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EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues

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BUSINESSES PROVIDING EXPRESSIVE OR ARTISTIC SERVICES NOT REQUIRED TO PROVIDE SUCH SERVICES TO SAME-SEX CUSTOMERS; SUPREME COURT SAYS FORCING EXPRESSIVE DESIGNS THAT COMMUNICATE MESSAGES VIOLATES THE FIRST AMENDMENT

In a case in which a website designer refused to make wedding websites for LGBTQ couples, the Supreme Court's 6-3 majority ruled that the First Amendment bars the government from forcing the designer to create expressive designs that communicate messages she disagrees with. *303 Creative LLC v. Aubrey Elenis*, Case No. 21-476 (June 30, 2023). Writing for the majority, Justice Gorsuch stated: "In this case, Colorado seeks to force an individual to speak in ways that align with its views but defy her conscience about a matter of major significance." The state had argued that it wasn't trying to regulate the web designer's speech, but only to regulate her conduct of denying services to same-sex couples that are otherwise available to the public, under the non-discrimination public accommodation concept. The Court rejected this view on the grounds that the state was attempting to use its anti-discrimination law "to compel an individual to create speech she does not believe." The case is reminiscent of a 2018 Supreme Court ruling where the Court found in favor of a Christian baker that had refused to make custom wedding cakes for same-sex couples, but the earlier ruling was on narrower grounds than the free speech Constitutional question.

The Court further indicated that it is unconstitutional for the state to eliminate from the public square ideas that it dislikes, including the belief that marriage is the union of husband and wife.

Editor's Note: To some extent, the case turns on the issue of whether in the concept of regulating conduct, the government can force a person to engage in certain type speech. One wonders whether this concept may play a role in the current litigation over the so-called "captive audience" issue. The National Labor Relations Board (NLRB) General Counsel wants to prohibit mandatory employer meetings in which a presentation is given discouraging unionization. The NLRB General Counsel contends that it is not regulating the employer's speech, only its conduct in requiring employees to hear such speech. Sometimes cases like this have broad ramifications beyond the factual context in which the precedent-setting case arose.

SUPREME COURT CHANGES STANDARD FOR RELIGIOUS ACCOMMODATIONS TO PERSONS REFUSING SUNDAY WORK

In *Groff v. DeJoy* (No. 22-174, June 29, 2023), the Supreme Court addressed a Christian who rejected Sunday work with the Postal Service due to his faith. He received progressive discipline for failing to work on Sundays, and eventually resigned. He sued under Title VII, contending that the Postal Service could accommodate his Sunday Sabbath practices "without undue hardship."

The Supreme Court reviewed the case to address whether the Court should discontinue the "more than - de minimis cost" test for refusing Title VII religious accommodations stated in *TransWorld Airlines, Inc. v. Hardison*. Another question before the Court was whether the employer may demonstrate "undue hardship on the conduct of the employer's business" under Title VII by showing that the requested accommodation burdens the employee's co-workers.

In the earlier *Hardison* ruling in 1977, the Court stated that requiring an employer "to bear more than a de minimis cost in order give [an employee] some Saturdays off is an undue hardship." In the unanimous current opinion authored by Justice Alito, the Court changed the test. According to the Court, it now "understands *Hardison* to mean that 'undue hardship' is shown when "a burden is substantial in the overall context of an employer's business." It is enough to say that an employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business, taking into account all relevant factors, including the particular accommodations at issue and their practical impact in light of the nature, size, and operating costs of an employer. While this is a change from the way the statute had previously been interpreted, the Court declined to incorporate the undue hardship test under the Americans with Disabilities Act (ADA), which requires significant difficulty and expense.

Unfortunately, the Court declined to determine what facts would meet this new test. The Court did state: "A good deal of the Equal Employment Opportunity Commission's (EEOC) guidance in this area is sensible and will, in all likelihood, be unaffected by the Court's clarifying decision." According to the Court, "The courts must apply the test to take into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, size, and operating costs of an employer." On the second question, whether undue hardship results if the requested accommodation burdens the employee's co-workers, the Court answered in the negative, but left the possibility that a substantial burden on employees would result in a substantial burden on the business. However, the Court again left unclear how an employer would meet this burden, in situations, for example, where employees aren't willing to volunteer to cover the Sundays for an employee that can't work. The Court does state that an employer must do more than conclude that forcing other employees to work overtime would constitute an undue hardship.

Editor's Note: Although what type fact patterns create an "undue hardship" under religious accommodation principles remain unclear, we do know that the burden on the employer to show undue hardship is less than an "action requiring significant difficulty or expense," as the Supreme Court rejected that tougher standard. At the same time, the Court finds that a "more than de minimis" cost as a standard for undue hardship is not enough. Further, the Court's rationale suggests that hardship to employees who have to assume the extra work for such an accommodation may not be sufficient to show an undue hardship to the employer.

Note that these issues come up not only in requesting days off, but also in grooming, dress, and other situations. Related issues may arise in reference to LGBTQ people and those seeking access to contraception. One case has been delayed pending a Supreme Court ruling that concerns Christian teachers' requests to be exempt from a policy on transgender students' names and pronouns.

But in any event, it will be a little harder for employers to deny religious exemptions in workplace policies based on the concept of undue hardship. Further, if the employer claims that the extra burdens on co-workers as an undue hardship, apparently such an accommodation must also harm the conduct of the business itself, such as through a loss of productivity or efficiency.

Employers may also need to change many of their policies to be consistent with the new reasonable accommodation standard. While policies should reference undue hardship, it may be harder to define what that concept means, particularly since it may vary as to whether it is an issue under religious accommodations, or under the ADA.

PREGNANT WORKERS FAIRNESS ACT IS IN EFFECT, AND ALSO REQUIRES REASONABLE ACCOMMODATION

The Pregnant Workers Fairness Act (PWFA) went into effect on June 27, 2023. The expanded rights for pregnant individuals will be similar to those qualified individuals with disabilities under the ADA. Under the PWFA, such individuals only have to show that they require reasonable accommodation due to a physical or mental condition related to pregnancy/childbirth or a related condition. The PWFA also does not allow an employer to require a qualified individual to accept accommodation other than one arrived at through the interactive process, nor require a qualified individual to take leave if another reasonable accommodation can meet the individual's needs.

Editor's Note: This is another area in which an employer's handbook and/or equal employment policies would likely need modification. Employers may also consider having separate forms or places on forms in which employees request accommodations for ADA, religion, or for pregnancy-related issues. In any event, employers must be aware that the concept of "undue hardship" varies somewhat between accommodations for religious, pregnancy or ADA purposes.

DOL REQUIRES NEW WAGE-HOUR NOTICE TO BE POSTED AT WORKPLACES

A new Department of Labor (DOL) Fair Labor Standards Act (FLSA) poster is now required which adds the requirements of the Providing Urgent Maternal Protections for Nursing Mothers Act (the PUMP Act). The April 2023 version of the poster must be used to be legally compliant. You can access this new poster by going to: https://www.dol.gov/agencies/whd/posters/flsa.

COURT SAYS EMPLOYERS MAY SUE FOR DAMAGES WHERE UNION FAILS TO TAKE REASONABLE PRECAUTIONS TO PROTECT EMPLOYER'S PROPERTY FROM EMINENT DANGER DUE TO STRIKE

The U.S. Supreme Court on June 1, 2023 ruled that the Labor Act does not protect strikers who fail to take "reasonable precautions" to protect their employer's property from foreseeable, aggravated and imminent danger due to the sudden cessation of work. *Glacier Northwest, Inc. v. Teamsters Local 174*, Case No. 21-1449. The union called the strike to start on the morning it knew the company was mixing substantial amounts of concrete and making deliveries. The union directed drivers to ignore their employer's instructions to finish deliveries in progress, resulting in the concrete mix becoming hardened and useless. The state court judge had dismissed the suit ruling that it would "defer to the exclusive competence" of the NLRB regarding activity "arguably" subject to the Labor Act. In an 8-1 ruling, Justice Barrett wrote for the majority that: "The National Labor Relations Board has long taken the position . . . that the [National Labor Relations Act (NLRA)] does not shield strikers who fail to take "reasonable precautions" to protect their employer's property from foreseeable, aggravated, and imminent danger due to the sudden cessation of work." Given this undisputed limitation of the right to strike, the Court concludes that: "The union has not met its burden as the party asserting pre-emption to demonstrate that the NLRA arguably protects the drivers' conduct." Thus, the union could be sued in state court for damages. Only Justice Ketanji Brown Jackson dissented.

Editor's Note: Although some press discusses the ruling as a blow to organized labor, it is not a significant change in existing law. Courts have generally found over the years that damaging company property is a matter reserved for state and local law, and not pre-empted by the NLRB, thus allowing employers to sue for damages. Damage to

the employer's property in the current case was a little more nuanced, as drivers simply abandoned their fully-loaded trucks without informing anyone about the strike, intentionally causing destruction of the concrete and compromising the safety of the trucks. The case turned on the employer's argument that the strike wasn't even arguably a protected strike but instead was a deliberate destruction of company property. Further, the ruling is not as broad as it first seems, as it did not create a blanket rule that the destruction of perishable goods can lead to state court damages alone. The court appeared to be distinguishing between conduct in which property is destroyed as a by-product of the work stoppage and one where the union targets and intends for company property to be destroyed.

AFFIRMATIVE ACTION RULING COULD IMPACT EMPLOYERS

The Supreme Court affirmative action ruling *(Students for Fair Admissions, Inc. V. President and Fellows of Harvard College*, No. 20-1119 (June 29, 2023)) is likely to have an impact on private industry affirmative action programs, even though the case itself involved the equal protection clause of the Fourteenth Amendment and admission policies at universities. There are older Supreme Court rulings involving temporary voluntary affirmative action programs designed to eliminate racial imbalances in a workforce, but Justice Gorsuch's concurrence noted the parallels between Title VI, applied to the universities and Title VII, which applies to private employers. The reasoning in the Supreme Court decision could apply to private employment as well. Thus, plaintiffs are more likely to attack hiring and promotion decisions under affirmative action programs.

A useful guideline for employers planning their affirmative action programs is that of the Office of Federal Contract Compliance Programs (OFCCP) found under Executive Order 11246, which focuses on removing barriers to protected classes through affirmative steps like outreach and recruitment. However, the Executive Order also states that employers are not required to hire or promote based on quotas or preferential treatment by race. An area apparently unaffected by the recent Supreme Court ruling is the evaluation of employment criteria to avoid adverse impact on protected classes. An employer is normally allowed to make adjustments in hiring criteria that are having an adverse impact on such persons, not under the concept of affirmative action, but under the concept of either avoiding adverse impact or having a job-related business reason for such impact.

The Supreme Court ruling expressly allows "non-racial" considerations in affirmative action, and employers may need to review their affirmative action programs to make sure they do not make race-conscious employment decisions. Further, each program should avoid any type of stereotyping of persons by race, which was expressly prohibited in the recent Supreme Court decision.

Editor's Note: This firm has prepared a more extensive article about affirmative action programs which is available upon request by contacting jww@wimlaw.com.

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