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VIEWPOINT

When is a PIP an adverse employment action?

■ TERENCE P. MCCOURT



Terence P. McCourt



A performance improvement plan — also referred to as a “PIP” — is a human resources tool commonly used by employers. As illustrated by the recent decision in *Walsh v. HNTB Corporation*, 169 F.4th 330 (1st Cir. 2026), not all PIPs are created equal in evaluating when they may serve as a basis for an employment discrimination claim.

DEFINITION OF ADVERSE EMPLOYMENT ACTION

The U.S. Supreme Court’s landmark opinion in *Muldrow v. City of St. Louis*, 601 U.S. 346 (2024), provides necessary background for discussing the significance of the *Walsh* decision.

Muldrow concerned a discrim-

ination case brought under Title VII of the Civil Rights Act of 1964. That statute prohibits discrimination based on sex and other protected categories with respect to terms and conditions of employment. To establish a *prima facie* case of discrimination, a plaintiff must initially demonstrate that they are in a protected class and that they suffered an “adverse employment action,” among other elements.

Leading up to *Muldrow*, there was a split among the federal circuit courts concerning the definition of adverse employment action. The fundamental disagreement was whether the adverse action had to be material or significant to satisfy that element of the *prima facie* case.

In support of a discrimination claim, the plaintiff in *Muldrow* alleged that a job transfer was an adverse employment action. The lower court dismissed the claim on the basis that the plaintiff

failed to prove that the job transfer at issue caused a “materially significant disadvantage.”

The Supreme Court rejected that formulation and held that there is nothing in the text of Title VII that distinguishes between “transfers causing significant disadvantages and transfers causing not-so-significant ones.”

Under *Muldrow*, an adverse action is not measured by materiality or severity but is any employment event in which the employer’s conduct leaves the employee “worse off” with respect to the “terms or conditions” of employment.

APPLICATION OF ‘MULDROW’ STANDARD

In *Walsh*, plaintiff Joanne Walsh alleged that she was discriminated against due to her age, after suffering an adverse action, namely being subjected to a PIP.

The lower court dismissed the bias claim and granted summary judgment in favor of the employer.

After that decision was entered, the Supreme Court decided *Muldrow*. On appeal, Walsh argued that, using the Supreme Court's new standard articulated in *Muldrow*, the PIP should be considered an adverse employment action sufficient to support her claim of discrimination.

The 1st Circuit then applied the *Muldrow* standard in determining whether the PIP constituted an adverse employment action in *Walsh*. The court divided the universe of PIPs into two broad categories:

- The first type of PIP is intended to “warn an employee about performance deficiencies or assist an employee in developing a plan to achieve an identified opportunity for skill development.”
- The second type of PIP “may impose new job responsibilities, change the present terms of employment, or deprive an employee of potential advancement opportunities.”

It is only the second type of PIP, according to the court in *Walsh*, that may constitute an adverse employment action.

Applying that framework to the PIP presented to Walsh, the court found no adverse action. The PIP identified its purpose as providing Walsh with “the opportunity to correct her unsatisfactory performance.” It listed problem areas and

provided corresponding improvement steps. It did not assign new duties, alter Walsh's title or compensation, or restrict her ability to seek internal advancement.

An evaluation of whether placement on a PIP may constitute an adverse employment action for purposes of proving a discrimination case is highly fact-specific and may differ by jurisdiction.

The 1st Circuit characterized the PIP as “nothing more than documented counseling.”

While the court cautioned that “there is no one-size-fits-all answer for whether a PIP constitutes an adverse action,” the decision does provide a practical framework in considering the issue of when a PIP may be considered an adverse action.

PIPs that serve primarily as documented counseling — identifying performance deficiencies and providing a roadmap for improvement — are unlikely to constitute adverse actions. By contrast, PIPs that impose new job responsibilities, alter compensation or title, restrict advancement opportunities, or otherwise change the present terms of employment may rise to the level of an adverse action.

PRACTICAL CONSIDERATIONS

It should be stressed that an evaluation of whether placement

on a PIP may constitute an adverse employment action for purposes of proving a discrimination case is highly fact-specific and may differ by jurisdiction. With that caveat in mind, the *Walsh* case presents some helpful parameters.

To lessen the possibility of a finding that placing an employee on a PIP was an adverse employment action, the PIP should clearly articulate its purpose with a focus on documented counseling and set forth a plan with measurable goals aimed at improving job performance.

Recall the admonition in *Muldrow* that an adverse employment action is one that leaves the employee “worse off.” Accordingly, a PIP that serves as a vehicle to change job titles, implement a demotion, or reduce compensation or benefits is more likely to be considered an adverse employment action according to the analysis by the *Walsh* court.

In sum, PIPs are not categorically exempt from being considered adverse employment actions. The *Walsh* decision provides helpful guidance to employers in navigating the intersection of performance management measures and adverse actions under employment discrimination law.

Terence P. McCourt is co-managing shareholder of the Boston office of Greenberg Traurig, where he chairs the labor and employment practice. For more information, contact mccourt@gtlaw.com.