasoning that the plaintiff's requirement to show harm, condition of employment, and discrimination will still bar many claims from moving forward in court.[96]

Finally, the Court dismissed the significant harm standard as indeterminate and established the proper standard of harm.[97] To illustrate that significant harm was unclear, the Court identified three examples of appellate decisions, which all used the same standard but came to varying conclusions.[98] In each of these decisions, the significance of the harm was "in the eye of the beholder."[99] *Muldrow* then concluded that a transferee must only "show some harm respecting an identifiable term or condition of employment" to satisfy the harm element of a Title VII discrimination claim.[100]

D. Justice Thomas's Concurrence in the Judgment

Justice Thomas's concurrence in the judgment disagreed with the majority's determination that the Eighth Circuit improperly required the plaintiff to show significant harm.[101] He highlighted the Eighth Circuit's definition of adverse employment, which required the plaintiff to show an "actual disadvantage."[102] Therefore, Justice Thomas argued, there exists a difference between the significant harm requirement that *Muldrow* discussed and an "actual disadvantage as compared to minor changes" that the Eighth Circuit applied.[103] According to Justice Thomas, the majority mischaracterized the standard that the Eighth Circuit applied, because he

92. *Muldrow*, 601 U.S. at 357–58 (quoting *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 68).

93. *Id.*

94. *Id.* at 358.

95. *Id.* (explaining that "there is reason to doubt that the floodgates will open in the way feared.").

96. *Id.* (arguing that "the anti-discrimination provision at issue [still] requires that the employee show some injury.").

97. *Id.* at 354–55.

98. *Id.* at 355–56 (2024) ("An engineering technician is assigned to work at a new job site—specifically, a 14-by-22-foot wind tunnel; a court rules that the transfer does not have a 'significant detrimental effect.' A shipping worker is required to take a position involving only nighttime work; a court decides that the assignment does not 'constitute a significant change in employment.' And a school principal is forced into a non-school-based administrative role supervising fewer employees; a court again finds the change in job duties not 'significant.'" (citations omitted)).

99. *Id.* at 355.

100. *Id.* at 354–55.

101. *Id.* at 360 (Thomas, J., concurring in the judgment).

102. *Id.* (Thomas, J., concurring in the judgment) (explaining that he does not "read the Eighth Circuit to have necessarily imposed a heightened-harm requirement in the form of a 'significance' test.").

103. *Id.* at 360–61 (2024) (Thomas, J., concurring in the judgment).

did not understand the court to have "imposed a heightened-harm requirement in the form of a 'significance' test."[104] Further, he disagreed that Muldrow's allegations showed any harm; instead, he believes that they merely showed a preference for the original job placement.[105] However, Justice Thomas ultimately agreed with the majority that significant harm should not be required in the Title VII context.[106]

E. Justice Alito's Concurrence in the Judgment

In his concurrence in the judgment, Justice Alito expressed his confusion about the some harm test and argued that showing harm inherently requires "some degree of significance."[107] He compared this necessary condition of harm to a hypothetical individual claiming they were harmed because a grocery store did not carry a certain desired product.[108] While Justice Alito agreed with the outcome of the case, he expressed that he believed the new standard to be vague and unhelpful.[109]

F. Justice Kavanaugh's Concurrence in the Judgment

The third concurrence in the judgment, written by Justice Kavanaugh, disagreed with the some-harm requirement because he believes that discrimination itself constitutes harm.[110] He argued that, if an employment decision is made based on a Title VII protected character trait, then the discrimination is harmful to the employee.[111] He proposed that the test should instead focus on the aspect of employment that the employer's action changed.[112]

III. ANALYSIS

When the Supreme Court decided the issue in *Muldrow*, it aimed to clarify the law. This decision resolved a critical circuit split, holding that a Title VII plaintiff challenging a job transfer only needs to prove some harm related to the terms or conditions of their employment. While *Muldrow*'s some-harm requirement is purportedly favorable to plaintiffs by rejecting a heightened-harm requirement, this standard unnecessarily complicates antidiscrimination law in Title VII and beyond. The standard does not dispel the ambiguity the Court observed in the significant harm standard and has generated much confusion in the lower courts in both Title VII

104. *Id.* at 360 (Thomas, J., concurring in the judgment).
105. *Id.* (Thomas, J., concurring in the judgment).
106. *Id.* (Thomas, J., concurring in the judgment).
107. *Id.* at 362–63 (Alito, J., concurring in the judgment).
108. *Id.* at 363 (Alito, J., concurring in the judgment) (questioning what we would "think if a friend said, 'I was harmed because the supermarket had run out of my favorite brand of peanut butter,' or, 'I was injured because I ran into three rather than the usual two red lights on the way home from work'?").
109. *Id.* (Alito, J., concurring in the judgment).
110. *Id.* (Kavanaugh, J., concurring in the judgment).
111. *Id.* at 364 (Kavanaugh, J., concurring in the judgment).
112. *Id.* at 365 (Kavanaugh, J., concurring in the judgment) ("The discrimination is harm. The only question then is whether the relevant employment action changes the compensation, terms, conditions, or privileges of employment. A transfer does so.").

claims and non-Title VII claims. The Court's failure to clearly define the line between an actual harm and a workplace annoyance has resulted in an unstable and unpredictable legal framework, leaving plaintiffs uncertain about their rights and employers struggling to ensure lawful compliance.

To demonstrate this challenge, this Note proceeds in three parts. First, it will analyze the problems associated with both the rejected significant harm standard and the new some harm language, emphasizing how the Court replaced one ambiguous standard with another. Second, this Note will review lower court rulings to illustrate how various circuits have inconsistently applied *Muldrow* to Title VII and non-Title VII claims. Finally, it will consider solutions: adopting an established subjective and objective standard or a reasonableness standard.

A. Muldrow*'s New Some-Harm Standard is Similarly Ambiguous to Significant Harm Because Both Lack a Clear Guideline for Application*

Like significant harm, the new standard is difficult to apply for three reasons. First, neither party in *Muldrow* argued for the application of the some harm standard; therefore, there is no context for courts to use to better understand how the Supreme Court envisioned its newly minted standard.[113] Second, the Court did not discuss how and why it determined its standard as the superior interpretation of Title VII.[114] For example, while *Muldrow* explained why *Burlington*'s "extra-textual" application of significant harm to retaliation is appropriate in the retaliation context, *Muldrow* rejected the application of the same principle to disparate treatment claims without explaining how and why some harm is the appropriate benchmark.[115] Finally, there are no applicable Supreme Court rulings that apply this standard in discrimination cases, which would be helpful as supplementary materials to discern analogous principles and applications.[116]

1. Considering the Statutory Text

Despite *Muldrow*'s intent to lessen and clarify the harm test in Title VII claims, the legal community remains uncertain about the standard's scope. Understanding the full and correct test to apply to some harm will only be determined over time; however, this Note seeks to understand how courts might interpret the new standard and the best avenue to do so. The first step in this analysis is to consider the language of Title VII:

> It shall be an unlawful employment practice for an employer—

113. *Id.* at 364–65 (Kavanaugh, J., concurring in the judgment).
114. *See generally id.* (explaining how the Court adopted a standard that was never previously adopted by any court and was not argued to the Court).
115. *Id.* at 357–58 (majority opinion) ("The provision thus flatly 'prevent[s] injury to individuals based on' status, without distinguishing between significant and less significant harms." (alteration in original) (citation omitted)).
116. *Id.* at 364–65 (Kavanaugh, J., concurring in the judgment); *see infra* Section III.A.2.

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.[117]

The first term requiring a definition is "discriminate against."[118] *Bostock* defined this phrase as "distinctions or differences in treatment that injure protected individuals."[119] The *Bostock* Court specified that Title VII discrimination usually appears when "an employer intentionally treats an employee worse than other similarly situated employees."[120]

Second, the phrase "terms, conditions, or privileges" includes both economic and non-tangible employment benefits.[121] *Meritor Savings Bank* established that this list "aims to strike at the entire spectrum of disparate treatment . . . in employment," and clarified that terms or conditions include more than the economic or tangible.[122] Further, *Hishon v. King & Spalding*[123] included "benefits" in the definition.[124] The *Hishon* plaintiff accepted an associate position at a law firm with the understanding that she would become partner in five to six years if her work was satisfactory.[125] However, she was ultimately denied a promotion to partnership and brought a Title VII claim for sex discrimination.[126] During her employment, the plaintiff entered into a contract that provided for consideration of her candidacy for partnership, which the Court considered a benefit.[127]

The Court found that benefits "are part of an employment contract," whether "formal or informal" and qualify as a "'[privilege]' of employment under Title VII.'"[128] Therefore, once a contractual relationship is established between employee and employer, Title VII applies to that relationship and the employee benefits it specifies.[129] The Court also explained that even if the condition offered by the employer is voluntary and not an employee right, they may not offer it discriminatorily.[130] Therefore, employee benefits are protected by Title VII, including "[h]ealth insurance and other fringe benefits."[131] Finally, the EEOC specifies that fringe benefits include "medical, hospital, accident, life insurance and retirement

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117. 42 U.S.C. § 2000e-2(a).
118. *Id.*
119. Bostock v. Clayton County, 590 U.S. 644, 681 (2020) (quoting Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 59 (2006)).
120. Lange v. Houston Cnty., 101 F.4th 793, 798 (11th Cir. 2024).
121. 42 U.S.C. § 2000e-2(a).
122. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986).
123. 467 U.S. 69 (1984).
124. *Id.* at 75; 42 U.S.C. § 2000e-2(a).
125. *Hishon*, 467 U.S. at 71–72.
126. *Id.* at 75.
127. *Id.* at 71–72.
128. Hishon v. King & Spalding, 467 U.S. 69, 74–75 (1984) (alteration in original).
129. *Id.* at 74.
130. *Id.* at 75.
131. 3 N. PETER LAREAU, LABOR AND EMPLOYMENT LAW § 59.04(1)(a) (2024) (quoting Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 682 (1983) (alteration in original)).

benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment."[132] While these terms in the text of Title VII are well-defined, judicial gloss on the text has created confusion as to the scope of Title VII.

2. Distinguishing Significant Harm from Some Harm

Up until the *Muldrow* decision, some lower courts applied the significant harm standard.[133] Examining the application of this rejected standard can inform the implications of the new—ostensibly less-demanding—standard. Generally, the Sixth Circuit required a major change of employment status and rejected discrete employment acts as discriminatory unless they caused a notable level of harm.[134] For example, in *Kocsis v. Multi-Care Management, Inc.*,[135] the Sixth Circuit held that a demotion "without salary or work hour changes" does not "constitute [an] adverse employment decision."[136] Similarly, the Tenth Circuit required a showing of significant harm.[137] The Tenth Circuit specifically considered "hiring, firing, failing to promote," a transfer with distinctly altered responsibilities, or a major change in benefits as satisfying the test.[138] The Second Circuit included "material" in its definition, specifying that the disadvantage must be "more disruptive than a mere inconvenience or alteration of job responsibilities."[139] The Second Circuit in *Wanamaker v. Columbian Rope Co.*[140] held that "the loss of a phone and office is [not] sufficiently deleterious to constitute adverse employment action."[141]

While some circuit courts applied a lower standard than significant harm, this some harm metric had not previously been used in the discrimination context, and the Supreme Court had only articulated a similar quantum of harm once in *Smith v. Texas*,[142] a criminal case. *Smith* considered the term some harm to measure the level of harm demanded by the harmless error test, therefore, this standard is not applicable here.[143] Accordingly, this Note will consider the pre-*Muldrow* standards applied by the minority of circuits that rejected the significant harm test. While these courts—including the D.C., Sixth, and Ninth Circuits—did not uniformly use the some harm phrase, their holdings effectively required a less

132. *Id.* (quoting 29 C.F.R. § 1604.9(a)).
133. *See* Milczak v. GM, LLC, 102 F.4th 772 (6th Cir. 2024); Stinnett v. Safeway, Inc., 337 F.3d 1213 (10th Cir. 2003); Littlejohn v. City of N.Y., 795 F.3d 297 (2d Cir. 2015).
134. *Milczak*, 102 F.4th at 786.
135. 97 F.3d 876 (6th Cir. 1996).
136. *Id.* at 885.
137. *Stinnett*, 337 F.3d at 1217.
138. *Id.*
139. Littlejohn v. City of New York, 795 F.3d 297, 312 n.10 (2d Cir. 2015) (quoting Galabya v. N.Y.C. Bd. of Educ., 202 F.3d 636, 640 (2d Cir. 2000)).
140. 108 F.3d 462 (2d Cir. 1997).
141. *Id.* at 466.
142. 550 U.S. 297 (2007).
143. *Id.* at 315.

demanding standard.[144] For example, the D.C. Circuit in *Chambers v. District of Columbia*[145] held that any "garden-variety" discrimination claim is actionable under Title VII.[146] Additionally, in *Threat v. City of Cleveland*,[147] the Sixth Circuit determined that the "materiality threshold" is inherently met when an employee is discriminated against.[148]

These decisions apply a low standard, requiring anything more than no harm.[149] They also suggest that *Muldrow* requires only something more than a *de minimis* employment harm—considering the harm "too small to be meaningful or taken into consideration."[150] For example, a Performance Improvement Plan (PIP) could be discriminatory if the employee could link the action to their protected class.[151] In some cases, a PIP prohibits an employee from applying to transfer positions, which could constitute harm because of a missed opportunity or diminished reputation; the employee would only need to identify a discriminatory reason for the decision.[152] Similar arguments could be made for schedule changes or removing responsibilities, supervisory duties, or benefits.[153]

Ultimately, Kenji Yoshino, the Chief Justice Earl Warren Professor of Constitutional Law at the New York University (NYU) School of Law,[154] warns, "it's going to take a lot of litigation to figure out" the difference between the two standards.[155] Several employment law practitioners have noted *Muldrow*'s ambiguity: "Whatever new line of 'adversity' was drawn by this decision . . . will undoubtedly be difficult to discern."[156] Justice Kagan's definition that "'[d]iscriminate against' means treat worse, here based on sex" does not determine "how much worse" the

144. *See* Ortiz-Diaz v. U.S. Dep't of Hous. & Urb. Dev., 867 F.3d 70 (D.C. Cir. 2017); Threat v. City of Cleveland, 6 F.4th 672, 679 (6th Cir. 2021); Maner v. Dignity Health, 9 F.4th 1114 (9th Cir. 2021).

145. 35 F.4th 870 (D.C. Cir. 2022).

146. *Id.* at 879 (internal quotation marks omitted).

147. 6 F.4th 672 (6th Cir. 2021).

148. *Id.* at 678 ("To 'discriminate' reasonably sweeps in some form of an adversity and a materiality threshold.").

149. *See Chambers*, 35 F.4th at 879; *Threat*, 6 F.4th at 672.

150. *Glossary – De Minimis*, THOMSON REUTERS PRACTICAL LAW, https://uk.practicallaw.thomsonreuters.com/1-382-3382?transitionType=Default&contextData=(sc.Default)&firstPage=true (last visited Nov. 24, 2025).

151. Kellee Boulais Kruse & Briana L. Scholar, *5 Job Actions That Can Be Found Illegal After Justices' Title VII Ruling*, THE EMPLOYMENT LAW GROUP (Apr. 25, 2024), https://www.employmentlawgroup.com/in-the-news/articles/5-job-actions-that-can-be-found-illegal-after-justices-title-vii-ruling/.

152. *Id.*

153. *Id.*

154. *Kenji Yoshino*, NYU Law, https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.overview&personid=22547 (last visited Nov. 24, 2025).

155. Julian Mark, *DEI 'Lives On' After Supreme Court Ruling, but Critics See an Opening*, WASH. POST (Apr. 19, 2024), https://www.washingtonpost.com/business/2024/04/19/dei-supreme-court-muldrow/.

156. Brandon Dixon, Matthew Gagnon, Taylor Iaculla, & Annette Tyman, *SCOTUS Issues Highly Anticipated Muldrow Decision, Rejecting Heightened Harm Requirement in Adverse Action Analysis*, JDSUPRA (Apr. 19, 2024), https://www.jdsupra.com/legalnews/scotus-issues-highly-anticipated-6938082/.

treatment must be.[157] Judge Rudofsky, a judge on the United States District Court for the Eastern District of Arkansas, wrote that the *Muldrow* decision provides no clarity on the bar for adverse action and that the court is "uncertain exactly what the Supreme Court means by 'some harm.'"[158]

B. Lower Court Applications of Muldrow *Vary Because of Its Ambiguity*

Lower court decisions applying *Muldrow*'s some-harm requirement resemble the three *Muldrow* concurrences in the judgment. The essential question is: Where does the new test sit on the spectrum of harm? The rejected significant harm requirement seemingly represents the highest bar, while the lowest bar aligns with Justice Kavanaugh's separate opinion, stating that discrimination is the harm.[159] Further, the *Smith* murder case and resulting lower court decisions seem to require the harm to be a little more than Justice Kavanaugh's per se standard. Lower courts applying *Muldrow*—in both Title VII cases and non-Title VII cases—debate whether the required showing is a little less than significant, a little more than no harm, or somewhere in between.

1. Lower Court Applications of *Muldrow* to Title VII Transfer Claims

As of this writing, there are 181 decisions citing *Muldrow*. For a plaintiff to establish a prima facie transfer claim, they must prove that they applied to an available position, were qualified for the position, and were discriminatorily rejected.[160] Within transfer claims, courts have applied the standard for harm variably. For example, the plaintiff in *Leon v. Bensalem Township School District*[161] took leave due to discrimination-related stress.[162] When she came back from leave, she was given a different job title, had reduced responsibilities, and was excluded from relevant information and meetings.[163] Based on these employment actions, the plaintiff claimed Title VII sex discrimination.[164] The level of harm the court in *Leon* required was unclear. The court held that the employment actions were sufficiently harmful because the "'material effects' [were] objectively unfavorable" to her.[165] While the court cited the new *Muldrow* test, it

157. Kruse & Scholar, *supra* note 151.

158. Smith v. Crittenden Cnty., No. 3:22-cv-00042-LPR, 2024 U.S. Dist. LEXIS 87518, at *17 n.129 (E.D. Ark. May 15, 2024).

159. Muldrow v. City of St. Louis, 601 U.S. 346, 364 (2024) (Kavanaugh, J., concurring in the judgment).

160. Elam v. C & P Tel. Co., 609 F. Supp. 938, 946 (D.D.C. 1984).

161. No. 23-01374, 2024 U.S. Dist. LEXIS 141688 (E.D. Pa. Aug. 9, 2024).

162. *Id.* at *3.

163. *Id.* at *5.

164. *Id.* at *8.

165. *Id.*

continued to frame the harm as "objectively adverse," terminology more consistent with the pre-*Muldrow* harm standard.[166]

Horn v. Del Toro[167] was clearer in applying the lower harm requirement.[168] The transferee plaintiff was "not given any meaningful work" at her new position and claimed Title VII discrimination.[169] The court held that the lack of meaningful work in her transfer position was a "cognizable harm within the scope of *Muldrow*," and satisfied the requirement to show discrimination.[170]

In contrast, the *Cavanaugh v. Wal-Mart Stores East, LP*[171] court did not apply *Muldrow* to a voluntary job transfer.[172] The plaintiff, a pregnant woman, requested a lateral transfer to a less strenuous position but was denied.[173] The court differentiated these facts from *Muldrow*, highlighting that *Muldrow* involved a forced transfer, while this plaintiff requested the transfer.[174] Therefore, the court reasoned, *Muldrow* was not relevant to the case, and there was no discriminatory action.[175]

These cases display the varying levels of harm lower courts apply post-*Muldrow*; *Leon* applied a standard that was a little less than "significant," *Horn* required a little more than no harm, and *Cavanaugh* determined that *Muldrow* only applies to involuntary transfers.[176] While *Horn*'s application is most closely related to *Muldrow*, the confusion among lower courts is evident.

2. Lower Court Applications of *Muldrow* to Title VII Non-Transfer Claims

While *Muldrow* concerned a transfer decision, the Supreme Court did not specify how broadly the new standard would apply.[177] For instance, the Court analyzed a retaliation claim based on the city's second argument that the harm requirement in retaliation cases, defined in *Burlington*, should apply to the disparate treatment claim based on a transfer decision

166. Leon v. Bensalem Twp. Sch. Dist., No. 23-01374, 2024 U.S. Dist. LEXIS 141688 at *8 n.2 (E.D. Pa. Aug. 9, 2024) ("[I]n *Muldrow v. City of St. Louis, Missouri*, the Supreme Court reevaluated such standards in the context of Title VII employment discrimination claims, holding that while a plaintiff 'must show some harm respecting an identifiable term or condition of employment,' she need not show 'that the harm incurred was significant . . . [o]r serious, or substantial, or any similar adjective suggesting that the disadvantage to the employee must exceed a heightened bar.'" (alteration in original)).

167. No. 23-5169, 2024 U.S. App. LEXIS 15154 (D.C. Cir. June 21, 2024).

168. *Id.* at *7.

169. *Id.*

170. *Id.*

171. 733 F. Supp. 3d 362 (M.D. Pa. 2024).

172. *Id.* at 369.

173. *Id.*

174. *Id.*

175. *Id.*

176. Leon v. Bensalem Twp. Sch. Dist., No. 23-01374, 2024 U.S. Dist. LEXIS 141688, at *8 (E.D. Pa. Aug. 9, 2024); Horn v. Del Toro, No. 23-5169, 2024 U.S. App. LEXIS 15154, at *7 (D.C. Cir. June 21, 2024); Cavanaugh v. Wal-Mart Stores E., LP, 733 F. Supp. 3d 362, 369 (M.D. Pa. 2024).

177. *See* Muldrow v. City of St. Louis, 601 U.S. 346, 346 (2024).

presented in *Muldrow*.[178] The Court rejected the argument, not because the *Muldrow* test only applied narrowly, but because retaliation requires a heightened harm standard on its face.[179] As a result, the application of the test was solely defined by its exclusion of retaliation, and it remains unclear if it applies to non-retaliation claims.[180] This ambiguity in scope has resulted in a varied and widening application of the same decision.

The court in *Staple v. School Board of Broward County*[181] applied *Muldrow* to Title VII religious accommodation claims.[182] The plaintiff was denied a modification to his work schedule so that he could observe a religious holiday.[183] On appeal, the court held that the district court incorrectly required the plaintiff to show termination or discipline to satisfy the harm requirement.[184] Instead, *Staple* determined that *Muldrow*'s harm requirement was satisfied when the employer forced the plaintiff to use paid leave for a religious accommodation.[185] Additionally, *McNeal v. City of Blue Ash*[186] applied *Muldrow* to a hostile work environment claim where the plaintiff was terminated for no apparent reason.[187] The court determined that *Muldrow* applied because hostile work environment and disparate treatment claims arise out of the same language, and ruled in favor of the plaintiff.[188]

The *Muldrow* decision was clear about its applicability to transfer-related disparate treatment and its inapplicability to retaliation claims.[189] However, some decisions, like *Versaggi v. KLS Martin, L.P.*,[190] have continued to improperly apply the lower bar to retaliation claims.[191] Further, some lower courts have extended the scope of some harm to religious accommodation, hostile work environment, and disability claims.[192]

178. *Id.* at 357.
179. *Id.* ("The test was meant to capture those (and only those) employer actions serious enough to 'dissuade[ ] a reasonable worker from making or supporting a charge of discrimination.'" (alteration in original)).
180. *Id.*
181. No. 21-11832, 2024 U.S. App. LEXIS 16047 (11th Cir. July 2, 2024).
182. *Id.* at *10.
183. *Id.* at *1–2.
184. *Id.* at *8–9.
185. *Id.* at *9.
186. 117 F.4th 887 (6th Cir. 2024).
187. *Id.* at 900.
188. *Id.*
189. *See* Muldrow v. City of St. Louis, 601 U.S. 346, 346, 348 (2024).
190. No. 21-20547, 2024 U.S. App. LEXIS 12222 (5th Cir. May 21, 2024).
191. *Id.* at *1–2, *6 (the plaintiff in *Versaggi* requested that she not have contact with a colleague at work due to their relation to a stalking incident, but was not offered a satisfactory solution by her employer. The court determined that the plaintiff would only need to show "some harm" to prevail on her claim).
192. Staple v. Sch. Bd. of Broward Cnty., No. 21-11832, 2024 U.S. App. LEXIS 16047, at *10 (11th Cir. July 2, 2024); *McNeal*, 117 F.4th at 900; Washington v. Dominion Energy, No. 3:23-cv-00056, 2024 U.S. Dist. LEXIS 183772, at *11–12 (W.D. Va. Oct. 8, 2024).

3. Lower Court Applications of *Muldrow* to Non-Title VII Claims

Lower courts have cited *Muldrow* in non-Title VII cases as well. For example, the plaintiff in *Milczak v. General Motors, LLC*,[193] who was over fifty years old, experienced inferior pay and a work schedule change after a transfer.[194] The court applied *Muldrow* to Milczak's Age Discrimination in Employment Act claim, holding that his experiences constituted some harm.[195] In *Queen v. United States*,[196] the plaintiff brought a claim under the Federal Tort Claims Act (FTCA), alleging prison officials assaulted him during his time in federal prison.[197] On appeal, Queen argued that the lower court improperly applied the *de minimis* injury bar and dismissed his claim.[198] The Fifth Circuit reversed, applying the principle established in *Muldrow* to the FTCA as a basis for applying additional requirements where the statutory language does not require them.[199] Other examples of non-Title VII applications of *Muldrow* include *Phillips v. Baxter*,[200] which required a showing of some harm to claims under 42 U.S.C. §§ 1981 and 1983,[201] and *Imhof v. New York City Housing Authority*,[202] which applied *Muldrow* to an ADA claim.[203]

Washington v. Dominion Energy[204] also applied *Muldrow* to an ADA claim.[205] The plaintiff's training was delayed when she returned from medical leave and was later informed that she failed a portion of her training.[206] The court held that requiring the plaintiff to repeat a training step qualified as an "adverse employment action."[207] *Washington* expounded that, even though the plaintiff's salary was unchanged, the facts still satisfied the some-harm requirement.[208]

The court in *Doe v. Board of Education*[209] expressed uncertainty about whether the some-harm standard extends to Title IX claims, which also require plaintiffs to show some level of adverse action.[210] The plaintiff in this case, a high school basketball player, reported sexual misconduct and was consequently threatened, removed as a starter, and unsupported

193. 102 F.4th 772 (6th Cir. 2024).
194. *Id.* at 779, 788.
195. *Id.* at 788–89.
196. 99 F.4th 750 (5th Cir. 2024).
197. *Id.* at 751.
198. *Id.* at 752.
199. *Id.* at 752–53; *see also id.* at 752 n.3.
200. No. 23-1740, 2024 U.S. App. LEXIS 10078 (7th Cir. Apr. 25, 2024).
201. *Id.* at *6, *8.
202. 23 Civ. 1880, 2024 U.S. Dist. LEXIS 121759 (S.D.N.Y. July 11, 2024).
203. *Id.* at *25–26.
204. Civil Action No. 3:23-cv-00056, 2024 U.S. Dist. LEXIS 183772 (W.D. Va. Oct. 8, 2024).
205. *See id.* at *11–12.
206. *Id.* at *3–5.
207. *Id.* at *11.
208. *Id.* at *11–12.
209. No. 22 C 583, 2024 U.S. Dist. LEXIS 158647 (N.D. Ill. Sep. 4, 2024).
210. *Id.* at *13.

in college recruitment.[211] The court expressed that the *Muldrow* analysis did not offer any indication as to how far this standard reaches.[212]

Some court decisions have strayed significantly from the *Muldrow* holding.[213] For example, in *Doe v. University of Kentucky*,[214] the plaintiff alleged that she was denied access to certain benefits that the University offered and thus filed a Title IX retaliation claim.[215] The court relied on Justice Kavanaugh's concurrence in the judgment to conclude that the discrimination was the harm; thus, the plaintiff did not need to prove additional harm.[216]

C. Applying an Established Standard May Stabilize Lower Court Decisions

Lower court applications of *Muldrow* vary, which is unfair to plaintiffs and makes it difficult for employers to navigate lawful employment decisions. But an alternative test could alleviate these detrimental effects by clarifying the *Muldrow* test and applying it more uniformly. Clearer judicial tests allow courts to "deliver at least minimally acceptable degrees of procedural and substantive fairness to all affected parties," which "promote[s] the broader public well-being."[217]

This Note proposes alternative frameworks to provide the needed clarity and uniformity to the some-harm standard. This Note will proceed in three parts. First, this Note considers purposivism—a method of statutory interpretation that considers the statute's objective and purpose—as applied to some harm. Analyzing some harm through this lens helps determine the statute's core goals and how to interpret it as society and policy change.[218] Next, this Note examines the *Muldrow* test in conjunction with the Title VII hostile working environment's objective and subjective test. This standard is already used in hostile work environment claims and offers a precedent-based method for evaluating the severity of harm in disparate treatment claims. Finally, this Note concludes by analyzing the reasonableness standard alongside some harm. This standard would provide a neutral benchmark to measure the alleged disadvantages against, which would help mitigate the indeterminacy of some harm.

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211. *Id.* at *3–5, 12.
212. *Id.* at *13.
213. *See, e.g.*, Williams v. Memphis Light, Gas & Water, No. 23-5616, 2024 U.S. App. LEXIS 17623, at *15–16 (6th Cir. July 16, 2024); Doe v. Univ. of Ky., 111 F.4th 705, 724 (6th Cir. 2024).
214. 111 F.4th 705 (6th Cir. 2024).
215. *Id.* at 724.
216. *Id.*
217. R. George Wright, *Objective and Subjective Tests in the Law*, 16 U. N.H. L. REV. 121, 144 (2017).
218. *See* Jordan Boudreaux, *Modern Statutory Interpolation: Correcting Court-Made Deficiencies in Title VII Law*, 108 MINN. L. REV. 2197, 2229 (2024).

1. Purposivism

One emerging concept to consider as a lens to inform the meaning of some harm in Title VII discrimination is purposivism. Generally, purposivism requires a court to look at the objective and purpose of the statute, including the context surrounding it, to inform the court's interpretation.[219] Purposivist analysis involves consideration of the legislative history, purpose of the text, and social context.[220]

Title VII followed a long history of hostility in the United States toward Black Americans.[221] The necessity for the Act was called to attention by Dr. King's civil rights movement, and the Act's protection was ultimately expanded throughout time and multiple amendments.[222] Congress enacted Title VII to protect employees from adverse employer actions based on protected characteristics[223] whereas the Fourteenth Amendment does not.[224] Considering the text's legislative history helps discern the legislative intent behind its enactment and maintain focus on that purpose.[225]

The statute protects employees who are intentionally treated worse because of their membership in a protected class[226] and applies to employee benefits and non-economic and non-tangible conditions.[227] However, the statute leaves certain terms undefined, which could indicate intent to broadly protect employees.[228] Additionally, the opportunity for a claimant to pursue legal action under Title VII and other state and federal statutes demonstrates that "Title VII was designed to supplement, rather than supplant" other protections from discrimination.[229] While the text of the Act protects certain classes of individuals, the Act's 1963 House Committee Report asserts that Title VII comprehensively applies to workplace discrimination; therefore, it "should not be constrained to those issues specifically considered at the time of passage."[230] Similarly, the Act declared in its statement of purpose that it serves "other purposes," which allows the Act to evolve with time to fulfill its purpose.[231] Ultimately, changing the harm requirement to some harm aligns with the Act's objective of broadly protecting plaintiffs from discrimination.[232]

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219. *Id.* at 2231.
220. *Id.* at 2235–36.
221. *See id.* at 2206.
222. *See supra* Section I.A.
223. *See* Boudreaux, *supra* note 218, at 2238.
224. *See id.* at 2240.
225. Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 847–48 (1992).
226. *See supra* Section III.A.1.
227. *See supra* Section III.A.1.
228. Boudreaux, *supra* note 218, at 2208.
229. Alexander v. Gardner-Denver Co., 415 U.S. 36, 48 (1974).
230. *See* Boudreaux, *supra* note 218, at 2209.
231. *Id.* at 2235.
232. *See id.* at 2238.

Several Title VII decisions have rested their analysis on a purposivist approach to better understand the overall goal of the text.[233] *Griggs v. Duke Power Co.*[234] is an early decision that closely followed Title VII's purpose.[235] The defendant–employer required Black employees to have a high school diploma or pass an intelligence test.[236] In its discussion, the Court focused on the Act's purpose of eliminating "artificial, arbitrary, and unnecessary" employment barriers.[237] *Griggs* concluded that intelligence tests were related to employment and covered by Title VII, even though it was not specifically indicated in the statute.[238] However, as the decades passed, courts began to stray from this purposivist approach in their application of Title VII.[239] For example, the court in *Dollis v. Rubin*[240] used an unnecessarily narrow application.[241] The plaintiff claimed her employer refused to promote her because of her EEOC complaint.[242] In its analysis, the court held that the plaintiff did not show an issue "address[ing] ultimate employment decisions," which is the purpose of Title VII.[243] Courts have used the *Dollis* standard since 1995,[244] however, *Hamilton v. Dallas County*[245] recently overturned the precedent within the Fifth Circuit.[246] *Hamilton* noted that the standard misinterpreted the text of the statute,[247] while other courts, like *White v. Burlington Northern & Santa Fe Railway*[248] argued that *Dollis* contravened Title VII's purpose of making employees whole after discrimination.[249]

While the purposivist approach leans heavily on legislative history, it also recognizes the importance that law evolves with society and policy.[250] Therefore, purposivism considers societal values, influence, fairness, and the progression of equality at the time of interpretation.[251] Specifically, "[c]ourts and scholars should move beyond trying to find the perfect methodology to resolve inadequacies in Title VII and shift their focus to the Act's broader goals."[252]

Ultimately, the purposivist approach asserts that the purpose of Title VII is to allow employees to "enjoy the benefits of employment" without

233. *See id.* at 2235–36.
234. 401 U.S. 424 (1971).
235. Boudreaux, *supra* note 218, at 2220.
236. *Griggs*, 401 U.S. at 429.
237. *Id.* at 431.
238. *See* Boudreaux, *supra* note 218, at 2220.
239. *See id.* at 2219.
240. 77 F.3d 777 (5th Cir. 1995).
241. *See id.* at 781–82.
242. *Id.* at 779.
243. *Id.* at 781.
244. *See generally id.*
245. 42 F.4th 550 (5th Cir. 2022).
246. *See id.* at 556.
247. *See id.*
248. 364 F.3d 789 (6th Cir. 2004).
249. *Id.* at 801–03.
250. Boudreaux, *supra* note 218, at 2229.
251. *See id.* at 2230.
252. *Id.* at 2231.

being disfavored for their membership in a protected class.[253] However, many commentators reject this approach, cautioning that it invites undue judicial discretion.[254]

2. The Objective and Subjective Standard

Hostile work environment is the only type of Title VII claim that requires a plaintiff to both objectively and subjectively prove harm to prevail.[255] The significance of examining this standard, as applied to some harm, is that it provides a well-established model. However, it also potentially places a high burden on plaintiffs by excluding the claims of individuals who do not fit the "reasonable person" mold. Title VII requires that, in a hostile environment claim, the adverse employment action is both objectively and subjectively harmful, i.e., "'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'"[256]

In *Harris v. Forklift Systems*,[257] the plaintiff was called a "dumb ass woman" and told that a man would be better suited for her managerial position.[258] The Supreme Court held that the conduct satisfies Title VII's hostile work environment requirements because of its objective and subjective effect on the employee.[259] This decision applied an objective and subjective test to the "severe or pervasive" requirement, defining objectivity through a "reasonable person" standard and subjectivity through the victim's perception.[260] Finally, courts must consider the "totality of circumstances" when applying this standard.[261]

Applying different requirements to Title VII harassment claims might be considered discriminatory.[262] Specifically, only requiring plaintiffs who allege hostile environment harassment to prove that the conduct was both objectively and subjectively discriminatory places an

253. *Id.* at 2240.

254. *See, e.g.*, Martin Katz, *Bostock and The Limits of Textualism: A Doctrinal Structuralist Approach*, 66 WM. & MARY L. REV. 1389, 1402–03, 1403 n.48 (2025).

255. *See* Harris v. Forklift Sys., 510 U.S. 17, 20, 23 (1993).

256. Tennessee v. Murphy-Brown, L.L.C., No. 2:10cv167, 2011 U.S. Dist. LEXIS 168297, at *18–19 (E.D. Va. Jan. 4, 2011).

257. 510 U.S. 17 (1993).

258. *Id.* at 19.

259. *Id.* at 22–23.

260. *Id.* at 21–22 ("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. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.").

261. Taylor v. Renfro Corp., 84 F. Supp. 2d 1248, 1258 (N.D. Ala. 2000).

262. *See* 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, 87 (2003) ("By requiring that hostile environment harassment be severe or pervasive before it alters a term or condition of employment and thus violates Title VII, the courts basically discriminate against one term or condition of employment by assigning a significantly lower importance to the right to work in an atmosphere free from discrimination.").

unnecessarily higher burden on those claims.[263] Therefore, it is good policy to apply the same standard, to the greatest extent possible, across all Title VII claims.

Applying this standard to disparate treatment claims would require courts to consider whether the plaintiff experienced some harmful employment action that is objectively and subjectively harmful.[264] This test may alleviate concerns that some harm includes petty disputes, like the assertions of Justice Alito and Justice Thomas in their concurrences in the judgment that the *Muldrow* standard allows a plaintiff to claim a preference or annoyance as harmful.[265] Certain ambiguities may remain when applying this standard to some harm; however, there are many precedential opinions that offer guidance to lower courts, which is not an option for the current standard.

While applying this standard may help clarify the ambiguous some harm standard, it may be underinclusive by requiring an objective interpretation that could undermine Title VII's core purpose of providing broad protection against discrimination. One reason that this test does not appropriately protect all claimants is that it bars claims by an "eggshell plaintiff."[266] This underinclusivity occurs because a plaintiff must both subjectively perceive the action as harmful and that perception must be objectively reasonable.[267] For example, a woman who tolerated problematic behavior because society had not identified it as problematic and she, therefore, perceived it as normal at the time, cannot meet the subjectively severe or pervasive standard to prevail in her claim.[268] Further, the objective standard requires a determination that a reasonable person *would* feel the same way, not merely that they could.[269] This distinction illustrates the difficulty for a plaintiff to prevail, because the factfinder must determine the likelihood of that objective element.[270] Additionally, the standard may allow judges to refer to previous reasonableness standards, even if societal expectations have changed.[271] Although this standard is widely used and offers a clearer test for Title VII discrimination, it is not without limitations.

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263. *See id.*

264. *See* Harris v. Forklift Sys., 510 U.S. 17, 21–22 (1993).

265. *See supra* Section II.D–E.

266. *See* Frank S. Ravitch, *Hostile Work Environment and the Objective Reasonableness Conundrum: Deriving a Workable Framework from Tort Law for Addressing Knowing Harassment of Hypersensitive Employees*, 36 B.C. L. REV. 257, 275 (1995).

267. *See id.* at 258, 265.

268. Wright, *supra* note 217, at 134 ("[N]o woman who because of youth, inexperience, or any form of institutionalized socialization believed at the time that the harassment in question was to be accepted as normal can possibly prevail, regardless of how severe or pervasive the harassment was.").

269. *Id.*

270. *See id.*

271. Levi Kimmel, *The Severe or Pervasive Standard in the Modern Age*, 84 MONT. L. Rev. 299, 307 (2023).

3. The Reasonableness Standard

While requiring a plaintiff to establish both subjective and objective harm might suppress too many claims, *Muldrow*'s some-harm requirement might nonetheless require a showing of objectively reasonable harm. This test differs from the objective and subjective test, because it only considers an objective perspective. The reasonableness standard commonly requires the factfinder to determine what "an ordinary person would have [done] in the same situation."[272] Generally, a reasonable person standard requires the factfinder to analyze what society expects of an individual in that position, rendering it a "kind of culpability-determining" standard.[273] Further, there is a judgment-based function of reasonableness that is divergent from the aforementioned culpability-based function.[274] This non-litigative understanding simply asks the factfinder to determine the legal significance of an interaction.[275]

The reasonableness standard is used in multiple legal tests, including tort negligence, "public nuisance, whether a contract offer remains open, . . . whether a criminal trial is improperly prolonged, [and] whether attorneys charge inappropriate fees."[276] In retaliation claims, courts require the defendant to "demonstrate a good faith, reasonable belief that the challenged practice violates Title VII."[277] In *Miller v. City & County of Honolulu*,[278] the plaintiff experienced racist comments, intimidation, and received negative evaluations.[279] The court held that the plaintiff did not satisfy the requirement of proving "that a reasonable employee would have found the [petty slights or minor annoyances] materially adverse."[280] Similarly, "reasonable accommodations to the religious needs of employees" is required by Title VII, as long as the accommodations do not generate an "undue hardship" on the employer.[281]

Considering the history of this standard is essential for defining its application to some harm, because it reveals that the standard is a flexible, context-dependent tool. The objective reasonableness standard originated

272. Jeffrey Johnson, *Reasonable Person Standard: Legal Definition And Examples*, FORBES ADVISOR (Aug. 26, 2024), https://www.forbes.com/advisor/legal/personal-injury/reasonable-person-standard/.

273. Mayo Moran, *The Reasonable Person: A Conceptual Biography in Comparative Perspective*, 14 LEWIS & CLARK L. REV. 1233, 1272 (2010) ("The traditional invocation of the reasonable person occurs in a situation where the function of the standard is to determine whether the litigant acted in a manner consistent with the demands of a legal norm broadly understood as reasonableness. Answering this question requires attentiveness to the attributes of the litigant in order to determine what the law could, for example, reasonably expect of him.").

274. *Id.*

275. *Id.*

276. Kevin P. Tobia, *How People Judge What is Reasonable*, 70 ALA. L. REV. 293, 298 (2018).

277. George v. Leavitt, 407 F.3d 405, 417 (D.C. Cir. 2005) (quoting Parker v. Baltimore & Ohio R.R., 652 F.2d 1012, 1020 (D.C. Cir. 1981)).

278. No. 07-00120, 2008 U.S. Dist. LEXIS 130075 (D. Haw. Oct. 30, 2008).

279. *Id.* at *2–3.

280. *Id.* at *23–25 (quoting Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006)).

281. Groff v. DeJoy, 600 U.S. 447, 457 (2023).

in *Vaughan v. Menlove*,[282] decided by the English Court of Common Pleas in 1837.[283] However, many cases discussing the standard in the United States were not until the 1960s and later.[284] *Ker v. California*,[285] decided in 1963, evaluated the reasonableness standard as applied to the Fourth Amendment's protection against "searches and seizures."[286] In this case, law enforcement searched the plaintiffs at their home, which resulted in their conviction for the possession of marijuana.[287] The Court held that the search was reasonable because it took place as part of a lawful arrest.[288] The Court also reiterated that "[t]here is no formula for the determination of reasonableness"; it must be based on a case-by-case fact analysis.[289] Additionally, *Evans v. Eaton Corp. Long Term Disability Plan*[290] examined an Employee Retirement Income Security Act of 1974 (ERISA) claim based on the plaintiff's termination, which deprived her of long-term disability benefits.[291] The court determined that a reasonableness conclusion must be based on "sound reasoning," "substantial evidence," and adherence to the applicable legal text.[292] Finally, *In re Parreira*[293] evaluated a bankruptcy declaration and dispute over reasonable creditor fees.[294] The court held that the fees were reasonable, considering a "combination of objective and subjective inquiries."[295] Throughout all applications, courts define the reasonableness standard through an objective perspective, while considering the totality of the circumstances and the case-specific facts.

An objective reasonableness standard reduces bias because the factfinder must assess the circumstances, context, and multiple factors, instead of focusing on the "protected class as the normative standard."[296] However, this standard may perpetuate inequality in other ways.[297] This may result when a plaintiff or factfinder does not align with the reasonable person.[298] For example, if either the factfinder or the claimant is particularly

282. Vaughan v. Menlove [1837] 132 Eng. Rep. 490.
283. Johnson, *supra* note 272 ("In 1837, the case Vaughn [sic] v. Menlove first created the standard—determining that a reasonable person would not have stacked hay in a dangerous manner next to a neighbor's structure (as the defendant in that case did) because of the risk of fire.").
284. *See, e.g.*, Ker v. California, 374 U.S. 23, 33 (1963); Terry v. Ohio, 392 U.S. 1, 9 (1968); New Jersey v. T.L.O., 469 U.S. 325, 337 (1985).
285. Ker v. California, 374 U.S. 23 (1963).
286. *Id.* at 30–31.
287. *Id.* at 24, 29.
288. *Id.* at 41–44.
289. *Id.* at 33 (quoting Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931)) (internal quotation marks omitted).
290. 514 F.3d 315 (4th Cir. 2008).
291. *Id.* at 318.
292. *Id.* at 322–23.
293. 464 B.R. 410 (Bankr. E.D. Cal. 2012).
294. *Id.* at 412.
295. *Id.* at 415, 420.
296. Jane Goodman-Delahunty, *Pragmatic Support for the Reasonable Victim Standard in Hostile Workplace Sexual Harassment Cases*, 5 PSYCH. PUB. POL'Y & L. 519, 551 (1999).
297. Moran, *supra* note 273, at 1233 ("Egalitarian critics point out that the reasonable person all too often seems to serve as a vehicle for importing discriminatory views into the heart of the legal standard.").
298. *Id.* at 1276.

privileged or underprivileged, then they are inherently on the extremes of the scale of privilege and may not reflect the understandings of a reasonable person.[299] Further, the burden is on the factfinder to be aware of how the privilege, or lack thereof, modifies their reasonableness analysis—something that is difficult to discern.[300] This consideration of the individual's characteristics and how they deviate from the reasonable person ultimately diverges from the reasonable person standard because the standard's purpose is to level all individuals.[301] In this way, the standard considers an individual's subjective qualities.[302] For example, three reasonable fact finders may have three completely different reactions to the same expression.[303]

No matter what type of law this applies to, legal scholars debate whether the reasonableness standard is statistical or prescriptive.[304] In other words, does the standard concern the decisions of an average person, or does it consider what an ideal person should do?[305] Kevin Tobia argues that this standard should include both statistical and prescriptive perspectives, which better reflect how courts already apply the standard.[306] The two other benefits of this hybrid approach are that it can be more uniformly applied throughout legal tests, and it reflects an individual's intuition.[307]

If applied to *Muldrow*'s some harm, the reasonableness standard would require the factfinder to consider what society expects an ordinary employer to have done in the same situation. The reasonableness standard, as applied to Title VII disparate treatment claims, helps define the contours of the some-harm requirement and benefits from numerous precedential cases that offer guidance. Additionally, it neutralizes some of the objective and subjective test's disadvantages. Namely, it does not apply the same burden of proof regarding the plaintiff's subjective perception. Instead, the reasonableness standard promotes the consideration of each fact and the plaintiff's circumstances. Finally, this test is not as indeterminate as some harm because it is based on societal norms and is established by precedent—both of which some harm lacks.

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299. *Id.*

300. *Id.*

301. *Id.* ("Unlike the privileged, the disadvantaged—who are by definition most divergent from the unmodified reasonable person—are forced to insist on an almost endless specification of their own characteristics.").

302. Johnson, *supra* note 272.

303. Wright*, supra* note 217, at 135 ("A particular verbal expression plainly need not be universally offensive to all reasonable hearers in order to come within the logic of the sexual harassment statute. As in the case of classic 'fighting words,' the same utterance at any given time and place could have more or less adverse associations for some reasonable hearers, minimal offensiveness to other reasonable hearers, and may have even overall positive associations, in some contexts, to yet other reasonable hearers.").

304. Tobia, *supra* note 276, at 299.

305. *Id.*

306. *Id.* at 305–06.

307. *Id.* at 309–10.

CONCLUSION

Muldrow rejected a requirement that a plaintiff show significant harm to prevail in a Title VII sex discrimination claim.[308] However, the Supreme Court's application and analysis of the new some-harm standard is unclear, which has led lower courts to inconsistently apply this decision. This lack of uniformity in application is unfair to plaintiffs and makes it difficult for employers to make lawful employment decisions. The Supreme Court has a clear duty to interpret the law; however, it also has a duty to establish clear decisions and legal tests so that the law is accurately and fairly applied throughout lower courts. The new some-harm requirement is not inherently flawed, but its practical application has proven problematic, whereas other precedentially developed standards might have provided a clearer framework. Ultimately, the true impact and meaning of some harm will only become clear over time as lower courts apply the standard in their decisions.

308. Muldrow v. City of St. Louis, 601 U.S. 346, 350 (2024).