

No. 26-1041

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Saira Ghumman,
Plaintiff-Appellant,

v.

Boeing Intelligence & Analytics, Inc.,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Maryland

**BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION AS AMICUS CURIAE IN SUPPORT OF APPELLANT**

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STATEMENT OF INTEREST

This appeal raises important questions concerning the appropriate standard for establishing an adverse employment action for purposes of a discrimination claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* The Equal Employment Opportunity Commission (EEOC) administers and enforces Title VII and thus has a substantial interest in the proper interpretation of the statute. *See* 42 U.S.C. § 2000e-5(a), (f)(1). The EEOC files this brief under Federal Rule of Appellate Procedure 29(a)(2).

STATEMENT OF THE ISSUE¹

Whether the district court should have applied the “some harm” standard set forth in *Muldrow v. City of St. Louis*, 601 U.S. 346 (2024), in assessing whether a plaintiff suffered an adverse employment action for purposes of a Title VII discrimination claim.

¹ The EEOC takes no position on any other issue presented or on the ultimate disposition of this appeal.

STATEMENT OF THE CASE

A. Statement of Facts.²

Saira Ghumman, “whose race is Asian and whose color is brown,” worked in various roles at Boeing Intelligence & Analytics, Inc., most recently as a Contracts Management Specialist. Mem. Op. at 3-4. Ghumman alleges that during her final annual performance review at Boeing, her supervisor gave her a lower performance score than merited because of her race and color. *Id.* at 19-21, 24-25. In that review, the supervisor gave Ghumman a score of 37 on a 50-point scale. *Id.* at 5-6. Although the supervisor gave the same or similar scores to his other direct reports (and Ghumman’s score was tied for the highest among those reports), *id.* at 6 & n.3, Ghumman maintains that her performance merited a higher score because she carried a heavier workload than her colleagues, worked on more complex matters, and achieved greater results, *id.* at 24-25, 29-30.

² We draw these facts from the district court’s memorandum opinion (ECF No. 46). Because this appeal involves a grant of summary judgment, the facts must be construed in the light most favorable to Ghumman as the non-moving party. *See Chapman v. Oakland Living Ctr., Inc.*, 48 F.4th 222, 228 (4th Cir. 2022).

A difference in performance scores could have affected Ghumman's compensation. Each year, Boeing gave eligible employees cost-of-living-adjustment (COLA) raises, *id.* at 5, and employees' "performance scores impacted [their] COLA awards," *id.* at 27. In other words, a higher performance score could result in a larger raise. Because Boeing based COLA raises on an employee's base salary, however, an employee with a higher score and smaller base salary might receive a larger *percentage* increase than another employee with a lower score and larger base salary but (all else being equal) still receive a smaller *net* increase in total dollars. *Id.* at 5.

Ghumman's performance score potentially suppressed her COLA raise. Based on the score she received, Boeing gave her a COLA raise of 2.88%, which was the highest percentage increase among her supervisor's direct reports (though not the largest net increase). *Id.* at 6. But a higher performance score might have resulted in a larger raise.³ According to

³ The district court stated that Ghumman had not "argued that her COLA increase, specifically, was less than it should have been." Mem. Op. at 28. But the court's own description of Boeing's methodology for calculating COLA raises makes clear that higher performance scores generated larger raises, and Boeing did not appear to suggest that Ghumman was subject to a cap of some sort. In her informal opening brief, Ghumman expressly

Boeing, the company “aimed to achieve a mean yearly COLA increase of 3-3.5% for all employees,” *id.* at 5, which meant Ghumman’s raise was, as a percentage, below the company average. Later that year, Ghumman voluntarily resigned from Boeing to take a job elsewhere. *Id.* at 6-7.

B. District Court’s Decision.

Ghumman filed this action, asserting claims for race and color discrimination under Title VII (among other claims). At summary judgment, the court discussed at length whether Ghumman’s performance score could be considered an adverse employment action. Mem. Op. at 24-33. According to the court, Ghumman needed to show that her score had a “tangible effect” on her terms or conditions of employment. *Id.* at 26 (quoting *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 377 (4th Cir. 2004), *abrogated by Muldrow v. City of St. Louis*, 601 U.S. 346 (2024)). The court understood such effects to include “discharge, demotion, decrease in

argues that her performance score “directly impacted her [COLA] and compensation.” Opening Br. of Plaintiff-Appellant at 2. To be clear, we express no view on whether Ghumman’s performance score in fact affected her compensation. As we argue in this brief, a performance review may be an adverse employment action even when it does not affect an employee’s compensation or have any other tangible effects on employment as long as it causes “some harm.”

pay or benefits, loss of job title or supervisory responsibility, or reduced opportunities for promotion.” *Id.* at 27 (indirectly quoting *Boone v. Goldin*, 178 F.3d 253, 255 (4th Cir. 1999), *abrogated by Muldrow*, 601 U.S. 346). Thus, the court reasoned, “[a] performance review which has no effect on Plaintiff’s compensation or promotion cannot be considered an adverse employment action.” *Id.* at 26 (quoting *Pulley v. KPMG Consulting, Inc.*, 348 F. Supp. 2d 388, 395 (D. Md. 2004), *aff’d*, 183 F. App’x 387 (4th Cir. 2006)).

Applying these standards, the court expressed considerable doubt that Ghumman’s score constituted an adverse employment action. Despite conducting that in-depth analysis, however, the court ultimately declined to resolve whether Ghumman suffered an adverse employment action, *id.* at 32-33, and instead granted summary judgment on alternative grounds.

Ghumman, now proceeding pro se, appealed.

ARGUMENT

I. The district court should have applied *Muldrow*’s “some harm” standard in assessing whether Ghumman suffered an adverse employment action.

In assessing whether Ghumman’s performance score constituted an adverse employment action, the district court erred by failing to apply the “some harm” standard set forth in *Muldrow v. City of St. Louis*, 601 U.S. 346

(2024). The court instead improperly imposed a “tangible effect” requirement, relying on caselaw that *Muldrow* abrogated. We take no position on whether this error warrants reversal or on whether Ghumman’s performance review meets *Muldrow*’s standard. Nonetheless, given the recurring nature of this error among district courts within this Circuit, we respectfully urge this Court to clarify that after *Muldrow*, a Title VII plaintiff no longer needs to show that her employer’s action had a tangible effect on her employment.

A. Under *Muldrow*, an employer’s conduct is sufficiently adverse if it causes “some harm.”

Title VII makes it unlawful for an employer to discriminate against any individual with respect to her “terms, conditions, or privileges of employment” because of her race or color. 42 U.S.C. § 2000e-2(a)(1). To prevail on a disparate-treatment discrimination claim, a plaintiff must show, among other things, that she suffered an adverse employment action. *See Johnson v. Balt. City*, 163 F.4th 808, 815 (4th Cir. 2026).

In *Muldrow*, the Supreme Court clarified that to establish an adverse employment action, a plaintiff must show that her employer took an action that caused “some harm respecting an identifiable term or condition of

employment.” 601 U.S. at 354-55; *see also id.* at 359 (plaintiff “need show only some injury respecting her employment terms or conditions”). Under this “simple injury standard,” the Court explained, a plaintiff “does not have to 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.” *Id.* at 355-56 & n.2 (citation omitted).

Three aspects of that ruling are important here. First, in adopting a “some harm” standard, *Muldrow* abrogated circuit precedents that imposed anything more demanding. As the Court stated, “this decision changes the legal standard used in any circuit that has previously required ‘significant,’ ‘material,’ or ‘serious’ injury,” and “[i]t lowers the bar Title VII plaintiffs must meet.” *Id.* at 356 n.2.

Second, *Muldrow*’s “some harm” standard encompasses intangible consequences. The Court reiterated that “[t]he ‘terms [or] conditions’ phrase” in Title VII “is not used ‘in the narrow contractual sense’” and “it covers more than the ‘economic or tangible.’” *Id.* at 354 (first alteration added) (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998), and *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)); *see also*

Ellis v. Noem, No. 24-cv-00977, 2025 WL 2732733, at *12 (D.D.C. Sept. 25, 2025) (“[T]he Supreme Court reaffirmed in *Muldrow* that actionable harm extends beyond economic or tangible harms.”).

Finally, although *Muldrow* addressed a forced transfer, nothing in Court’s reasoning suggests its holding is limited to such actions. To the contrary, the Court “made clear that its interpretation stemmed from Title VII’s generally applicable statutory language, ... which contains no language requiring plaintiffs to show a high level of harm.” *McNeal v. City of Blue Ash*, 117 F.4th 887, 900 (6th Cir. 2024). As a result, *Muldrow*’s holding naturally extends to other employment actions – including performance reviews. See *Xu v. LightSmyth Techs., Inc.*, No. 23-35423, 2024 WL 4562748, at *1-2 (9th Cir. Oct. 24, 2024) (remanding for district court to consider, among other things, whether performance review was an adverse employment action under *Muldrow*), *vacating in relevant part*, No. 6:20-cv-01201, 2023 WL 3653269, at *8 (D. Or. May 25, 2023); see also *Xu v. LightSmyth Techs., Inc.*, No. 6:20-cv-01201, 2025 WL 2770511, at *5, *7 (D. Or. Sept. 25, 2025) (considering the issue on remand).

B. The district court improperly imposed a “tangible effect” requirement that *Muldrow* abrogated.

Here, the district court did not mention or apply *Muldrow*’s “some harm” standard in assessing whether Ghumman’s performance score could be an adverse employment action. Instead, it continued to impose a “tangible effect” requirement. Mem. Op. at 25-27. After *Muldrow*, however, “Title VII discrimination claims do not require any heightened requirement of a ‘material’ or ‘tangible’ impact.” *Xu*, 2024 WL 4562748, at *1 (emphasis added); see also *Peifer v. Bd. of Prob. & Parole*, 106 F.4th 270, 277 (3d Cir. 2024) (under *Muldrow*, “an employee need not demonstrate that the asserted adverse employment action was a ‘serious and tangible’ employment-related harm”).

The district court also relied on pre-*Muldrow* decisions that applied heightened adversity standards and thus “did not survive *Muldrow*.” *Thomas v. JBS Green Bay, Inc.*, 120 F.4th 1335, 1337 (7th Cir. 2024). See Mem. Op. at 25-27. Indeed, several applied a “significant detrimental effect” requirement that *Muldrow* expressly rejected. See, e.g., *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 376 (4th Cir. 2004); *Boone v. Goldin*, 178 F.3d 253, 256 (4th Cir. 1999). In fact, *Muldrow* specifically listed *James* and *Boone*

among those that incorrectly applied a “heightened threshold of harm.” *Muldrow*, 601 U.S. at 353 & n.1 (citing *James*, 368 F.3d at 376); *id.* at 355 (citing *Boone*, 178 F.3d at 256); *see also Herkert v. Bisignano*, 151 F.4th 157, 164 (4th Cir. 2025) (recognizing that *Muldrow* “abrogated our decision in *James*”). The district court was thus mistaken in suggesting that *Muldrow* abrogated these decisions “on other grounds.” Mem. Op. at 26-27 (italics omitted). *Muldrow* abrogated them on the same grounds and the district court therefore erred in relying on them for purposes of assessing adversity.

Under the correct standard – *Muldrow*’s “some harm” standard – a performance review can be an adverse employment action even when it does not have a tangible effect on employment (such as termination, decreased pay, or reduced opportunities for promotion). Instead, various intangible consequences can amount to “some harm” or “simple injury.” *See Muldrow*, 601 U.S. at 354 (Title VII is not limited to “economic or tangible” harms) (citation omitted).

As Justice Kavanaugh’s concurrence in *Muldrow* explains, employment actions that cause reductions in “prestige, status, career prospects, interest level, perks, professional relationships, networking

opportunities, effects on family obligations, or the like” cause some harm or simple injury and thus may be sufficiently adverse. *Id.* at 365 (Kavanaugh, J., concurring in judgment); *compare with James*, 368 F.3d at 377 (holding, pre-*Muldrow*, that “[a]n evaluation merely causing a loss of prestige or status is not actionable”). In other contexts, the Supreme Court has long recognized similar forms of intangible harm as concrete injuries. *See Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (recognizing “impairment of reputation, personal humiliation, and mental anguish and suffering” as cognizable injuries for purposes of compensatory damages under 42 U.S.C. § 1983) (citation modified); *TransUnion LLC v. Ramirez*, 594 U.S. 413, 425 (2021) (“Various intangible harms can also be concrete.”).

When a performance review causes such intangible harms, it satisfies *Muldrow*’s standard and constitutes an adverse employment action. *See Turner v. Buttigieg*, No. 23-cv-01665, 2024 WL 4346332, at *8 (D.D.C. Sept. 30, 2024) (plaintiff’s allegation that she received a less favorable performance review “meets the standard of ‘some harm’ to the terms and conditions of her employment under *Muldrow* because it represents a

change that negatively impacted her work environment”) (quoting *Muldrow*, 601 U.S. at 350).⁴

C. This Court should clarify that a Title VII plaintiff no longer needs to show that her employer’s action had a “tangible effect” on her employment.

We respectfully urge this Court to clarify that after *Muldrow*, a Title VII plaintiff no longer needs to show that her employer’s action had a tangible effect on her employment. Such guidance would be especially important because the error the district court committed appears to be a recurring one.

Even after *Muldrow*, numerous decisions from district courts within this Circuit have continued to articulate or apply heightened adversity

⁴ To reiterate, the Commission takes no position on whether the performance review here meets the *Muldrow* standard. Separately, we also note that the district court in passing expressed doubt that Ghumman’s disparate workload was an adverse employment action, again relying on pre-*Muldrow* caselaw that applied heightened adversity standards. Mem. Op. at 19-20 n.13. For the reasons outlined above, that too was incorrect. As one court recently explained: “A person’s workload and assignments are plainly a ‘term or condition’ of employment and receiving a heavier workload or less favorable assignments could be found to constitute ‘some harm.’” *Albert v. Allegheny Health Network*, No. 2:21-cv-01625, 2026 WL 234009, at *17 (W.D. Pa. Jan. 29, 2026) (quoting *Muldrow*, 601 U.S. at 355); see also *Rhone v. Rubio*, No. 24-v-03389, 2025 WL 3017791, at *7 (D.D.C. Oct. 28, 2025) (finding that an “increased workload” caused “some harm” where it negatively impacted an employee’s work environment).

standards. Some have continued to require a “tangible” effect on employment or rely on caselaw imposing such a requirement.⁵ Some have continued to require “material,” “serious,” or “significant” effects.⁶ Many have continued to rely on pre-*Muldrow* decisions like *James* – sometimes without acknowledging *Muldrow* or, as the district court did here, incorrectly suggesting that *Muldrow* abrogated them on other grounds.⁷ As

⁵ See, e.g., *Schrof v. Clean Earth, Inc.*, No. 1:22-cv-01533, 2025 WL 3089467, at *16 (D. Md. Mar. 31, 2025) (requiring “tangible effect”); *Aly v. Yellen*, No. 8:23-cv-01699, 2024 WL 2053492, at *5 (D. Md. May 8, 2024) (same); see also *Credle v. Va. Cmty. Coll. Sys.*, No. 3:24-cv-00233, 2025 WL 27827, at *8 (E.D. Va. Jan. 3, 2025) (citing caselaw requiring “tangible effect”); *Reid v. MJ Logistics, LLC*, No. 1:22-cv-03112, 2024 WL 2302320, at *5 (D. Md. May 21, 2024) (same); *Downer v. Prince George’s Cnty. Bd. of Educ.*, No. 21-cv-01618, 2024 WL 3277563, at *13, *19 (D. Md. July 2, 2024) (citing caselaw requiring “tangible employment action”).

⁶ See, e.g., *Dixon v. Royal Live Oaks Acad. of the Arts & Sci. Charter Sch.*, No. 9:22-cv-04198, 2025 WL 3002089, at *8 (D.S.C. Oct. 27, 2025) (“significant change”); *Spiller-Holtzman v. Univ. of Md., Balt.*, ___ F. Supp. 3d ___, No. 1:22-cv-00514, 2025 WL 2653768, at *7 (D. Md. Sept. 16, 2025) (“material change”), *appeal docketed*, No. 25-2243 (4th Cir. Oct. 17, 2025); *Nordan v. Wal-Mart Stores E. LP*, No. 4:24-cv-00176, 2025 WL 2408545, at *3 (E.D.N.C. July 21, 2025) (“serious and material impact”), *report and recommendation adopted*, 2025 WL 2405512 (E.D.N.C. Aug. 19, 2025).

⁷ See, e.g., *Dixon*, 2025 WL 3002089, at *8 (relying on *James* but not citing *Muldrow*); *Bradley v. Gannett Co. Inc.*, No. 1:23-cv-01100, 2025 WL 2533504, at *10 (E.D. Va. Sept. 3, 2025) (same), *appeal docketed*, No. 25-2190 (4th Cir. Oct. 7, 2025); *Michaux v. Mann+Hummel Filtration Tech.*, No. 3:25-cv-00200, 2025 WL 2881169, at *4 (W.D.N.C. Oct. 9, 2025) (indirectly relying on *James* but not citing *Muldrow*); *Schrof*, 2025 WL 3089467, at *11, *15-16 (stating that

these rulings reflect, many district courts appear to be unaware of *Muldrow's* existence or do not appreciate that it abrogated prior decisions that used heightened adversity standards.

This Court has not yet had occasion to offer significant guidance on *Muldrow's* impact. To date, it has cited *Muldrow* in only two published opinions. One recited *Muldrow's* holding in a footnote. See *Barnhill v. Bondi*, 138 F.4th 123, 129 n.6 (4th Cir. 2025). The other correctly acknowledged that *Muldrow* abrogated *James*, recognized that *Muldrow's* holding extends to other anti-discrimination statutes that use statutory language similar to Title VII's (there, the Rehabilitation Act), and reasoned that a loss of supervisory authority could be sufficiently adverse under some circumstances. *Herkert*, 151 F.4th at 164-65. Neither had reason to address how *Muldrow* might apply to other employment actions, like performance reviews or disparate workloads, or what effect it had on the "tangible effect" requirement. Nor did this Court's only two unpublished decisions that cite *Muldrow*. See *Johnson v. Navy Fed. Credit Union*, No. 23-2057, 2025

Muldrow abrogated *James* and *Boone* on other grounds); *Owens v. Bisignano*, No. 1:23-cv-01623, 2025 WL 2695714, at *5 (D. Md. Sept. 22, 2025) (stating that *Muldrow* abrogated *James* on other grounds).

WL 2437832, at *1 (4th Cir. Aug. 25, 2025); *Hansley v. DeJoy*, No. 23-1426, 2024 WL 4947275, at *2 (4th Cir. Dec. 3, 2024). The lack of precedent from this Court on these questions further militates in favor of additional guidance.

To be sure, the district court here granted summary judgment on alternative grounds without resolving whether Ghumman's performance score was an adverse employment action. *See* Mem. Op. at 32-33. And although an adverse employment action need not have a tangible effect on employment, Ghumman's performance score may have had such an effect by suppressing her COLA raise. *See id.* at 27 ("[I]t is undisputed among the parties that the performance scores impacted employees' COLA awards."). *But see id.* at 28 (stating that Ghumman had not "argued that her COLA increase, specifically, was less than it should have been"). Accordingly, this Court could potentially resolve this appeal without reaching the questions raised above. Given the apparent uncertainty among district courts regarding *Muldrow's* effect and their continuing reliance on abrogated caselaw, however, this Court's guidance would be both timely and appropriate.

Finally, although Ghumman’s opening brief does not address the district court’s application of pre-*Muldrow* standards, that does not prevent this Court from addressing the issue. To the contrary, this Court “retains the independent power to identify and apply the proper construction of governing law.” *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991); see also *Roberts v. Carter-Young, Inc.*, 131 F.4th 241, 249 n.2 (4th Cir. 2025) (“It is our duty to interpret the law, and party presentation principles do not override that ultimate duty.”); *Wideman v. Innovative Fibers LLC*, 100 F.4th 490, 494 n.3 (4th Cir. 2024) (similar).

CONCLUSION

For the foregoing reasons, the EEOC respectfully urges this Court to clarify that after *Muldrow*, a Title VII plaintiff no longer needs to show that that her employer’s action had a tangible effect on her employment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 3,256 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I certify that on February 17, 2026, I electronically filed the foregoing brief in PDF format with the Clerk of Court via the appellate CM/ECF system. I certify that counsel of record for Defendant-Appellee are registered CM/ECF users, and service will be accomplished via the appellate CM/ECF system. I further certify that a copy of this brief was served by U.S. mail on Plaintiff-Appellant, a pro se litigant, at the following address:

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