COLLAZO FLORENTINO & KEIL LLP Client Advisory

For Clients And Friends Of The Firm

July 20, 2015

Notable End-of-Term Supreme Court Cases

This June, the Supreme Court of the United States (the "Supreme Court" or the "Court") issued a variety of decisions relevant to employers. This Client Advisory details three of these important decisions, which address religious accommodations, health care, and marriage equality.

I. No Employer Knowledge Requirement for Religious Accommodation Claims

On June 1, 2015, the Supreme Court clarified the employers' obligation to discuss and provide religious accommodations during the hiring process, holding that a prospective employee asserting a disparate treatment claim based on a failure to accommodate a religious belief need only show that the need for an accommodation was a motivating factor in the employer's decision. *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. ___ (2015). As noted in our prior blog post, the case arose when Abercrombie & Fitch, operator of several youth-oriented clothing stores, refused to hire a prospective employee, Samantha Elauf, because she wore a religious article of clothing, a hijab (or headscarf), that conflicted with the employee dress code. The dress code, referred to internally as the "Look Policy," prohibits, among other things, employees from wearing black "caps."

Elauf identifies as a practicing Muslims and wears a hijab for religious reasons. Elauf applied for a sales associate position at an Abercrombie & Fitch store and was interviewed by a store manager. During the interview, Elauf wore a hijab, but neither she nor the store manager discussed it. Elauf did not state that she was wearing the hijab for religious reasons, and did not request a religious accommodation to wear it at work. The store manager did not ask Elauf about the hijab or why she wore it, and did not inform her that the Look Policy would prohibit wearing the hijab at work. During litigation, it was established that the store manager assumed that Elauf was a Muslim who wore the hijab for "religious reasons." When the store manager consulted with the district manager regarding Elauf, the district manager decided that Elauf should not be hired because the hijab was not permitted under the Look Policy, even if worn for religious reasons.

747 Third Avenue
New York, N. Y. 10017
Tel: 212-758-7600
www.cfk-law.com

Title VII of the Civil Rights Act of 1964 prohibits employers from intentionally discriminating against applicants and employees because of their religion. Under Title VII, refusing to accommodate an employee's religion where such an accommodation would not create an undue hardship on the employer's business constitutes intentional discrimination. An established corollary of these principles is that employers are prohibited from refusing to hire an applicant in order to avoid accommodating a religious practice that it could accommodate without an undue hardship.

The issue before the Court was whether an employer's duty to provide a religious accommodation arises only where the employer has "actual knowledge" of the need for an accommodation gained from the applicant's request, or whether the applicant's religious clothing puts the employer on constructive notice of the need for accommodation.

Although both parties focused on the significance of knowledge, the Court rejected the argument that employer knowledge was the crux of the issue. The Court noted that, unlike the Americans with Disabilities Act, which only requires accommodation of "known physical or mental limitations," the text of Title VII addressing religious discrimination does not include a knowledge requirement. Instead, Title VII requires only that religion not be a "motivating factor" in an employer's decision not to hire an applicant. Thus, the Court articulated the following rule: "An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions." In other words, even if an employer does not have actual knowledge of a prospective employee's religion or need for an accommodation, the employer's mere suspicion or "hunch" that a prospective employee needs a religious accommodation, and reaching an employment decision on that basis, is sufficient to establish an unlawful failure to accommodate.

While the majority opinion reads as though this was an easy case, footnote 3 belies the matter-of-fact tone of the opinion and hints at the harder questions the Court, and employers, will face down the road. The Court noted that while Title VII does not impose a knowledge requirement, a certain amount of employer knowledge may need to be shown to prove employer motivation. As articulated by the Court, "While a knowledge requirement cannot be added to the motive requirement, it is arguable that the motive requirement itself is not met unless the employer at least suspects that the practice in question is a religious practice—i.e. that he cannot discriminate 'because of' a 'religious practice' unless he knows or suspects it to be a religious practice."

The Court declined to decide the specific relationship between motive and knowledge because it was clear that Abercrombie knew or suspected that Elauf wore the hijab for religious reasons, and thus the issue was not presented to the Court. We expect future cases to explore this distinction and provide further guidance.

Employers should review both their hiring process and religious accommodation protocols to ensure they are in compliance with this ruling.

II. *King v. Burwell*: The Affordable Care Act Survives Another Legal Attack

In a 6-3 decision issued on June 25, 2015, the Supreme Court ruled that insurance subsidies will be preserved for otherwise eligible purchasers of health insurance under the Patient Protection and Affordable Care Act (the "ACA" or "Act"), regardless of whether such insurance is purchased on a federal or state-established health insurance exchange. *See King v. Burwell*, ___ 576 U.S. ____ (2015). At issue in the case was the validity of an Internal Revenue Service ("IRS") final rule implementing the premium tax credit provision of the Act for individuals who purchase health insurance on the Federal Exchange popularly known as HealthCare.gov.

The petitioners were Virginia residents who did not wish to buy health insurance through the ACA. Because Virginia has not established its own State Exchange, it has been served instead by the Federal Exchange. The petitioners argued that since the Federal Exchange was not established by the state of Virginia, it does not qualify as "an Exchange established by the State," which, under the Act, is defined as only the 50 states or the District of Columbia. If the petitioners' view prevailed, the tax credits would not apply and, thus, the cost of buying insurance would constitute more than eight percent of their annual incomes, thereby exempting them from the Act's coverage requirements. If, on the other hand, the government's view prevailed, petitioners, along with millions of other Americans, would be eligible to receive the tax credits, making the cost of buying insurance less than eight percent of their incomes and subjecting them to coverage under the Act.

The petitioners argued that because the relevant statutory phrase in the ACA specifically limits the tax credits to "an Exchange established by the State," the subsidies were not intended to apply to the Federal Exchange operating in Virginia. The government argued that the IRS final rule was consistent with the overall structure of the law and with congressional intent.

Writing for the majority, Chief Justice John Roberts sided with the government's position, holding that although the ACA contains "more than a few examples of inartful drafting" and although petitioners' plain meaning arguments were "strong," the relevant section of the law "can fairly be read consistent with what we see as Congress's plan [to have the tax credits apply to both State and Federal Exchanges], and that is the reading we adopt."

The Court noted that while the meaning of the phrase "an Exchange established by the State" may seem to be limited to State Exchanges if "viewed in isolation," such a reading turns out to be "untenable in light of [the statute] as a whole." In essence, the Court ruled that the context and structure of the Act compelled it to depart from what would otherwise be the most natural reading of the relevant statutory phrase.

Under the Act, if a state declines to establish an Exchange, the ACA requires the Secretary of Health and Human Services to establish "such Exchange." By using the words "such Exchange," the Court reasoned that the Act may have intended for State and Federal Exchanges to be treated the same. But, as the Court noted, State and Federal Exchanges would differ in a fundamental way if tax credits were available only on State Exchanges—i.e., the State Exchanges would help make insurance more affordable by providing billions of dollars to their citizens, while the remaining states, including Virginia, served only by the Federal Exchange, would not.

Finding the statutory text ambiguous in this regard, the Court looked "to the broader structure of the Act to determine whether one of the statutory provision's permissible meanings produces a substantive effect that is compatible with the rest of the law." It rejected the petitioners' interpretation on the ground that it would destabilize the individual insurance market in any state with a Federal Exchange, and likely create the very "death spirals" that Congress designed the Act to avoid. The Court determined that it was implausible that Congress meant the Act to operate in this manner. The Court stated that Congress intended the Act to apply in every state in the Nation, but those requirements would only work when combined with the coverage requirement and tax credits. "It thus stands to reason that Congress meant for those provisions to apply in every State as well."

In a dissent joined by Justices Thomas and Alito, Justice Scalia wrote: "The Court holds that when the [ACA] says 'Exchange established by the State' it means 'Exchange established by the State or the Federal Government.' That is of course

quite absurd, and the Court's 21 pages of explanation make it no less so." The dissent would have found in favor of the petitioners based on the plain language of the relevant statutory phrase. Justice Scalia also stated that this is the third instance in which the Supreme Court has "rewritten" the ACA to enable it to survive legal challenges. He then quipped that we should start calling the Act "SCOTUScare."

King v. Burwell represents a major victory for the Obama administration in its ongoing efforts to preserve its landmark ACA legislation. Based on the Court's decision in this case and in *National Federation of Independent Business v. Sebelius*, 567 U. S. ___ (2012) (upholding the ACA against several Constitutional attacks), it appears that opponents of the Act may need to rely upon the legislative process if they still wish to see the ACA amended or overturned.

III. Same-Sex Marriage Now Lawful in All Fifty States

Two years after the Supreme Court held in *United States v. Windsor*, 570 U.S. ___ (2013), that the Defense of Marriage Act was unconstitutional to the extent it prevented the Federal Government from treating same sex marriages as valid even if the marriages were lawful in the state in which they were licensed, the Court has issued another landmark ruling on the issue of marriage equality.

In *Obergefell v. Hodges*, fourteen same-sex couples from four different states claimed that the various state laws violated the Fourteenth Amendment by denying them the right to marry or to have their marriages, which were legally and validly performed in another State, recognized. In this June 26, 2015 decision, the Supreme Court held that there exists a fundamental right to marry and that to deny this right to same sex couples "would disparage their choices and diminish their personhood". The Court further noted that not only is the right of same-sex couples to marry a part of the liberty guaranteed by the Fourteenth Amendment, but is also part of that Amendment's equal protection guarantees. Specifically, the Court noted that the marriage laws enforced by the respondents to the action were, in essence, unequal because same-sex couples were denied the benefits afforded to opposite-sex couples and were barred from exercising a fundamental right. As a result of this decision, same-sex couples across all 50 states now have the right to marry.

The *Obergefell* decision has the immediate effect of legalizing same sex marriage; however, it also has more nuanced effects on the employment relationship. Although the *Windsor* decision already expanded the definition of "spouse" under the Family

and Medical Leave Act to include marriages which were lawful in the jurisdiction where the marriage occurred, *Obergefell* will expand the definition even further to include all same sex marriages in each and every state. This change in definition may also alter certain state and local leave laws that previously applied only to opposite-sex couples. Employers may also need to examine their various benefit plans to determine whether certain changes or amendments are necessary to extend benefits to married same-sex couples and avoid claims of discrimination. Finally, although *Obergefell* is not an employment law case and does not expand the scope of Title VII to cover sexual orientation, the decision may be cited in support of sex discrimination cases as they relate to sexual orientation.

If you have any questions or concerns regarding any of the topics covered in this Client Advisory, please contact Phil Repash, Kristina Grimshaw, Amanda Baker, or any other attorney at the Firm at (212) 758-7600.