DEPARTMENT OF LABOR SEEKS TO CLARIFY RELIGIOUS EXEMPTION FOR FEDERAL CONTRACTORS

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
was illegal, Adler responded to Hickle that she would “find
reminded her that firing him because of his military service
due to a military obligation. Adler told Hickle that if he
work the weekend when the Avengers movie was opening
Finally, Adler’s frustration reached a boiling point in April
a pamphlet by USERRA regarding employers’ obligations
upcoming military leave, Adler told him that he “need[ed]
shortly before his discharge, when Hickle gave notice of
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 was investigating the plaintiff for the food theft incident.
The plaintiff was 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
behavior and impeding an investigation. " Since AMC was the decision to discharge the plaintiff for "unprofessional explain the rationale behind the investigation findings and Finally, the Court noted that AMC was unable to fully 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.
Churches, religiously affiliated schools and non-profits clearly must sacrifice or violate his or her religious convictions. It just because one opens a business does not mean the business carries 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 own 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.