U.S. Supreme Court Prepares to Adjourn by Issuing Two Highly Anticipated Decisions Involving Affirmative Action and Religious Accommodation

Posted in Alert on June 30, 2023

June 30 will mark the end of the 2022-2023 U.S. Supreme Court term. The high court has a penchant for issuing highly anticipated decisions during the last few days of the term, such as overturning Roe v. Wade last year in a June 24 decision, recognizing homosexual marriage in a June 26 decision back in 2015, and including sexual orientation and gender identity as federally protected classes in a June 15 decision in 2020.

This year does not disappoint with two highly anticipated decisions involving affirmative action and religious accommodation issued on June 29, 2023.

Supreme Court Decision Involving Affirmative Action

On June 29, 2023, the Supreme Court issued a joint decision striking down the use of affirmative action in higher education with respect to the cases, Students for Fair Admissions v. President & Fellows of Harvard and Students for Fair Admissions v. University of North Carolina et al. This decision, while certainly anticipated to be used *in the future* to argue against employer use of affirmative action, does not address affirmative action in this context. Private employers who qualify as covered federal contractors so as to be subject to Executive Order 11246 still have a government-sanctioned mandate under this Executive Order to engage in "affirmative action" pursuant to legally required "Affirmative Action Plans" or "AAPs."

If you are an employer that is not subject to Executive Order 11246 and does not have an official "Affirmative Action Plan" sanctioned by the same, engaging in "affirmative action," by giving preferential treatment to underrepresented groups in your organization through some type of informal "preferential treatment hiring plan" or practice has never been lawful. For employers that have AAPs due to being federal contractors who are subject to Executive Order 11246, the Harvard/UNC joint decision again does not mark the end of your obligations under this Executive Order. Legal pundits are speculating that "the end is near" in light of this decision. But don't jump the gun by throwing your AAP away or otherwise disregarding it just yet!

Supreme Court Decision Involving Religious Accommodation

June 29 also brought a second highly anticipated decision which, unlike the Harvard/UNC one, does directly impact employers. In Groff v. DeJoy, the Supreme Court considered whether the "undue hardship" standard employers must use in determining whether a request for religious accommodation under Title VII needed to be "clarified" to more closely match the "undue hardship" standard employers must use in assessing a request for disability accommodation under the Americans with Disabilities Act (ADA). The answer to this question per the Groff decision is "yes."

Specifically, the Court rejected the lower "more than a *de minimis* cost" or burden test employers have been using in assessing religious accommodation requests. The Court held that the U.S. Postal Service, the employer at issue in the Groff case, instead should have determined whether Mr. Groff's request not to work on Sundays in observance of his Sabbath was reasonable or not by considering whether this request would result in a "substantial cost" or burden on its operations, other workers, etc. This "substantial cost" or burden test is more aligned with the ADA disability accommodation "undue hardship" standard.

Interestingly, the Court did not hold that Mr. Groff should "win" his lawsuit against the Postal Service. It only held that the case should be reconsidered by the lower court which previously ruled in the Postal Service's favor by finding that Mr. Groff's requested religious accommodation was lawfully denied based on the Postal Service's ability to show that granting it would involve "more than a *de minimis* (or very slight) cost" or burden on its operations, other workers, etc.

The fact that the same language is used in both Title VII and ADA cases regarding the ability to lawfully reject an applicant or employee's request for accommodation based on a showing that the requested accommodation would involve an "undue hardship" when the "undue hardship" standard for religious accommodations under Title VII vs. the "undue hardship" standard for disability accommodations under the ADA were in fact different based on the court decisions which previously had explained this "undue hardship" standard in both contexts has always been a bit confusing to employers.

So, the Supreme Court's holding in Groff that going forward this should not be the case should – at least in theory – make applying the "undue hardship" standard more straightforward. In practice, applying this new higher "substantial burden" test in the context of religious

accommodations is not anticipated to be any less challenging than the "more than a *de minimis* cost" or burden one – as employers already know from using a higher standard to assess "undue hardship" in the context of disability accommodations for the past few decades.

This is one area of human resources where taking a uniform or standardized "one size fits all" approach is not a good idea. Both courts and the Equal Employment Opportunity Commission (EEOC), the federal agency which enforces both Title VII and the ADA, have repeatedly affirmed the expectation that employers apply an individualized, fact-specific approach to analyzing both religious and disability accommodation requests. The only difference the new Groff decision makes in this process is that the "undue hardship" standard used to assess a request for religious accommodation under Title VII now will be similar to the one employers have been using to assess disability accommodation requests under the ADA – *Will the requested accommodation cause a "substantial burden" on our operations in terms of cost, impact on other workers, customers, etc.*?

We Can Help

Please feel free to contact Stacie Caraway or any other member of our Labor & Employment Law Practice Group when you are faced with religious or disability accommodation requests. We have forms, policies and a listening ear that can assist you in complying with Title VII and the ADA when analyzing these requests.