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LABOR RELATIONS

Expert Analysis

Supreme Court Review: LGBTQ Rights, Ministerial Exemption, Contraception

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Notwithstanding the global pandemic, during the 2019-2020 term the Supreme Court issued several landmark civil rights decisions with significant implications for employers. This month's column reviews the court's rulings pertaining to protections for LGBTQ individuals under Title VII of the Civil Rights Act of 1964 (Title VII), on the one hand, and broadening exemptions from employment laws for religious employers and from the mandate that employer health plans cover contraception, on the other hand. In our next column, we will address other Supreme Court developments impacting employment law.

LGBTQ Protections

Fired after joining a gay softball league, Gerald Bostock along with two other plaintiffs achieved a major victory for LGBTQ rights in *Bostock v. Clayton Cty.*, 140 S.Ct. 1731 (2020). In this long-awaited decision, the Supreme Court held Title VII prohibits covered employers from discriminating against employees and applicants based on their sexual orientation or transgender status.

The Supreme Court consolidated three cases—*Bostock* (No.17-1618) from the Eleventh Circuit, *Altitude Express v. Zarda* (No. 17-1623) from the Second Circuit, and *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC* (No. 18-107) from the Sixth Circuit—that demonstrated the circuit split on treatment of homosexual and transgender individuals under Title VII. In these cases the respective employers each terminated a long-term employee soon after learning the employee was either gay (*Bostock* and *Zarda*) or transitioning from a man to a woman (*R.G. & G.R. Harris Funeral Homes*). Each of the employers conceded it made the termination decision based on the sexual orientation or transgender status of the employee, but asserted such decision was not by prohibited by Title VII.

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The district courts in all three cases concluded Title VII's prohibition of employment discrimination on the basis of sex does not include discrimination based on sexual orientation or transgender status. The Second Circuit in *Zarda* and Sixth Circuit in *R.G. & G.R. Harris Funeral Homes* reversed. On the other hand, the Eleventh Circuit in *Bostock* held it was bound by a prior case finding "discharge for homosexuality is not protected by Title VII."

In a 6–3 ruling, the Supreme Court interpreted Title VII's "on the basis of sex" language to include traits "inextricably bound up with sex." It found "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second." The court illustrated this with the example of an employer firing an employee because she is a woman married to a woman, while it would not do the same to a man married to a woman; the court explained that such

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employer is taking action because of the employee's sex because the action would not have taken place but for the employee being a woman. Similarly, the court stated that if an employer fires an employee because that person was identified as male at birth, but now identifies as a female, the employer is taking action against the individual because of sex since the action would not have been taken but for the fact the employee was originally identified as male. Importantly, the court noted its focus on "but-for" causation in this opinion does not foreclose the use of "motivating factor" causation for Title VII cases.

While many states and localities already have their own prohibitions against discrimination based on sexual orientation and transgender status, the court's *Bostock* ruling will have a significant impact on employers covered by Title VII (employers with 15 or more employees) in the dozens of states that do not have such laws. Employers covered by Title VII are advised to immediately review and update their anti-discrimination policies and training programs to ensure they involve LGBTQ individuals. In addition, such employers should review their employee benefit plans, including group health plan coverage, in light of *Bostock* to evaluate and address any possible instances in which LGBTQ employees may be treated differently.

Although the court declined to decide whether the Religious Freedom Restoration Act (RFRA) provides an exception for religious employers in Title VII cases pertaining to LGBTQ rights, it left open the possibility an exception to this ruling based on the free exercise of religion may exist in some cases. In addition, given the "ministerial exception" discussed below, an LGBTQ individual who is a key employee of a religious institution may not be afforded the Title VII protections established in *Bostock*. These issues likely will be litigated in subsequent cases.

Ministerial Exception

In *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, No. 19-267 (U.S. July 8, 2020), the Supreme Court broadened the scope of the First Amendment's "ministerial exception." Under this exception, courts must stay out of employment disputes between religious institutions—e.g., houses of worship, schools, hospitals, and retirement homes with a religious mission—and certain employees of those institutions. In this case, the court held the ministerial exception barred employment discrimination claims against two religious schools by its teachers, even though the teachers did not have the title or religious training of a minister.

> The Agencies' rules allow almost any employer who objects on religious or moral grounds to avoid providing no-cost contraceptive care to its employees.

The Supreme Court adopted the ministerial exception eight years ago in *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 565 U.S. 171 (2012). It identified four relevant factors for deciding when an employee qualifies as a minister: (1) the employee's title; (2) whether the employee had formal religious training or commissioning; (3) whether the employee held herself out as a minister, such as accepting a formal call to religious services and claiming certain tax benefits; and (4) whether the employee's job responsibilities reflected a role in conveying and carrying out the employer's religious message and mission.

The plaintiffs in *Our Lady of Guadalupe School* were teachers at Catholic elementary schools who taught both religious and secular studies, participated in religious activities with students (e.g., prayer), and were responsible for furthering the schools' religious missions by forming the Catholic faith of students. Neither had "minister" in their respective titles, neither exclusively taught religion, and neither had formal religious training or commissioning. After their respective employers declined to renew their contracts, both teachers brought suit, one alleging age discrimination in violation of the Age Discrimination in Employment Act, and the other alleging disability discrimination in violation of the Americans with Disabilities Act. The district court in both cases dismissed the claims under the ministerial exception. However, the Ninth Circuit reversed both cases, finding neither teacher satisfied the four factors established in *Hosanna-Tabor*.

In a 7–2 opinion, the Supreme Court found *Hosanna-Tabor* did not establish a rigid checklist that must be met in all cases. Rather, the most important factor is the employee's responsibility in furthering the religious mission of the employer. Applying that understanding, the court concluded the two teachers did qualify as "ministers," as the record made clear they performed vital religious duties, including educating their students in the Catholic faith and guiding them to live their lives in accordance with that faith.

Justice Sotomayor, joined by Justice Ginsburg, issued a forceful dissent,

criticizing the court's insulation of religious employers from employment discrimination claims, merely because some aspect of a claimant's job duties touches upon religion. The dissent warned that the holding, although applied to teachers here, will have a great impact on "the rights of countless coaches, camp counselors, nurses, social-service workers, in-house lawyers, media-relations personnel, and many others who work for religious institutions."

Given the court's rejections of a rigid test for application of the ministerial exception, religious employers should expect to see future disputes in this area focused on an employee's job responsibilities and the employer's qualification as a religious institution. Accordingly, employers seeking to rely on the ministerial exemption are advised to update employee handbooks and other policies to reflect the institution's religious mission, explain in job descriptions, offer letters and/or employment agreements how an employee's duties contribute to the institution's religious mission, and tie performance reviews to religious standards.

Contraception

In *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, No. 19-431 (U.S. July 8, 2020), the Supreme Court upheld Trump administration rules providing that employers with sincerely held beliefs against offering insurance coverage for contraceptive measures are exempt from the Patient Protection and Affordable Care Act (ACA) requirement to offer such coverage.

The ACA requires employer health plans to provide "preventive care and screenings" without any cost-sharing requirements. Although not specified in the ACA, under President Obama, the Departments of Health and Human Services, Labor and the Treasury (the Agencies) issued a rule—the so-called contraceptive mandate—that included contraception in the "preventive care and screenings." The Agencies subsequently exempted religious employers, such as churches and other houses of worship, from the contraceptive mandate, and then promulgated a rule accommodating qualifying non-profit religious organizations such that they would not have to provide contraceptive coverage directly through their health plans.

The contraceptive mandate has been the subject of much litigation, most notably *Burwell v. Hobby Lobby Stores*, 573 U.S. 682 (2014), in which the Supreme Court held the RFRA requires the government to exempt for-profit corporations that object to direct coverage of contraceptive care from the mandate, just as it exempted religious non-profits. In 2017, the Agencies promulgated two rules that dramatically expanded the scope of existing exemptions related to the contraceptive mandate to include employers with objections based on sincerely held religious *or moral* beliefs. The religious exemption applies to all employers, including for-profit and publicly traded companies. The moral exemption also applies to for-profit companies, but not those that are publicly traded.

The States of Pennsylvania and New Jersey challenged those two rules, asserting the Agencies lacked statutory authority to promulgate the exemptions and departed from required rulemaking procedures. The district court issued a nationwide preliminary injunction, and the Third Circuit affirmed.

The Supreme Court reversed in a 7–2 opinion, finding the ACA delegated broad authority and discretion to the Agencies to establish exemptions from preventative care and screening requirements. The court further found the States' procedural objections unavailing, as the final rules provided ample notice, gave interested parties the opportunity to submit their views and were published well before going into effect. Accordingly, the court upheld both the religious and moral exemptions and remanded the case to the Third Circuit.

The Agencies' rules allow almost any employer who objects on religious or moral grounds to avoid providing no-cost contraceptive care to its employees. Even a publicly traded for-profit company can avail itself of the religious exemption previously reserved for houses of worship. However, employers should pay attention to anticipated future litigation on this issue. In addition, the Agencies' rules are subject to change with a new administration.