Employment Issues Facing Municipal Attorneys

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Important Decisions of the Past Year

Groff v. DeJoy: On June 29, 2023, the Supreme Court of the United States revived an employee's religious discrimination lawsuit, unanimously holding that to deny a sincere religious accommodation request under Title VII of the 1964 Civil Rights Act, employers must show that the burden of granting it "would result in substantial increased costs in relation to the conduct of its particular business."

* Nine female correctional officers alleged that their shift schedules, formerly determined based on seniority, changed in April 2019, when the county adopted a sex-based scheduling policy that detrimentally impacted them. They argued the new scheduling system allowed male officers to have full weekends off, while female officers could only receive weekdays and/or partial weekends off. Based on these allegations, plaintiffs sued the county for sex discrimination under Title VII. Relying on Fifth Circuit precedent, the district court dismissed the complaint because it did not allege an ultimate adverse employment action. The Court held that a necessary element of Title VII was absent, namely that "[c]hanges to an employee's work schedule, such as the denial of weekends off, are not an ultimate employment decision." On initial appeal, the panel affirmed, holding that it was "bound by this circuit's precent" and urged the full court to "reexamine our ultimate-employment-decision requirement." The Fifth Circuit then granted a rehearing en banc for such consideration.

While no judges from the Fifth Circuit dissented, several concurred in the final decision because they believed the Court issued an "incomplete" ruling, stating, "[t]he majority holding amounts to this: we hold that speeding is illegal, but we will not say now what speed is illegal under what circumstances. Ordinary concepts of due process should have required notice to the public regarding this vital and pervasive workplace law." The majority countered that it believes its new standard is in line with the U.S. Supreme Court's construction of Title VII, but the Court acknowledged that "federal courts [are] not to 'transform Title VII into a general civility code for the American workplace.'" The Court's ruling may open the door to wider complaints from employees.

Students for Fair Admissions v. Harvard: On June 29, 2023, the Supreme Court issued a decision in *Harvard* that, by a vote of 6–2, reversed the lower court ruling. In writing the majority opinion, Chief Justice John Roberts held that affirmative action in college admissions is unconstitutional, overruling prior cases.

* In the aftermath of the Harvard case, Attorneys General from 13 states and United States Senator Tom Cotton of Arkansas sent letters to business leaders, warning them about potential risks associated with their DEI programs.

In these letters, the Attorneys General assert that "racial discrimination in employment and contracting is all too common among Fortune 100 companies and other large businesses." The letters warn against using racial preferences or quotas to combat discrimination, a path prohibited by Title VII of the Civil Rights Act of 1964. They urge corporations to overcome their inherent biases and ensure equal treatment for all employees, applicants, and contractors, regardless of race. They also give specific examples of allegedly illegal hiring practices, such as racial hiring quotas and preferences for contractors with diverse staff or minority ownership. The letters attempt to link the legal framework under Title VI (which prohibits race discrimination in government-funded programs), addressed by the court in *SFFA v. Harvard/UNC*, with the requirements of Title VII (which prohibits race discrimination in employment), through Justice Gorsuch's concurrence in *SFFA v. Harvard/UNC*, where he reasoned that Title VI principles "apply equally to Title VII and other laws restricting race-based discrimination in employment and contracting."

In a stark contrast, just a few days later, on July 19, 2023, Attorneys General from 21 states sent letters underscoring the legality and necessity of Fortune 100 companies' DEI initiatives. They challenge the opposing stance of the 13 Attorneys General who suggest that addressing racial disparity is intrinsically unlawful. Their correspondence focuses on the inapplicability of the *SFFA v. Harvard/UNC* ruling to employers and reminds employers the decision does not prohibit companies from recruiting from a diverse pool of candidates to address historical racial inequities and to create opportunities for everyone to be successful in the workplace. They cite Justice Jackson's dissent to underscore how the continued existence of racial segregation, a practice deemed unconstitutional nearly a hundred years ago, remains tied to our present socio-economic life. The letters note that addressing racial disparities in the workplace is legal and a free market approach to doing so, through vendor diversity programs and recruiting initiatives, was not impacted by the *SFFA v. Harvard/UNC* ruling. These letters encourage employers to continue utilizing permissible means to recruit, retain, and advance in employment a diverse workforce.

These dueling letters come at a time when many companies have committed to investing in and developing programs and policies that support DEI to attract and advance a workforce that reflects our nation's diversity. They further highlight the importance of employers evaluating their DEI initiatives for potential increased scrutiny or legal challenges.

Hamilton v. Dallas County: On August 18, 2023, the en banc Fifth Circuit reconsidered its precedent that requires that individuals challenging employment discrimination under Title VII of the Civil Rights Act show that the discrimination constituted an "ultimate employment decision."

The *Hamilton* case presented unusual facts in that it involved allegations constituting direct evidence of discriminatory intent. Given these two factors, the impact of *Hamilton* to cases involving circumstantial evidence of discrimination and pending on motions for summary judgment may not be as significant as would be suggested by the Fifth Circuit's upending of a thirty-year-old precedent.

In sum, *Hamilton* broadened the types of personnel actions that can form the basis of a cognizable discrimination claim, which will likely increase the number of claims filed and likely bring a new complexity to summary judgment briefing (i.e., adverse employment actions not culminating in ultimate employment decisions will now require substantive briefing as opposed to simple summary citation to now eviscerated Fifth Circuit precedent). At a minimum, *Hamilton* serves as the Fifth Circuit's reminder that "[n]owhere does Title VII say, explicitly or implicitly, that employment discrimination is lawful if limited to non-ultimate employment decisions."