
Supreme Court Preview and Federal Case Law Update
Office of Congressional Workplace Rights
Office of the General Counsel
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advancing workplace rights, safety & health, and accessibility in the legislative branch
OFFICE OF CONGRESSIONAL WORKPLACE RIGHTS
UNITED STATES CONGRESS

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Welcome

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Presenters

- Hillary Benson, Deputy General Counsel
- Dynah Haubert, Associate General Counsel
- John Mickley, Associate General Counsel

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Overview

- Preview of relevant Supreme Court OT 2023 cases
- Recent Federal Courts of Appeal cases involving CAA-applied statutes
- Recent First Amendment cases

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Supreme Court Preview

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Muldrow v. City of St. Louis, Mo.

- Docket no. 22-193
- Lower court decision: *Muldrow v. City of St. Louis, Mo.*, 30 F.4th 680 (8th Cir. 2022)
- Question Presented: **Does Title VII prohibit discrimination in transfer decisions absent a separate court determination that the transfer decision caused a significant disadvantage?**
- Title VII section 703(a)(1): "It shall be an unlawful employment practice 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[.]" 42 U.S.C. § 2000e–2(a)(1)
- Potential broader implications for how courts analyze "adverse employment actions" in Title VII discrimination cases?

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Acheson Hotels, LLC v. Laufer

- Docket No. 22-429
- Lower court decision: *Laufer v. Acheson Hotels, LLC*, 50 F.4th 259 (1st Cir. 2022)
- Question Presented: **Does a self-appointed Americans with Disabilities Act "tester" have Article III standing to challenge a place of public accommodation's failure to provide disability accessibility information on its website, even if she lacks any intention of visiting that place of public accommodation?**

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Lindke v. Freed* and *O'Connor-Ratcliff v. Garnier

- Docket nos. 22-611 and 22-324
- Lower court decisions: *Lindke v. Freed*, 37 F.4th 1199 (6th Cir. 2022) and *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158 (9th Cir. 2022)
- Questions Presented
  - *Lindke*: **Whether a public official's social media activity can constitute state action only if the official used the account to perform a governmental duty or under the authority of his or her office.**
  - *O'Connor-Ratcliff*: **Whether a public official engages in state action subject to the First Amendment by blocking an individual from the official's personal social-media account, when the official uses the account to feature their job and communicate about job-related matters with the public, but does not do so pursuant to any governmental authority or duty.**

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Murray v. UBS Securities, LLC

- Docket No. 22-660
- Lower court decision: *Murray v. UBS Securities, LLC*, 43 F.4th 254 (2d Cir. 2022)
- Question Presented: **Under the burden-shifting framework that governs Sarbanes-Oxley cases, must a whistleblower prove his employer acted with a "retaliatory intent" as part of his case in chief, or is the lack of "retaliatory intent" part of the affirmative defense on which the employer bears the burden of proof?**

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Americans with Disabilities Act

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ADA Case Law

- *EEOC v. Charter Commc'ns, LLC*, 75 F.4th 729 (7th Cir. 2023) – If a qualified employee's disability interferes with their ability to get to work, they may be entitled to a work-schedule accommodation if commuting to work is a prerequisite to an essential job function.
- *Kinney v. St. Mary's Health, Inc.*, 76 F.4th 635 (7th Cir. 2023) – Continued remote work was not a reasonable accommodation for employee, even though her employer had directed all employees to work remotely for a time beginning in March 2020 due to the pandemic.

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Age Discrimination in Employment Act

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ADEA Case Law

- *Spears v. La. Coll.*, No. 20-30522, 2023 WL 2810057 (5th Cir. Apr. 6, 2023) – Simply because a terminated employee's duties were divided among multiple younger individuals doesn't mean she wasn't "replaced" by someone younger; employers may not circumvent the law's protections by "fractioning" an employee's job.

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Title VII

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Religious Discrimination

- *Groff v. DeJoy*, 600 U.S. 447 (2023) – SCOTUS clarified that to show undue hardship, the test is ***not*** whether the employer can show more than a *de minimis* cost, but whether the burden of accommodating a religious belief "is substantial in the overall context of an employer's business."
- *Kluge v. Brownsburg Cmty. Sch. Corp.*, 64 F.4th 861 (7th Cir. 2023), *vacated on denial of reh'g*, No. 21-2475, 2023 WL 4842324 (7th Cir. July 28, 2023) – Seventh Circuit held that accommodating a music teacher's religious beliefs by allowing him to violate the school's policy for addressing transgender students would be an undue hardship, but subsequently vacated and remanded in light of *Groff v. DeJoy*
- *Lowe v. Mills*, 68 F.4th 706 (1st Cir. 2023), *petition for cert. filed*, No. 23-152 (U.S. Aug. 15, 2023) – Allowing a religious exemption from Maine's vaccine mandate for healthcare workers would be an undue hardship on the defendant healthcare providers "under any plausible interpretation of the statutory text" because it would subject them to a substantial risk of license revocation as well as monetary penalties.

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Adverse Employment Actions

- *Hamilton v. Dallas Cnty.*, — F.4th —, No. 21-10133, 2023 WL 5316716 (5th Cir. Aug. 18, 2023) (en banc) – Sex-based scheduling policy could violate Title VII even though it did not involve an "ultimate employment decision" because the employer discriminated based on sex in the "terms, conditions, or privileges" of employment.
- *Rahman v. Exxon Mobil Corp.*, 56 F.4th 1041 (5th Cir. 2023) – Inadequate training may constitute an adverse employment action if it is directly tied to the worker's job duties, compensation, or benefits.
- *Naes v. City of St. Louis, Mo.*, No. 22-2021, 2023 WL 3991638 (8th Cir. June 14, 2023) – One of the judges who sat on the panel in the *Muldrow* case has had second thoughts about that decision, which will be considered by the Supreme Court in the upcoming term.

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More Title VII Cases of Interest

- *Sharp v. S&S Activewear, L.L.C.*, 69 F.4th 974 (9th Cir. 2023) – Sexually derogatory and violent music played throughout the workplace can form the basis of a hostile work environment claim, regardless of whether it is directed at any particular plaintiff and even it offends both male and female employees.
- *Carr v. New York City Transit Auth.*, 76 F.4th 172 (2d Cir. 2023) – The Second Circuit provides a good explanation of the different standards applied to discrimination and retaliation claims, including claims of retaliatory hostile work environments.
- *Alley v. Penguin Random House*, 62 F.4th 358 (7th Cir. 2023) – The plaintiff was demoted not because she reported sexual harassment, but because she failed to follow the company's established procedures for doing so, and therefore she did not engage in protected activity for Title VII retaliation purposes.
- *Burton v. Bd. of Regents of Univ. of Wis. Sys.*, No. 20-2910, 2022 WL 16948602 (7th Cir. Nov. 15, 2022) – Opposing unlawful conduct does not immunize an employee from the consequences of her "grossly unprofessional conduct"; here, the employee was terminated not for complaining about potential Title VII violations, but for the manner in which she did so.

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Family and Medical Leave Act

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FMLA Case Law

- *Render v. FCA US, LLC*, 53 F.4th 905 (6th Cir. 2022) – Employee provided sufficient notice for his need for intermittent FMLA leave due to flare-ups of recurrent depression, even though he had only provided that notice the first time he sought approval for the leave.
- *Milman v. Fieger & Fieger, P.C.*, 58 F.4th 860 (6th Cir. 2023) – Plaintiff's leave request was FMLA-protected activity, even if she was not ultimately entitled to FMLA leave.

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Fair Labor Standards Act

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FLSA Case Law

- *Cadena v. Customer Connexx LLC*, 51 F.4th 831 (9th Cir. 2022) – Time spent by employees booting up their computers was compensable under the FLSA as integral and indispensable to their principal job duties.
- *Bridges v. United States*, 54 F.4th 703 (Fed. Cir. 2022) – Travel time between a back-to-back prison shift and voluntary overtime hospital shift was not compensable time under the FLSA.

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WARN Act

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WARN Act Case Law

- *Roberts v. Genting New York LLC*, 68 F.4th 81 (2d Cir. 2023) – "Operating unit" does not only encompass entities that could exist independently; this would drastically limit the WARN Act's protections and contravene its purpose.

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USERRA and VEOA

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USERRA and VEOA Case Law

- *Clarkson v. Alaska Airlines, Inc.*, 59 F.4th 424 (9th Cir. 2023) – When assessing USERRA violations, comparability of the unpaid short-term military leave taken by pilot and other paid leave offered by airlines was to be determined by examining the length of the leave at issue, rather than by using a categorical approach.
- *Williams v. Dep't of Def.*, No. 2022-2246, 2023 WL 3575987 (Fed. Cir. May 22, 2023) – VEOA required agency to consider all Plaintiff's material experience, even if he erred in not considering this experience himself in his answer on the application.

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Occupational Safety and Health Act

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OSH Act Case Law

- *Chewy, Inc. v. U.S. Dep't of Lab.*, 69 F.4th 773 (11th Cir. 2023) – The General Duty Clause does not apply to the failure to prevent a hazard when a specific standard covers that hazard; because Chewy was in compliance with the standard addressing forklift under-ride hazards, OSHA could not cite it under the General Duty Clause for under-ride accidents.

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Labor-Management Relations

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Federal Service Impasses Panel

- *NFFE Local 476*, 23 FSIP 039 (2023) – The Agency failed to demonstrate why one additional day in the office would help meet its "important and weighty" justifications for in-office work. FSIP imposed the Union's telework proposal of two days in-office per pay period.
- *SEC*, 23 FSIP 3 (2023) – The Union failed to support its proposal of full-time telework and in-office work "as needed." FSIP found that the Union's proposal went too far by including commuting during work hours and unclear costs, and imposed the Agency's telework proposal of two days in-office per pay period.

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First Amendment

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First Amendment Cases Arising in the Employment Context

- *Kirkland v. City of Maryville, Tenn.*, 54 F.4th 901 (6th Cir. 2022) – The City's interest in executing its public services efficiently outweighed the police officer's interest in voicing her criticism of the Sheriff; the negative comments she posted on Facebook threatened to disrupt government operations, which outweighed her free speech interests, and the City did not violate her First Amendment rights when it fired her over the posts.
- *Lowe v. Mills*, 68 F.4th 706 (1st Cir. 2023), *petition for cert. filed*, No. 23-152 (U.S. Aug. 15, 2023) – Because Maine's vaccination mandate allowed for medical exemptions but not religious exemptions – despite the fact that the state's interest in stopping the decline in vaccination rates among healthcare workers and reducing the risk of disease spread in healthcare facilities would be undermined by the medical exemptions too – the law was not generally applicable and therefore would be subject to strict scrutiny.

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Questions?

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