Podcast

Live from Workplace Horizons 2025: *Muldrow* One Year Later — How Can Employers Minimize Litigation Exposure?

By Ana C. Shields

May 27, 2025

Meet the Authors

Ana C. Shields
Office Managing Principal
(631) 247-4657
Ana.Shields@jacksonlewis.com

Details

May 27, 2025

Welcome to a special edition of We get work®, recorded live from Workplace Horizons 2025 in New York City, Jackson Lewis' annual Labor and Employment Law Conference. Over 500 representatives from 260 companies gathered together to share valuable insights and best practices on workplace law issues impacting their business today. Here's your personal invitation to get the insights from the conference, delivered directly to you.

YouTube

Listen on Apple Podcasts

Transcript

INTRO

You're listening to a special edition of We get work®, recorded live from Workplace Horizons 2025 in New York City, Jackson Lewis' annual Labor and Employment Law Conference. Over 500 representatives from 260 companies gathered together to share valuable insights and best practices on workplace law issues impacting their business today. Here's your personal invitation to get the insights from the conference delivered directly to you. We'll see you in 2026.

Alitia Faccone

Senior Director of Business Development

You're listening to a special edition of We Get Work, recorded live from Workplace Horizons 2025 in New York City, Jackson Lewis' annual Labor and Employment Law Conference. Over 500 representatives from 260 companies gathered together to share valuable insights and best practices on workplace law issues impacting their business today. Here's your personal invitation to get the insights from the conference delivered directly to you. We'll see you in 2026.

Good morning, Ana Shields. Welcome to Workplace Horizons 2025, live from the conference here in our podcast studio. Thank you for joining us today. Ana, you're a principal in the Long Island office of Jackson Lewis. Can you tell us first a little bit about your practice and really what clients are interested in these days? What's keeping them up at night?

Ana Shields

Principal, Long Island

Thank you so much. I'm really excited to be here. This is terrific. It is such a tremendous time at this conference, getting to see everybody and listen to my colleagues. It's been remarkable so far, and I'm really excited about today's programming.

A little bit about me and what I do. I am primarily a litigator. That's how I spend most of my time and I love it. I've been doing that for my whole career. Before I joined Jackson Lewis, I was doing general commercial litigation at another firm and am now going into my 20th year at Jackson Lewis. I have been practicing management side employment litigation for that entire time. I am also now co-leading our National Employment Litigation Group together with Carolyn Burnett, who's my fabulous co-leader out in our Sacramento office. It's been a really, really terrific opportunity to learn more about all of the tremendous litigation activity going on around the firm.

When I'm not litigating, I also spend a lot of time giving advice and counsel to clients and trying to put them in a situation where they don't need us to litigate the case. I like litigating but I find most clients don't. We try our best to look for opportunities to try and get everybody to a place where they can make the best decisions for their organization without fear of litigation.

In terms of what's keeping our clients up at night, I think you had asked me about that. There's a couple of high-level items, a little bit outside the scope of my topic this weekend, but certainly some of the other topics. Certainly, the panel yesterday on diversity, equity, and inclusion – there is a lot to think about and a lot of difficult decisions to be made for employers right now. That's certainly high on the agenda. AI is something that is at the forefront for most of our clients. They are trying to understand how to leverage these phenomenal tools that are becoming available, but to do that in a way that is safe, compliant and lawful and in a way that is not going to result in them having to deal with the litigation.

Faccone

Ana, considering how you just told us how you spend your days and what you've spent your career doing, it is absolutely no surprise that your topic was on the *Muldrow* case one year later, essentially, and how employers can hopefully mitigate their exposure. Can you tell us a little bit about that case, your presentation and why it was important to discuss today in 2025?

Shields

Muldrow is easily one of the most significant workplace law decisions we've seen in the last few years coming out of the U.S. Supreme Court. You heard the panel yesterday describe it as a game changer and that's exactly right. The story of *Muldrow* is one that probably sounds very familiar to most employers. It's a case that I probably would have thought the employer would have come out on top.

Basically, you had Sergeant Muldrow working in one division for a number of years, almost 10 years. In 2017, her employer transferred her to another division with the same rank, same pay, same job perks, same schedule and same responsibilities. I suspect that the general counsel, HR business partner or whoever blessed this decision

had no idea that it would lead to this. After all, can't an employer unilaterally transfer an employee to another division? What's the real risk so long as it's not resulting in a change in pay or the opportunities for you at the employer? But here, Muldrow argued it was discriminatory. She argued it was a Title VII violation. She was replaced in her prior department by a man and said the decision was based in whole or in part on her sex.

She also argued, importantly, that after the transfer, she experienced some harm. She said that she no longer had the opportunity to work with high-ranking officials. She lost access to an unmarked take-home vehicle. She had a less regular schedule and involved some weekend shifts. The employer at the time predictably argued, you can't prove a Title VII sex discrimination claim. Why? Because there was no adverse employment action, which is one of the necessary things for a plaintiff to prove sex discrimination under Title VII. You weren't fired, there was no change in your pay and no change in your title. All the things that we've relied upon for years, frankly, to dismiss claims like this. The district court agreed, granted the dismissal to the employer and the Eighth Circuit affirmed. The U.S. Supreme Court, however, said an employee challenging a job transfer under Title VII must show some harm, that's true, but that harm does not need to be significant. It doesn't need to be serious, substantial or any other adjective suggesting that the disadvantage to the employee has to be subject to some heightened bar. So, huge decision in the respect that basically now, so long as an employee can show some harm they might have a claim under Title VII. At the time, we're about a year later now, there was great concern that this decision would really open the floodgates to litigation. A year later has that happened, yes.

Faccone

A true game changer, as you mentioned. During your presentation at Workplace Horizons, how did you address this seismic change in the law and how employers are dealing with this change?

Shields

I can't help as a litigator to look at things from a litigation perspective and think about what employers can do now to put themselves in a better situation should litigation arise or hopefully to avoid the litigation in the first place. That's the lens that I'm coming at this with. I would say to you, that what we're seeing happening in workplace law is not just *Muldrow* but other decisions and other legislation as well. Something is happening to really erode an employer's ability to dismiss these claims by summary judgment. Something that's getting away from the way we've dismissed cases and successfully won litigations for many years without having to try the case, something's changed.

For example, there was a ruling in 2023 that Jackson Lewis talked a lot about at the time, *Groff*, the Supreme Court decision had clarified the undue hardship standard for employers in a Title VII religious accommodation case. Holding that an undue hardship is shown when a proposed accommodation could show a substantial burden in the overall context of an employer business. That means that the hardship needs to be more than a mere burden – something hard to bear, excessive, unjustifiable, not small or trifling. Again, so in that context, here we've changed the undue hardship standard and made it that much harder for an employer to really meet the burden to

prove undue hardship, harder to dismiss those cases now on summary judgment than it was before *Groff*.

Harassment claims, same thing. What are we seeing with harassment claims? A complete erosion of the Title VII standard, at least at state and local levels. Here in New York, for example, where we are for Workplace Horizons. New York State and New York City have completely moved away from the Title VII standard of what's required to prove harassment claims. For example, under Title VII, one still needs to show that the alleged, if it's sex harassment, alleged sex harassment was severe or pervasive in some way. You don't have to show that anymore in New York state law or New York city law. If a plaintiff doesn't have to show that it was severe or pervasive, it is much more challenging for an employer to successfully dismiss a harassment claim on summary judgment. Because essentially what you're left with is either an issue of fact as to whether the thing was said or the thing was done, which needs by its nature to go to a jury, even if it only happened once potentially because it doesn't have to be pervasive. Or you're left with, if I admit that fact, is that enough, and looking at the other components of the law and what a plaintiff needs to prove.

Muldrow, just jumping back to that, is part of this trend that we're seeing. It's moving away from these defenses that we have utilized for years. Everything an employer is doing is under tremendous scrutiny, and an employer must really assume that their case will be tried before a jury, unless they caught Jeff Brecker, Scott Jang and Doug Klein speaking about arbitrations in their panel.

You really get back to a fairness standard. When you're making a decision as an employer, you come back to how is this going to look optically and what can I do now to support the fact that this decision was not discriminatory if that arises?

Faccone

Tougher for motion to dismiss, tougher for motion for summary judgment, potentially more trials. How is Jackson Lewis helping advise and guide employers through these pretty stressful changes in the law?

Shields

A couple different things to think about. One is it is definitely tougher to get summary judgment, but far from impossible. If an employer sets themselves up well now, that's still certainly a possibility. For example, our advice and counsel team are working with our clients to prepare policies that are very well written and ensuring that the employer practice is consistent with that policy. How do you show that an internal transfer like *Muldrow* was not discriminatory? What does your transfer policy say? Did you apply it consistently to all of your employees, or did you single this person out based on sex? What's the process that's in place? Things like that, the process piece becomes very important legally for the defense.

Also, if you don't get summary judgment, that's the fairness piece. I'd love to be able to tell a jury that this was fair, they got the policy and this happened to all the other employees who were transferred of all different races. This is not about race, this is not about sex, and to defend a claim on the merits that way. Policies would be thing one.

Thing two would be documentation. When a transfer decision is made, and this isn't just about transfers, it's just an easy descriptor for this because of the specific facts of *Muldrow*. When a decision like that is made, review your documentation with this lens, how is it going to look? Is it going to look like we were fair? Did we give the employee adequate notice of what was happening? Did we explain to the employee why we were making the decision? Did we document the legitimate nondiscriminatory business reasons for making the decision?

Lastly, Jackson Lewis does a lot of training as well to really at all levels, for in-house counsel, HR managers, but also for managers and supervisors. They're the boots on the ground, and are the ones often making these decisions, specifically now post-*Muldrow*. A lot of organizations have system of checks and balances in place if they're going to fire someone. If I'm a lower level supervisor and I want to fire someone, I'd probably have to run that by someone in HR at this point. These little decisions that supervisors and managers do have a tremendous amount of discretion to make, now, post-*Muldrow*, some harm, they could lead to claims. Training your managers and supervisors about the importance of making objective, consistent, fair business decisions consistent with your existing company policies becomes critically important.

I've talked to a lot of speakers and thought leaders this afternoon about being proactive. It sounds like here is another case where that makes sense. Make sure your policies are in place and you're acting fairly.

Ana Shields, thank you so much for getting behind the podcast mic with me this afternoon, and please enjoy the rest of the conference.

OUTRO

Thank you for joining us on We get work®. Please tune into our next program where we will continue to tell you not only what's legal, but what is effective. We get work® is available to stream and subscribe to on Apple Podcasts, Spotify and YouTube. For more information on today's topic, our presenters and other Jackson Lewis resources, visit jacksonlewis.com.