Labor & Employment Issues
In Focus

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For Clients and Friends

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SUPREME COURT CONSIDERS RAISING THE BURDEN FOR DENYING RELIGIOUS ACCOMMODATION REQUESTS

On Friday, January 13, 2023, the U.S. Supreme Court announced that it will hear argument in *Groff v. DeJoy*, No. 21-1900 (3d Cir. 2022) and consider whether it should interpret more broadly the federal law that requires obliging the religious observance of workers unless doing so would impose an "undue hardship" on the employer. In taking up the appeal, the Court will be reevaluating the existing standard enunciated in its earlier decision of *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977) ("TWA"), which explained that demonstrating such burden would require the employer "to bear more than a *de minimis* cost." *Id*. at 84. *DeJoy* could provide yet another example of how the Roberts court has and is attempting to continue to be tremendously protective of religious rights.

In *DeJoy*, the employee was an evangelical Christian who joined the U.S. Postal Service ("USPS") in 2012 as a fill-in postal carrier. When USPS entered into a service agreement with Amazon to deliver packages on Sundays, Groff requested a religious accommodation due to his inability to work on Sundays because of his Sabbath observance. USPS offered to facilitate shift swaps but was unable to find colleagues willing to swap on many Sundays. When Groff called out on those Sundays, he was disciplined, resigned, and then sued for the failure to accommodate in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"). USPS rejected Groff's claim that swapping was not reasonable because it did not fully eliminate the conflict between his religion and the USPS's work rule, as there was no guarantee he would always find a swap.

Under Title VII, in determining the reasonableness of an accommodation, the analysis considers the degree to which the proposed accommodation eliminates the conflict between the plaintiff's religious beliefs and the employer's work rule requirements. The U.S. Equal Employment Opportunity Commission, in its guidance, has stated that an accommodation is not "reasonable" if it reduces – rather than eliminates – the conflict though, ultimately concluding that the reasonableness of any proposed accommodation is a fact-specific question. However, as interpreted by the United States Court of Appeals for the Third Circuit ("Third Circuit"), where Groff's appeal was heard, in order for an accommodation to be reasonable, it must eliminate the conflict between the employee's religious practices and the employment requirements.

Here in *DeJoy*, the Third Circuit agreed with the U.S. District Court for the Eastern District of Pennsylvania in finding that, while shift-swapping can be a reasonable accommodation, because the shift-swaps did not eliminate the conflict between Groff's religious beliefs to observe the Sabbath and his work obligations, Groff was still unable to find coverage on 24 Sundays in a 60-week period. Thus, the Third Circuit determined that USPS failed to provide a reasonable accommodation.

However, citing appellate court cases from other jurisdictions, the Third Circuit found that that the accommodation that Groff requested – to be fully exempt from Sunday work – would cause an undue hardship, in that it had more than *de minimis* impacts on the USPS' operations, including on productivity, personnel, and overtime costs. Further, since his requests occurred during the busy holiday season, it created a tense atmosphere among co-workers. In fact, other workers complained about Groff's Sunday refusal because it resulted in additional (and admittedly unwanted) shifts for them; even causing one of Groff's co-workers to file a grievance claiming it violated the collective bargaining agreement. Accordingly, the Third Circuit found that USPS did not violate Title VII in rejecting this request. Of particular note, the Third Circuit identified other possible accommodations for employee Sabbath observers, including the exhausting of paid leave.

The petition filed by Groff with the High Court has been joined by, among others, numerous religious organizations, several states and members of Congress, and they are seeking to overturn *TWA's* "more than a de minimis" standard and impose a more rigorous standard for establishing undue hardship, which is more than possible with the Court's current composition. Further, Justices Clarence Thomas, Samuel A. Alito Jr., and Neil M. Gorsuch have urged their colleagues to reexamine the need to raise the bar for demonstrating "undue burden" in the context of religious accommodation requests. In prior writings, Justice Gorsuch has written: "Title VII's right to religious exercise has become the odd man out," and "[a]lone among comparable statutorily protected civil rights, an employer may dispense with it nearly at whim."

"I SPEAK FOR EVERYONE WHEN I SAY" THIRD CIRCUIT COURT OF APPEALS ADOPTS PROXY LIABILITY FOR TITLE VII SEXUAL HARASSMENT CASES

Recently, the United States Court of Appeals for the Third Circuit ("Third Circuit") held that the "proxy" theory of liability is viable for Title VII sexual harassment cases. The case, *O'Brien v. Middle East Forum et al*., 21-2646 (3rd Cir. Jan. 5, 2023), was on appeal from the Eastern District of Pennsylvania, where the jury found that the Plaintiff O'Brien was not sexually harassed. O'Brien appealed, arguing that the jury should have been instructed that the *Faragher/Elllerth* affirmative defense is not available where the alleged harasser was a "proxy" for the employer. To be clear, employers can raise the *Faragher/Ellerth* affirmative defense in litigation, which allows an employer to escape liability if: (1) the employer exercised reasonable care to prevent and correct any harassing behavior; and (2) the plaintiff failed to avail him/herself of preventative or corrective opportunities and/or procedures provided by the employer, such as filing a complaint with an internal office for equal employment opportunities.

However, like other Circuit Courts of Appeal, the Third Circuit held that that this affirmative defense is not available where the supervisor responsible for the harassment was a "proxy" for the employer. The Third Circuit analyzed previous, illuminative appellate precedence and found that "proxy" liability is rooted in agency law. Specifically,

where “the master itself intended the conduct or consequences,” "proxy" liability is found where an official is high enough in the management hierarchy that his actions “speak” for the employer. *Id*. at 19. However, only persons with “exceptional authority” and control within an organization will meet the standard. *Helm v. Kansas*, 656 F.3d 1277, 1286 (10th Cir. 2011).

In *O’Brien*, the alleged harasser was the chief operating officer, director and secretary of the board of directors. Further, he was “second-in-command,” ran the organization’s day-to-day operations, and was slated to be the next president. Also, he was a public face of the organization making media appearances on the company’s behalf. In light of that evidence, the Third Circuit found that a reasonable jury could find that the alleged harasser was a “proxy” for the Middle East Forum. However, the Third Circuit found that the lack of jury instruction was harmless error, given that the affirmative defense was irrelevant because the jury found that O’Brien was not sexually harassed at all.

Even so, with the Third Circuit adopting “proxy” liability for Title VII sexual harassment claims, it joins its sister circuits, including the United States Court of Appeals for the Second Circuit, who view the doctrine as viable in these suits.

NINTH CIRCUIT UPHOLDS BIDEN’S FIRING OF FORMER NLRB GENERAL COUNSEL

Recently, the United States Court of Appeals for the Ninth Circuit (“Ninth Circuit” or “Court”) held that President Biden’s firing of the Trump-Appointed Peter Robb was lawful. The case is *NLRB v. Aakash, Inc.*, No. 22-7002 (9th Cir. Jan 27, 2023).

The matter was before the Ninth Circuit when the National Labor Relations Board (“NLRB” or “Board”) petitioned for the enforcement of a final order against Aakash Inc., (“Aakash”) which operated a skilled nursing facility in California. In 2020, Service Employees International Union, Local 2015 (“Union”) successfully added registered nurses and licensed vocational nurses to its bargaining unit of nursing aids. In March 2021, the Union requested that Aakash recognize the new bargaining unit and agree to bargain. Aakash refused, and the Union filed an unfair labor practice charge. In October 2021, the Board’s General Counsel issued a complaint.

In its appeal to the Ninth Circuit, Aakash argued that the Board’s General Counsel, Jennifer Abruzzo, lacked authority to prosecute the complaint because President Biden could not remove the previous General Counsel Peter Robb, without cause during his four-year term; therefore, General Counsel Abruzzo’s acts were void.

The Court found President Biden has the authority to remove the Board’s General Counsel at will because the statute establishing the fixed four-year term had no limitation on the President’s authority to remove the Board’s General Counsel. Further, the statute, 29 U.S.C. § 153, states NLRB Members may be removed “upon notice and hearing, for neglect of duty or malfeasance in office . . .”; in contrast, this section does not have a

clause stating how the Board's General Counsel would be removed. The Ninth Circuit presumed that, when Congress uses text in one section of the statute but omitted it from another section of the same statute, it is intentional. Therefore, Congress intentionally placed no limit on the President's power to remove the Board's General Counsel. Also, the Court reasoned if fixing a term of office added a for-cause protection, then the above language protecting Board members would be unnecessary. The Court also looked at history – the Truman, Eisenhower, Reagan, and Bush Administrations all took the position that the Board's General Counsel was removable at will.

Finally, Aakash argued that the President did not have a constitutional prerogative to remove the Board's General Counsel because he/she does not exercise substantial executive power. In prior rulings regarding this issue, the Supreme Court has established two exceptions to the President's removal power, but neither applied. With respect to the first exception, Congress can impose removal restrictions on a group of principal officers serving as part of a multimember body of experts who do not exercise substantial executive power; but here, the Board's General Counsel is a single officer with independent executive functions. The second exception, Congressional protection of inferior officers with limited duties and no policymaking or administrative authority, was equally inapplicable. The Board's General Counsel exercises significant administrative authority over the Board's officers and employees in regional offices, all Board attorneys besides administrative law judges, and the Board Members' legal assistants. Further, the Board's General Counsel has final authority to investigate, issue complaints, and prosecute unfair labor practice charges. Thus, he/she cannot be defined as an "inferior officer." *Aakash, Inc.*, at *13.

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