LAW360 Employment Authority

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4 Issues To Watch As Justices Shake Up Bias Law

By **Vin Gurrieri**

Law360 (July 7, 2023, 8:44 PM EDT) -- The U.S. Supreme Court closed out its recent term with a flurry of blockbuster decisions and orders covering issues such as religious worker accommodations and affirmative action that experts say will reverberate for years to come.

In the wake of the U.S. Supreme Court closing out its term, the justices' decisions and orders have sparked concerns and questions about employment-related discrimination issues linked to religious accommodations, affirmative action and free speech. (AP Photo/J. Scott Applewhite)

Here, Law360 looks at four issues to watch in the second half of 2023 as courts and companies digest those landmark rulings.

How Will Courts and Employers Interpret the Revised Hardison Test?

On June 29, the justices **clarified a nearly five-decade-old test** for measuring the burden that religious accommodations pose on employers, reinterpreting it in a way that makes it harder for workplace adjustments for religious workers to be denied.

The high court's unanimous ruling in Groff v. DeJoy revised a test established in a 1977 decision called Trans World Airlines v. Hardison. The new test requires that an employer seeking to establish undue hardship to deny a religious accommodation show that the burden of granting an accommodation would result in "substantial increased costs in relation to the conduct of its particular business."

Under Title VII, employers must provide "reasonable accommodations" to workers whose religion clashes with their job as long as they don't impose an "undue hardship" on the company. In Hardison, the court had held that a hardship qualifies as undue if it translates to more than a "de minimis" burden on the employer.

In Groff, the justices agreed that the Third Circuit wrongly held that the U.S. Postal Service lawfully denied Gerald Groff, an evangelical Christian, a religious accommodation that aligned with his observance of the Sunday Sabbath. The justices vacated the circuit court's ruling and remanded the case to be reconsidered under the revised standard.

Jerry Hunter, senior counsel at Bryan Cave Leighton Paisner LLP and a former senior trial attorney for the U.S. Equal Employment Opportunity Commission, said he believes the Groff decision will "result in a big shift" in how employers review their legal obligations because most employers had relied on Hardison's "de minimis" language.

Hunter also noted that the justices made clear that objections by a religious worker's colleagues to potential accommodations won't necessarily be enough in the future for accommodations to be rejected, but that the court left open the assessments of what constitutes a "substantial cost" to lower courts on a case-by-case basis. Groff, he says, clearly places a higher burden on companies both to conduct and assessment and make sure they do it right.

"So there's no bright line test for employers to follow. The only thing employers know is that they have to accommodate requests for accommodation based on employees' religious beliefs," Hunter said. "From there, it appears to be pretty open-ended. It may be difficult to assess what may be substantial costs associated with the employer's business."

Donald Schroeder, a partner at Foley & Lardner LLP, similarly said the ruling will make it easier for employees to establish a basis for accommodation based on a standard that will be harder for employers to rebut.

To the extent employers have treated requests for religious accommodations under Title VII any differently than they do requests for disability accommodations under the Americans with Disabilities Act, the time is now to bring those divergent approaches into alignment since the latter is "more in line with the court's expectations," he said.

"I would caution employers to use whatever protocol they're already using for an ADA accommodation and apply it in this context," Schroeder said. "And then … when they do get a religious accommodation request, they can't rely on perhaps an impact on employee morale. That's not going to cut it. They've really got to look at other avenues [or] reasonable alternatives to accommodate somebody's request for religious accommodation."

The case is Groff v. DeJoy, case number 22-174, in the Supreme Court of the United States.

Will Employers Change Approach to DEI After the Affirmative Action Ruling?

In one of its final decisions of the term, the justices on June 29 **struck down affirmative action policies** that Harvard University and the University of North Carolina used as part of their admissions process.

Chief Justice John Roberts Jr. authored the majority opinion, writing that the universities' admissions policies ran afoul of the 14th Amendment's equal protection clause.

Although the 6-3 decision occurred in the educational context, employment observers have said it could indirectly affect private companies and have significant ramifications for their diversity, equity and inclusion programs.

Tashwanda Pinchback Dixon, a Georgia-based partner at Balch & Bingham LLP and a member of the firm's executive committee and DEI council, noted that it has long been illegal under Title VII for employers to use race as the basis for employment decisions.

The high court's ruling that institutions of higher education can't rely on race for admissions purposes is consistent with that basic principle, according to Dixon.

"I don't think it should change much about how employers have put together their DEI programs because they should never have [had] quota-based programs in the first place," Dixon said. "Employers or companies can still have initiatives where, for example, they may increase the pool of candidates for jobs by doing more targeted recruiting, but they still need to select the best person for the job and not just try to fill spots based off of any race-based quota."

In the wake of the high court's ruling, Dixon said employers should review their programs to make sure quotas aren't incorporated, suggesting that a better approach would be to set long-term goals.

"Instead of saying, 'We have 20 openings and we're going to reserve five for minorities, or people of color, women, etc.,' you create a goal, and you may say, 'OK, we want to fill 25% with a minority,'" Dixon said. "If you don't hit the goal, there [are] no repercussions, but at least you just kind of have it in mind. So that's one thing that the companies can look at to increase diversity without having to worry about violating the law."

But Dixon also said it is very possible that employers will nonetheless face more challenges to their DEI programs, particularly as some organizations have indicated an interest in doing so. How those potential cases play out, however, remains to be seen.

"I'd be surprised if they didn't, I just don't know how successful it would be given the fact that companies should already be in compliance," Dixon said. "I guess it's kind of hard to predict, but given the fact that the Supreme Court did rule the way it did, I wouldn't be surprised if other organizations start looking at companies to see if they can find a way to hold them not in compliance."

The cases are Students for Fair Admissions v. President & Fellows of Harvard, case number 20-1199, and Students for Fair Admissions v. University of North Carolina et al., case number 21-707, in the Supreme Court of the United States.

Will Employee Free Speech Encroach on Workplace Accommodations?

In one of the just-concluded term's most controversial outcomes, the high court's conservative supermajority **by a 6-3 vote** found that a Christian website designer's free speech rights would be violated if she were exposed to legal liability under Colorado anti-discrimination law for refusing to create websites for same-sex weddings.

The justices sided with website designer Lorie Smith, the owner of 303 Creative LLC, in her pre-enforcement challenge that sought to block the Colorado Civil Rights Commission from ever enforcing the state's anti-discrimination law against her over her policy to refuse to provide services for same-sex weddings as she expands her business.

Writing for the majority, Justice Neil Gorsuch said the First Amendment bars Colorado from forcing Smith to create expressive designs that communicate messages she disagrees with.

"In this case, Colorado seeks to force an individual to speak in ways that align with its views but defy her conscience about a matter of major significance," Gorsuch said, writing for the majority.

FordHarrison partner Shannon Kelly said she doesn't believe that private employers were paying close attention to the case because of the context under which it arose, but that they should be aware of what the high court decided.

"I think it's more just for employers to be aware that this case is out there because the First Amendment is just not on most private employers' radar, because it's historically been, 'We're private-sector, we don't have to think about that,'" Kelly said. "This case, I think, calls that into question in a way that employers were not necessarily expecting."

For businesses that fall under the ambit of public accommodations, like hotels, restaurants or others that serve customers and patrons, Kelly said the ruling creates the potential that employees of those businesses "may object to their efforts to comply with these public accommodations laws due to their own sincerely held religious beliefs."

Claims by workers that they are being compelled to act or engage in speech to comply with a government law that they disagree with under what they believe is their First Amendment right will most likely arise in the context of workplace accommodations rather than litigation, according to Kelly.

"So it creates a tension for employers trying to comply with public accommodations law, while potentially having employees that are objecting to conduct that the employer will have to take to comply with those laws," Kelly said.

"How do I, as an employer, resolve that issue? Because I'm kind of hamstrung," Kelly added. "On the one hand, I may be violating a public accommodation law, and on the other hand this employee may allege that there's a violation of their First Amendment rights, and I don't want to get tangled up in that."

The case is 303 Creative LLC v. Aubrey Elenis et al., case number 21-476, in the Supreme Court of the United States.

Are the Justices Poised to Expand Title VII's Scope?

Hours after the last of its decisions were published, the justices **agreed to take up a case** next term that asks it to consider whether lateral job transfers that don't involve negative impacts like terminations or demotions can be a valid foundation for employment discrimination suits.

The justices granted certiorari to police Sgt. Jatonya Clayborn Muldrow, who is appealing an April 2022 ruling by the Eighth Circuit that nixed her 2018 sex discrimination suit against the city of St. Louis.

Muldrow had alleged that she was illegally reassigned from a prestigious task force and saddled with administrative work because she's a woman. Muldrow also claimed that after she was transferred, the city rejected her request to again be transferred to another position. But the Eighth Circuit held that her suit couldn't move forward because the job transfer didn't result in a change to her title, salary or benefits.

The specific question the justices will consider is whether Title VII bars discrimination in transfer decisions without a court having separately determined that the transfer decision "caused a significant disadvantage."

Variations of that question have percolated in district and appeals courts in recent years. Among the notable decisions was one **issued last year** by the D.C. Circuit in a case called Chambers v. District of Columbia holding that discriminatory job transfers can qualify as discrimination that violates Title VII.

Prior to granting certiorari, the justices had asked the Biden administration for its view on whether Muldrow's request should be granted, and received a **response in the affirmative** from the U.S. Department of Justice and the EEOC.

The EEOC for its part has **actively pressed its position** in numerous circuit courts that workers should be able to sue when they are transferred to lateral positions, denied transfers or given shift assignments for discriminatory reasons regardless of whether they suffered any negative effects.

Gerald Maatman, chair of the workplace class action group at Duane Morris LLP, said the outcome of the Muldrow case when it is heard by the justices next term will have "significant real-world implications for employers in making personnel decisions and managing legal risks in the workplace."

"It either will be a 'door-opener' for expansion of Title VII rights or a 'door closer' in terms of placing limits on when workers can sue over personnel decisions that do not change their title, salary or benefits," Maatman said.

The case is Jatonya Muldrow v. St. Louis et al., case number 22-193, in the Supreme Court of the United States.

--Editing by Bruce Goldman and Nick Petruncio.