

In the
Supreme Court of the United States

CASEY CAMPBELL,

Petitioner,

v.

MERRICK B. GARLAND,
ATTORNEY GENERAL OF THE UNITED STATES;
AND WILLIAM ONUH, IN HIS OFFICIAL CAPACITY
AND IN HIS PERSONAL CAPACITY,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR REHEARING

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
PETITION FOR REHEARING	1
REASONS FOR GRANTING REHEARING	1
I. No “SIGNIFICANCE TEST” FOR TITLE VII PLAINTIFFS	2
II. “SOME HARM TEST”	3
III. FIFTH CIRCUIT “SEVERE AND PERVERSIVE TEST”	4
IV. SOME HARMS TO CASEY CAMPBELL	5
CONCLUSION.....	7
RULE 44.2 CERTIFICATE	9

TABLE OF AUTHORITIES

	Page
CASES	
<i>Bostock v. Clayton County</i> , 590 U.S. 644 (2020)	4
<i>Bye v. MGM Resorts Int'l, Inc.</i> , 49 F.4th 918 (5th Cir. 2022).....	4, 5
<i>Campbell v. Garland</i> , 22-11067 (5th Cir. Nov 2, 2023).....	3, 4
<i>Gowesky v. Singing River Hosp. Sys.</i> , 321 F.3d 503 (5th Cir. 2003)	2
<i>Hudson v. Lincare, Inc.</i> , 58 F.4th 222 (5th Cir. 2023).....	3, 4
<i>In re Campbell</i> , 4:21-cv-0881-P (N.D. Tex. Sep 16, 2022)	2
<i>Muldrow v. City of St. Louis, Missouri, et al.</i> , 22-193 (April 17, 2024).....	1, 2, 3, 5, 6, 7
<i>Oncale v. Sundowner Offshore Services, Inc.</i> , 523 U.S. 75 (1998)	4
STATUTES	
42 U.S.C. § 2000e-2(a)(1)	4
JUDICIAL RULES	
Sup. Ct. R. 44.2	1, 9



PETITION FOR REHEARING

Casey Campbell petitions for rehearing of his petition for writ of certiorari. Campbell timely seeks rehearing within 25 days of this Court’s April 15, 2024 Order.



REASONS FOR GRANTING REHEARING

This Court’s Rule 44.2 authorizes a petition for rehearing based on “intervening circumstances of a substantial or controlling effect.” Two days after the denial of Casey Campbell’s Petition for Writ of Certiorari on April 15, 2024, this Court issued its decision in *Muldrow v. City of St. Louis, Missouri, et al.*, 22-193 (April 17, 2024). *Muldrow* establishes that Title VII plaintiffs must only show “some harm . . . to prevail in a Title VII suit, [but] need not show that the injury satisfies a significance test.” *Id.* This Court said “Title VII’s text nowhere establishes that high bar [of a ‘significance test’]”. *Muldrow* at 4. The Court said “this decision changes the legal standard used in any circuit that has previously required ‘significant,’ ‘material,’ or ‘serious’ injury.” *Id.* at 22, n2.

The Court’s rejection of a “significance test” in Title VII cases is an intervening circumstance with a controlling effect here. The District Court dismissed Campbell’s claims, and the Fifth Circuit affirmed the dismissal, applying a rejected “significance test”. Casey Campbell accordingly asks the Court to grant his petition for rehearing, grant certiorari, and then consider his Title VII claims using the “some harm test”. In the alternative, Campbell asks the Court to vacate the lower court’s decision and remand the case for reconsideration by the Fifth Circuit under the new “some harm test”.

This is an appropriate case for rehearing. The Court can explain the application of the “some harm test” to religious discrimination claims, to hostile work environment claims, and to cases of harassment that change the terms and conditions of employment in violation of Title VII. As an alternative to the Court considering his claims, Casey Campbell asks the Court to grant his petition, vacate the decision below, and remand this case to the Fifth Circuit for reconsideration under the new “some harm test” announced in *Muldrow*.

I. NO “SIGNIFICANCE TEST” FOR TITLE VII PLAINTIFFS

The District Court applied a “significance test” to dismiss Casey Campbell’s Title VII claims, finding “[t]he “legal standard for workplace harassment in this circuit is . . . high,” regardless of the type of harassment alleged. *In re Campbell*, 4:21-cv-0881-P (N.D. Tex. Sep 16, 2022) (citing *Gowesky v. Singing River Hosp. Sys.*, 321 F.3d 503, 509 (5th Cir. 2003)) (App.31a-32a) The Fifth Circuit affirmed the dismissal, as it also applied a “significance test”, stating “only

harassment that is ‘severe or pervasive’ will be considered to affect ‘a term, condition or privilege of employment.’” *Campbell v. Garland*, 22-11067 (5th Cir. Nov 2, 2023) (citing *Hudson v. Lincare, Inc.*, 58 F.4th 222, 229 (5th Cir. 2023)) (App.8a).

The Fifth Circuit’s “significance test” for harassment affecting a term or condition of employment limits Title VII remedies to “severe or pervasive” harassment in a hostile work environment, when Title VII has no “severe or pervasive” harm requirement. Campbell acknowledges the *Muldrow* decision does not specifically list “severe” or “pervasive” among the terms that will identify an improper “significance test”. But the lower bar for Title VII plaintiffs after *Muldrow* should remove the “severe or pervasive” bar that is created by this Fifth Circuit “significance test”. Campbell’s Title VII case “will come out differently” when the “some harm test” is applied.

Casey Campbell, like Jaytona Muldrow, suffered “some harm” to the terms and conditions of his employment because of his religious faith and because he complained of religious discrimination. The District Court applied a “significant harm” test to dismiss Campbell’s claims, finding no “significant harm” to the terms and conditions of Campbell’s employment, which was affirmed by the Fifth Circuit. Like Officer Muldrow, Chaplain Campbell asks that his Title VII claims be evaluated under the “some harm test”.

II. “SOME HARM TEST”

“Although an employee must show some harm from a forced transfer to prevail in a Title VII suit, she need not show that the injury satisfies a significance test. Title VII’s text nowhere establishes that high bar.”

Id. at 4. “Title VII makes it unlawful 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.’” *Id.* at 8 (citing § 2000e-2(a)(1)).

The “‘terms’ and ‘conditions’ of Muldrow’s employment” were changed, including the “what, where, and when of her [] work.” *Id.* This change was a “‘disadvantageous’ change in an employment term or condition.” *Id.* (citing *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998)). Muldrow suffered “differences in treatment that injure’ employees.” *Id.* (citing *Bostock v. Clayton County*, 590 U.S. 644, 681 (2020)). Casey Campbell believes the harm he suffered was significant, even if the court below found otherwise. Like Jaytona Muldrow, Campbell certainly suffered “some harm” to “an identifiable term or condition of employment.”

III. FIFTH CIRCUIT “SEVERE AND PERVERSIVE TEST”

The Fifth Circuit affirmed the dismissal of Campbell’s Title VII claims because the statute “is not a ‘general civility code’ and is not intended to address ‘complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language . . . and occasional teasing.’” *Campbell v. Garland*, at 7 (citing *Bye v. MGM Resorts Int’l, Inc.*, 49 F.4th 918, 923 (5th Cir. 2022)) (App.8a) The court below explained “only harassment that is ‘severe or pervasive’ will be considered to affect “a term, condition or privilege of employment.” *Id.* (citing *Hudson v. Lincare, Inc.*, 58 F.4th 222, 229 (5th Cir. 2023)). (App.8a) “For conduct to be sufficiently severe or pervasive, it

must be both objectively and subjectively offensive.” *Id.* (citing *Bye*, 49 F.4th at 924). (App.8a) Casey Campbell suffered “some harm” that affected the terms and conditions of his employment, even if the Fifth Circuit did not consider it to be “severe or pervasive” harm.

The Fifth Circuit also identified factors trial courts must consider under its “significance test”, including “(1) frequency of the discriminatory conduct; (2) its severity; (3) whether it is physically threatening or humiliating, or merely an offensive utterance; and (4) whether it interferes with an employee’s work performance.” *Id.* “No single factor is determinative.” *Id.* (App.8a) The Final Agency Decision demonstrates that Casey Campbell satisfied the frequency, severity, and interference tests. (App.99a-App.132a) But this “higher bar” of a “significance test” should not have been applied to Campbell’s claims.

IV. SOME HARMS TO CASEY CAMPBELL

The District Court concluded in error that Casey Campbell had not suffered significant harm that affected a term or condition of his employment. The Fifth Circuit affirmed the dismissal in error, under its “significance test”. Campbell contends he suffered significant harms that affected the terms and conditions of his employment, even if the lower courts disagreed. Campbell asks this Court to reconsider his Petition for Writ of Certiorari to evaluate his claims for “some harm” consistent with the *Muldrow* decision.

The issue of “significant harm” versus “some harm” was not squarely addressed by Campbell in his Petition to this Court. Casey Campbell raised several issues, but he and his counsel were unaware the “significance

test” was at issue in *Muldrow* when the Petition was filed. If Campbell had known, he would have expressly stated “some harm” he suffered to the terms and conditions of his employment.

Harms Casey Campbell suffered include being forced to move his office to avoid the harassment. (App.1a) Campbell’s workplace was regularly transferred from the prison’s main institution to the prison camp, and repeatedly changed back, as his work assignment was changed to prevent him from working with Defendant Onuh. (App.157a) In similar fashion, Campbell was forced to change his work schedule time after time to avoid Onuh. (App.150a; App.153a) “Changing nothing less than the what, where, and when of [his work]” affected the “terms” and “conditions” of Campbell’s employment. *Muldrow*, at 7.

Casey Campbell and his co-workers were forced to “pick up the extra workload” that Onuh refused, and Onuh was allowed to refuse the workload, because of his religion. (App.116a; App.153a) Onuh was not required to perform his job duties because of his religion, so Campbell “and the rest of us must perform [Onuh’s duties]”, which also changed the “terms” and “conditions” of Campbell’s employment. (App.107a; App.121a; App.156a; App.158a)

Campbell was treated differently than Onuh because of religion. (App.124a) He was placed at risk of harm when Defendant Onuh incited inmates against him. (App.102a; App.108a) Campbell and other chaplains were forced to cancel their programs and religious services at times, to avoid harassment from Onuh, and at other times to accommodate Onuh’s preferences for the timing of his own religious services. (App.122a; App.144a; App.145a; App.148a-149a)

The terms and conditions of Casey Campbell's employment at FMC Carswell were changed because of religion. The "what, where, and when" of Campbell's employment were changed due to religion. The application of a "significance test" by the District Court and by the Fifth Circuit when those courts considered Campbell's Title VII claims was incorrect. Casey Campbell asks this Court to reverse the denial of his Petition for Writ of Certiorari so his claims may be reconsidered under the "some harm test" announced in *Muldrow*.



CONCLUSION

The Court's decision in *Muldrow* to reject any "significance test" in favor of the "some harm test" under Title VII is an intervening circumstance with controlling effect on this case. Casey Campbell asks the Court to grant his petition for rehearing, grant certiorari and consider his Title VII claims under the "some harm test". Alternatively, Campbell asks the Court to vacate the lower court's decision and then remand this case to the Fifth Circuit for reconsideration under the new "some harm test".

Respectfully submitted,

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May 10, 2024

RULE 44.2 CERTIFICATE

As counsel for the petitioner, I certify that this petition for rehearing is presented in good faith, not for delay, and it is restricted to the grounds specified in Rule 44.2.

Respectfully submitted,

/s/ Thomas B. Cowart

Thomas B. Cowart