Wimberly Lawson
Wright Daves & Jones, PLLC
Attorneys & Counselors at Law

Briefly

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DEPARTMENT OF LABOR SEEKS TO CLARIFY RELIGIOUS EXEMPTION FOR FEDERAL CONTRACTORS

Edward H. Trent

"The goal of the new regulations is to provide clarity to religious organizations and institutions when it comes to applying for government contracts."

On August 15, 2019, the Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") issued proposed regulations updating the definitions section of 41 CFR Part 60-1 "to clarify the scope and application of the religious exemption contained in section 204(c) of Executive Order 11246, as amended." The goal of the new regulations is to provide clarity to religious organizations and institutions when it comes to applying for government contracts. While some have already claimed that the new regulations will legalize discrimination against those who identify with the LGBT community, OFCCP maintains that the regulations merely ensure that the long-standing Executive Order designed to implement Title VII in the area of federal contracts remains consistent with Supreme Court precedent protecting religious freedom.

HISTORICAL OVERVIEW AND THE OFCCP'S CONCERNS

One year following his signing of the Civil Rights Act of 1964, President Lyndon B. Johnson issued Executive Order 11246 requiring equal employment opportunities in federal government contracting. While religion and sex protections were omitted from the original order, President Johnson corrected this omission two years later. As the preamble to the proposed regulations states: "because the [religious] exemption administered by OFCCP springs directly from the Title VII exemption, it should be given a parallel interpretation."

In support of the clarifying definitions, the OFCCP references several recent Supreme Court decisions. One case is *Trinity Lutheran Church of Columbia, Inc. v. Comer*, a 2017 decision where the Court held that the State could not preclude a church pre-school from participating in a State grant program for playground equipment just because it was a religious institution. The Court held that the State violated the Free Exercise Clause by conditioning a generally available public benefit on an entity giving up its religious character. Another is the Court's 2018 decision in *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, where the Court held that a State may not make decisions based on hostility to religion. These broad religious free exercise protections, however, raise the question on who qualifies for the religious exemptions under E.O. 11246 and under what circumstances.

The OFCCP expresses concern that organizations decline to participate in federal contract programs out of fear they would be required to sacrifice their religious identity to participate. This in spite of decades of court decisions holding that religious entities do not have to sacrifice their religious identity to participate in the marketplace. Indeed, the Third Circuit Court of Appeals (covering Delaware, New Jersey, Pennsylvania, and the U.S. Virgin Islands) held in 1991 that "the permission to employ persons 'of a particular religion' [as set out in Title VII] includes permission to employ only persons whose beliefs and conduct are consistent with the employer's religious precepts." Similarly, the Sixth Circuit Court of Appeals (covering Tennessee, Ohio, Michigan, and Kentucky) held in 2000 that Title VII protects "the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its [religious] employer."

THE PROPOSED REGULATIONS

The proposed regulations are relatively brief but clear that the religious exemption is to be given "broad interpretation." The regulations add definitions of "Exercise of religion," "Particular religion," "Religion," "Religious corporation, association, education institution or society," and "Sincere." "Religion" is given the same definition as in Title VII, specifically that it "includes all aspects of religious observance and practice, as well as belief." This protects both the employer and the employee. Likewise, "Exercise of religion means any exercise of religion, whether or not compelled by, or central to, a system of religious belief. An exercise of religion need only be

Continued on page 4

WHAT MANAGERS SAY IS JUST AS IMPORTANT AS WHAT THEY DO: SIXTH CIRCUIT ISSUES WARNING

Kelly A. Campbell

"Members of management must be careful not to vent their frustrations … as their comments alone can create potential legal liability for discrimination and retaliation."

The Sixth Circuit Court of Appeals recently issued a decision in the case of Hickle v. American Multi-Cinema, Inc., which reminds employers that manager comments are just as risky as manager conduct in discrimination and retaliation cases.

In this case, the plaintiff, Jaren Hickle, began working for AMC at a large Ohio dine-in theater in 2004. During his employment, Hickle was promoted several times, holding the position of Kitchen Manager when his employment ended in 2013. He joined the National Guard in 2008. Shortly after joining the Guard, Hickle applied for a promotion and interviewed with the General Manager, Kalman. When Hickle told the GM that he would be going on military leave in a few months, the interview ended, and another person was given the promotion. The plaintiff always requested time off for his military service well in advance, and AMC granted time off as requested. His performance reviews by the GM were generally positive, except for some issues with communication skills.

However, Hickle's immediate supervisor, Adler, repeatedly expressed disapproval and frustration when Hickle had to take leave for military duty. She made comments that his military leave was frustrating to her, was a major issue on her schedule, and suggested that Hickle be moved to another area so he would not be such a headache. Shortly before his discharge, when Hickle gave notice of upcoming military leave, Adler told him that he "need[ed] to find another job, as [he] no longer met the …minimum qualifications" for the job. The plaintiff reported these remarks to the General Manager Kalman, who responded that "he would take care of it." When Hickle returned from that leave, he met with the GM, and provided Kalman with a pamphlet by USERRA regarding employers' obligations for uniformed services members.

Finally, Adler's frustration reached a boiling point in April of 2015, when the plaintiff notified her that he could not work the weekend when the Avengers movie was opening due to a military obligation. Adler told Hickle that if he could not work that weekend, he would be fired. When he reminded her that firing him because of his military service was illegal, Adler responded to Hickle that she would "find something else to terminate you on." Adler's comments were witnessed by another employee, Keeton.

On April 17, 2015, Hickle was involved with a verbal dispute with co-workers, regarding the alleged theft of food when those co-workers were reportedly taking more food home than was allowed by company policy. The plaintiff was involved in several heated discussions with these employees, which ultimately resulted in two employees being suspended and employment ultimately terminated for their part in the dispute. When Hickle reported these issues to Adler, she instructed the plaintiff to obtain written statements from them regarding the dispute.

A couple of days later, other co-workers reported to plaintiff that Adler was plotting to get the plaintiff fired. These co-workers said that Adler, who did not have direct hiring/firing authority over Hickle, was trying to get them to write up complaints against Hickle to send to AMC headquarters, eventually causing plaintiff's discharge.

While the plaintiff was investigating these reports, AMC was investigating the plaintiff for the food theft incident. Adler claimed that Hickle's actions in obtaining written statements interfered with the investigation, despite the fact that she instructed Hickle in this activity. The GM requested that AMC's Compliance Manager initiate an investigation, and plaintiff was suspended pending the results of the investigation. Plaintiff then reported to the Compliance Manager the various comments Adler made threatening to get him fired for taking military leave and about the plot to get him fired. However, the Compliance Manager's response was that if plaintiff was not denied any military leave, then "why are we talking about it?" The Compliance Manager partnered with the GM during the investigation, which ultimately resulted in the recommendation that plaintiff's employment be terminated for unprofessional behavior and impeding an investigation.

Plaintiff then filed suit under USERRA and Ohio's statute prohibiting discrimination on the basis of military service, claiming wrongful termination and failure to promote. USERRA is a federal statute, whose purpose is to prohibit discrimination against individuals because of their military service. A violation occurs if an employee's military service is a "motivating factor" in taking adverse employment action, which can be established either through direct or circumstantial evidence. Once a plaintiff meets this initial burden, then the employer must come forward with evidence to show that the employer had a valid reason for the adverse action and would have taken that action anyway despite the military service.

The district court granted summary judgment to AMC, holding that plaintiff presented no direct evidence of discrimination based on his military activity. Further, the

Continued on page 3

district court held that the circumstantial evidence of Adler's negative comments directed toward plaintiff's military service could not be inferred to the employer since she had no authority to hire or fire employees at plaintiff's level, and she had no part in making the final discharge decision.

The district court also held that "cat's paw" liability was not established as plaintiff did not establish that Adler intended to cause the plaintiff to be fired. The U.S. Supreme Court has recognized that even where an employee expressing antimilitary animus is not the ultimate decision maker, an employer may nevertheless be liable under a "cat's paw" theory. In Staub v. Proctor Hosp, 562 U.S. 411 (2011), the Supreme Court held that "if a supervisor performs an act motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA."

On appeal, the 6th Circuit Court of Appeals disagreed, stating that Adler's persistent, discriminatory comments were sufficient to constitute direct evidence of discrimination. In addition, the 6th Circuit stated that Adler's persistently making anti-military comments and her comments that she would fire plaintiff "for something else" was adequate evidence to establish that Adler intended to cause the plaintiff's discharge.

The 6th Circuit rejected AMC's argument that its "thorough and independent" investigation broke any chain of causation relating to the termination decision. The Court noted that the investigation was not thorough, as only a few employees were interviewed, and the witness to Adler's threat to fire plaintiff was not interviewed. Further, the Court noted that the investigation was not independent, as the GM "partnered" with the Compliance Manager to conduct the investigation, and the GM was fully aware of the hostile comments made by Adler to plaintiff about his ongoing military obligations. The 6th Circuit noted that the plaintiff also presented sufficient circumstantial evidence of discrimination.

Finally, the Court noted that AMC was unable to fully explain the rationale behind the investigation findings and the decision to discharge the plaintiff for "unprofessional behavior and impeding an investigation." Since AMC was unable to establish legitimate reasons for the discharge decision, it could not present evidence to show it would have fired the plaintiff anyway, regardless of his military service.

Since multiple issues of fact existed in the record regarding these claims, the 6th Circuit reversed the trial court's grant of summary judgment and remanded the case for trial.

What does this mean for employers? There are several lessons to be learned from this decision. First, it emphasizes the importance of management training, to ensure that all members of management are aware of the issues associated with discrimination and retaliation, particularly when employees take protected leaves of absence, such as leave for military service. Members of management must be careful not to vent their frustrations over scheduling issues created by employees taking protected leaves of absence, as their comments alone can create potential legal liability for discrimination and retaliation. Therefore, they need to watch their comments as well as their conduct and actions, especially when dealing with employees who have engaged in protected activity or taken protected leave, such as military leave.

Further, this decision highlights the necessity of taking prompt effective action when employee complaints are made. In this case, nothing was done when Hickle reported his concerns about his supervisor, even during the ultimate investigation. AMC should have taken appropriate corrective action when the initial reports were made about Adler's comments: Instead, no action was taken, and Adler was allowed to continue with her hostile remarks toward Hickle's protected military leave.

Finally, this decision emphasizes the importance of conducting thorough and independent investigations. Investigators and decision-makers must thoroughly vet any information provided to ascertain any underlying bias or discriminatory motive. Investigators and decision-makers must also ensure that individuals with potential bias do not participate in the investigation, and that all pertinent witnesses are interviewed. Otherwise, employers will have difficulty in relying upon an investigation as "thorough and independent" to defend a challenged employment decision.

sincere." This keeps a court from determining the importance of a religious precept or its application. Additionally, "[a]s the Supreme Court has repeatedly counseled, 'religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.'" The definition of "particular religion" includes the provision that the religious employer can include "acceptance of or adherence to religious tenants as understood by the employer as a condition of employment."

This still does not answer the question of who qualifies to claim the religious exemption. To address this question, OFCCP includes a definition of "Religious corporation, association, educational institution, or society," which is determined based on three criteria. First, the entity "must be organized for a religious purpose, meaning that it was conceived with a self-identified religious purpose." The entity does not need to have an exclusively religious purpose, as defined by the employer, but such a purpose must be clear either as expressed in its articles of incorporation, its advertising, its website, or some other means. Second, "the contractor must hold itself out to the public as carrying out a religious purpose." Similar to evidence of the first criteria, such a religious purpose must be evident to the public in advertising, corporate philosophy statements on its website, and other considerations. Third, "the contractor must exercise religion consistent with, and in furtherance of, a religious purpose." This may be in the way it operates its business, the kinds of activities it supports, or other means to establish it does more than pay lip service to a religious identity.

While no for-profit company is specifically identified as a "religious corporation" in the proposed regulations, the Supreme Court held in 2014 that Hobby Lobby was able to exercise religion. In doing so, the Court did not address the issue of whether Hobby Lobby was a "religious corporation" under Title VII or any federal regulation. Accordingly, given the breadth of the proposed definition of "religious corporation," the issue of who qualifies as a religious employer and entitled to the religious exemption is the greatest point of contention.

The potential expansion of who constitutes a religious employer has some complaining that the regulations go too far, while others champion the clarification maintaining that just because one opens a business does not mean the business owner must sacrifice or violate his or her religious convictions. Churches, religiously affiliated schools and non-profits clearly fall within the protections and are not required to hire or retain employees who do not support the religious principles of the organization. While there are those who believe that all organizations should be required to abide by all federally mandated non-discrimination provisions without exception - even if those provisions violate the organization's religious teachings - the Supreme Court has made it clear that religious institutions have special protections when it comes to those who carry out its activities. For example, Catholic Charities should not have to hire and retain an employee who opposes or violates its religious teachings just to qualify for a government contract to provide needed services to immigrants.

The broader question is whether a for-profit business whose primary economic activity is not "religious" by nature can claim to be a religious employer under the criteria referenced above. While Hobby Lobby sought an exemption from having to provide certain forms of contraception that violated its owners' religious beliefs, the question remains whether Hobby Lobby or any other business could qualify as a "religious corporation." If so, the chorus of objections will rise with the refrain that the exemption is nothing more than a "license to discriminate," presumably against those who identify with the LGBT community. The issue of whether an employer has a religious exemption from retaining an employee who announces that the employee will undergo a gender transition was raised and rejected by the Sixth Circuit in *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.* in 2018. While this case is before the Supreme Court this fall, the issue of the funeral homes' religious objections to an employee appearing and dressing as a member of the opposite sex is not before the Supreme Court at this time. Yet, that is clearly one of the fears of those who oppose these regulations.

CONCLUSION

Both sides of the debate will find aspects of the regulations to support their arguments. There is obviously some tension when it comes to balancing the rights of employers to operate their business in accordance with the employer's religious beliefs and the rights of an employee to be free from discrimination as provided by Title VII and E.O. 11246. Title VII and numerous court opinions address both protectable interests and often the balance comes down to whether the employer is a religious employer. Accordingly, while the regulations do clarify the scope of the religious protections given to religious organizations and entities created for a religious purpose, just how far the courts and future administrations will go when it comes to deciding whether a particular business qualifies as a "religious corporation" remains anything but clear.