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CLIENT ALERT: First Circuit Clarifies Supreme Court Decision Finding Performance Improvement Plans May Not Constitute an Adverse Employment Action

On March 13, 2026, the First Circuit Court of Appeals issued their decision in *Walsh v. HNTB Corp.*, No. 24-1499, 2026 WL 710036, in which the Court clarified the United States Supreme Court's decision in *Muldrow v. City of St. Louis,* 601 U.S. 346 (2024). The First Circuit held that an employer's performance improvement plan ("PIP") must actually have adverse effects on the employee's terms and conditions of employment in order to be considered an adverse employment action under Federal anti-discrimination statutes. According to the First Circuit, "A per se rule that all PIPs constitute an adverse action is inconsistent with *Muldrow*."

To briefly recap, in 2024, the Supreme Court issued its decision in *Muldrow* and rejected the "materiality" requirement for an employee to successfully show they were subjected to an adverse employment action in setting forth a federal discrimination claim. While courts previously required employees pursuing such claims to demonstrate that the specific adverse action was material or rose to a level more disruptive than a mere inconvenience, *Muldrow* held that any employment event can be considered an adverse action so long as the employee is "worse off" with respect to the terms or conditions of their employment.

The appellant in *Walsh* argued that after *Muldrow,* any PIP should be considered an adverse employment action for the purposes of proving a federal discrimination claim. The First Circuit was not convinced and declined to adopt a "one-size-fits-all" approach to PIPs and adverse employment actions. Instead, the Court found in a post-*Muldrow* world, the inquiry is "fact-intensive" and PIP-specific. The First Circuit noted that PIPs do not have the same effect in every employment situation – when a PIP serves to simply warn an employee of poor performance or to develop a plan for improvement, that type of PIP does not leave an employee worse off. But, if the PIP imposes more job responsibilities or deprives the employee of job advancement opportunities, it is possible that the PIP could be considered an adverse employment action.

Employers can look to the *Walsh* decision for guidance on how to potentially implement PIPs without meeting the definition of an "adverse employment action". For example, employers should be explicit in their PIPs the ways the employee can improve in their role and be aware of the potential impact of new duties, titles, or compensation implemented as a result of the PIP. Employers drafting and implementing PIPs should consult with their MBJ attorney to understand how this widely used performance management tool could impact their legal risk under federal anti-discrimination statutes.

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This alert was prepared on March 26, 2026.

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