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# Early Resolution Strategies for Employment Practices Litigation (EPL)

## A. Obergefell: Same-Sex Marriage

*Obergefell v. Hodges*, 135 S.Ct. 2584, 192 L. Ed. 2d 609 (2015)

On June 26, 2015, the United States Supreme Court held that under the Due Process and Equal Protection clauses of the Fourteenth Amendment, same-sex couples have the fundamental right to marry under state law. The Court's decision struck down laws in all states prohibiting same-sex marriage.

The Court set forth various reasons as to why same-sex marriage is a right under the Constitution including that: "the right to personal choice regarding marriage is inherent in the concept of individual autonomy"; "Two-person unions" are a fundamental right; Marriage, as a "keystone" of the nation's social order, safeguards families and children; and denying same-sex couples the right to marry subjects same-sex couples and their children to instability and humiliation by denying them the same right as opposite-sex couples

The Court expressly recognized that the First Amendment, however, protects religious organizations' and individual's right to oppose same-sex marriage.

The Court stated:

> "[I]t must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons."

### Obergefell: The Dissents

The Court's decision was made with a 5-4 majority vote and each of the four dissenting Justices wrote their own dissent

Ultimately, the difference between the Justices supporting the decision and those against came down to whether the Justice believed the issue should have been decided by the Courts or by the voters at the polls and Congress.

Writing for the majority, Justice Kennedy found:

"The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act."

**Obergefell: What next?**

Potential litigation:

- The refusal to issue marriage licenses to same-sex couples
- Benefits issues
- Discrimination / Retaliation Claims
- Scope of Employment Issues

**Marriage licenses and ceremonies**

*"Alabama top justice tells judges not to issue gay marriage licenses."* FOX News 1/6/16

Alabama Supreme Court Chief Justice Roy Moore ruled that "[u]ntil further decision by the Alabama Supreme Court, the existing orders of the Alabama Supreme Court that Alabama Marriage Protection Act remain in full force and effect."

Moore wrote that even though the U.S. Supreme Court invalidated anti-gay marriage laws – he cited laws in Michigan, Kentucky, Ohio, and Tennessee – "confusion and uncertainty exist among the probate judges of this State as to the effect" on existing orders in Alabama. "Many probate judges are issuing marriage licenses to same-sex couples in accordance with Obergefell (the Supreme Court case); others are issuing marriage licenses only to couples of the opposite gender or have ceased issuing all marriage licenses." The Alabama Supreme Court, "[will] continue to deliberate on the matter."

Counties or clerks refusing to issue licenses could be subject to costly litigation including third party discrimination claims. Laws protecting the right to marriage allow for fee shifting which would require municipalities and their insurers to pay for plaintiff's attorneys fees in addition to their own.

**Benefits issues**

With regard to benefits, the ruling in *Obergefell* essentially says that if an employer plans to offer benefits to an employee's spouse, they must do so whether the spouse is the opposite sex or not. Excluding such spouses would subject the employer to liability.

Employers appear to be quickly moving to extend health and other benefits to married same-sex couples.

**Discrimination Claims**

Regardless of whether entities fully comply with the Court's ruling or if litigation is needed to enforce it, the topic is highly charge

It would not be surprising to find some employers, vehemently opposed to the concept of same-sex marriage, enacting additional policies or procedures that ultimately discriminate against their employees and cause them to sustain an adverse employment action. Many employers will counter in these that their actions are protected by the Court's decision in *Burwell v. Hobby Lobby* and that they are entitled to a religious exemption.

"*Pre-Filed Legislation Seeks to Undermine Marriage Equality"* Alaska Commons, 1/8/16

> In 1998, Alaska enacted a ban on same-sex marriages which was overturned by the *Obergefell* decision. Two legislators have proposed a law, however, that would allow an officiant to reject performing a marriage between anyone and prohibiting the state or municipality from taking any action against them. Supporters of same-sex marriage rights are concerned that this law will serve to undermine Anchorage's new anti-discrimination laws.
>
> As cities and states change their laws in response to the ruling, the legal landscape continues become more and more unclear paving the way for more litigation.

**Scope of Employment Issues**

Employers are not typically responsible for the actions of their employees unless the employee was acting within the scope of their employment

Whether an employee is acting within the scope of their employment or not can be very difficult to ascertain

Employers need to be aware of this while also being cognizant of the facts that if they seek to restrict their employees' speech, they may end up facing claims that they violated their employees' First Amendment rights. These types of issues may be especially likely to arise where the employee is expressing their religious objections to the decision.

## B. EEOC v. Abercrombie & Fitch Stores, Inc.

**Overview**

Title VII of the Civil Rights Act of 1964, as amended, prohibits two categories of employment practices. It is unlawful for an employer: (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's race, color, **religion**, sex or national origin or (2) to limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, color, **religion**, sex or national origin.

42 U.S.C. § 2000e-2(a) (emphasis added)

The word "religion" is defined to include all aspects of religious observance and practice as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to any religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. § 2000e(j)

**<u>EEOC v. Abercrombie & Fitch Stores, Inc.</u>, 135 S.Ct. 2028, 192 L.Ed.2d 35 (2015)**

1. *Factual Background*

- Plaintiff Samantha Elauf, a practicing Muslim, applied for a position as a floor sales person ("Model") at an Abercrombie & Fitch Store ("Abercrombie").
- Abercrombie developed a "Look Policy" which contained a dress code. The "Look Policy" prohibited "caps" – an undefined term – as too informal for Abercrombie's desired image.
- Ms. Elauf was interviewed by an Assistant Store Manager who found her qualified for a Model position. The Assistant Manager contacted Abercrombie's District Office to determine if a scarf worn by Ms. Elauf would violate Abercrombie's "Look Policy" if worn to work.
- The Assistant Manager advised Abercrombie's District Office that she "believed" Ms. Elauf wore the head scarf because of her faith. There had been no discussion between Ms. Elauf and the Assistant Manager about either her religion or any need for accommodation.

2. *The Case*

- The EEOC brought suit against Abercrombie on a "disparate impact" theory. Abercrombie defended by stating it ought not to be held liable, as it had no "actual knowledge" of Ms. Elauf's need for accommodation.
- In writing for the majority, Justice Scalia held Abercrombie could not read a knowledge requirement into a claim of disparate treatment under Title VII.
- Justice Scalia noted that the Americans with Disabilities Act only forbade discrimination for an employer's failure to accommodate **known physical or mental limitations**. Title VII does not contain a knowledge requirement. Instead, Title VII prohibits certain motives, regardless of the state of the employer's knowledge.
- According to Justice Scalia, the EEOC showed that although the Assistant Manager held a "belief" Ms. Elauf wore a scarf for religious reasons, there was no question Ms. Elauf's mode of dress was a motivating factor in Abercrombie's decision not to hire, and a case of disparate treatment had been proven.
- A facially neutral policy does not, on its own, release an employer from its obligation to accommodate. Where an applicant requires accommodation as an aspect of religious practice, it is no defense that the employer's failure to hire was due to an otherwise neutral policy.

**Immediate Concerns**

The *Abercrombie* decision provides no guidance on what constitutes an "undue burden" for an employer in accommodating a religious practice or dress. Areas which can be legitimately considered are:

- Employee safety
- Security concerns

For a more detailed analysis of religious accommodation duties, see the EEOC's publication "Religious Garb and Grooming in the Workplace: Rights and Responsibilities," published in March, 2014.

**What Does the Future Hold?**

Justice Scalia's distinction between "knowledge" and "motive" in Title VII cases may open the door to other claims:

- A failure to hire or discharge claim brought by a woman who claims the employer's conduct was motivated by a suspicion she was pregnant.
- A failure to hire or discharge claim brought by an individual who claims the employer's conduct was motivated by a suspicion he or she was a member of a disfavored ethnic group.

## C. Americans With Disabilities Act (ADA) Developments

**Pregnancy Discrimination**

On September 25, 2008, President Bush signed into law The ADA Amendments Act of 2008 (ADAAA) became effective January 1, 2009.

Title I of the ADA prohibits discrimination on the basis of physical or mental disability in employment and requires employers to make reasonable accommodations that are necessary to permit persons with disabilities to perform the essential functions of a job, unless an accommodation would pose an undue hardship.

Coverage under the ADA turns on the threshold question of whether an individual has a "disability." The ADA defines the term "disability" as a physical or mental impairment that "substantially limits one or more major life activities," a "record of such an impairment", or "being regarded as having such an impairment."

In *Young v. United Parcel Serv., Inc.*, _U.S._, 135 S.Ct. 1338, 191 L. Ed. 2d 279 (2015). Plaintiff, a delivery truck driver, submitted a medical restriction when she became pregnant indicating that she should not lift more than 20 lbs. for the first 20 weeks of her pregnancy, and then not lift more than 10 lbs. thereafter. Employer removed Plaintiff from duty because her job description included the ability to lift up to 70 lbs. Employer also concluded that Plaintiff was ineligible for light duty because Employer offered light duty only to employees who suffered on the job injuries and required an ADA accommodation, or had lost their DOT certification.

Plaintiff sued in 2007 (pre-ADAAA) under the "regarded as" prong of the ADA, claiming that Employer improperly relied on a mistaken belief about Plaintiff's ability to work and that Employer had a duty to seek additional information to independently evaluate Plaintiff's' ability to work. The district

court held that Employer was under the belief that plaintiff was pregnant and under a temporary lifting restriction, which does not amount to a disability under the ADA.

Rejecting the ADA and Pregnancy Discrimination Act (PDA) interpretations of Young, UPS and the Solicitor General, the Court ruled that an individual pregnant worker making a disparate treatment claim may make out a prima facie case under the *McDonnell Douglas* framework by showing that 1) she belongs to the protected class; 2) that she sought accommodation; 3) that the employer did not accommodate her; and 4) that the employer did accommodate others "similar in their ability or inability to work."

The employer may then seek to justify its refusal to accommodate the plaintiff by relying on "legitimate, nondiscriminatory" reasons for denying accommodation. The Court ruled that the reason normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those whom the employer accommodates. If the employer offers a "legitimate, nondiscriminatory" reason, the plaintiff may also show that it is in fact pre-textual.

The plaintiff may reach a jury on this issue by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's "legitimate, nondiscriminatory" reasons are not sufficiently strong to justify the burden, but rather – when considered along with the burden imposed – give rise to an inference of intentional discrimination.

The plaintiff may also create a genuine issue of material fact as to whether a significant burden exists by providing evidence that the employer accommodates a large percentage of non-pregnant workers while failing to accommodate a large percentage of pregnant workers.

The ADAAA was passed after the time of Young's pregnancy. The 2008 amendments expanded the definition of "disability" under the ADA to make clear that "physical or mental impairment[s] that substantially limi[t]" an individual's ability to lift, stand, or bend are ADA-covered disabilities. As interpreted by the EEOC, the new statutory definitions requires employers to accommodate employees whose temporary lifting restrictions originate off the job, See 29 CFR pt. 1630, App., § 1630.2(j)(1)(ix). The Court did not express a view on the ADAAA or the EEOC's interpretation.

**EEOC Response to *Young***

In response to *Young v. UPS*, the EEOC made changes to its pregnancy discrimination guidance – Section 1(B)(1) Disparate Treatment), and 1(C) (Light Duty):

> Evidence indicating *disparate treatment* based on pregnancy, childbirth, or related medical conditions includes the following:
>
> - An explicit policy or a statement by a decision maker or someone who influenced the challenged decision that on its face demonstrates pregnancy bias and is linked to the challenged action.
>
> - Close timing between the challenged action and the employer's knowledge of the employee's pregnancy, childbirth, or related medical condition.
>
> - More favorable treatment of employees of either sex who are acted by pregnancy, childbirth, or related medical conditions, but are similar in their ability or inability to work.

- Evidence casting doubt on the credibility of the employer's explanation of the challenged action.

- Evidence that the employer violated or misapplied its own policy in undertaking the challenged action.

- Evidence of an employer policy or practice that, although not facially discriminatory, significantly burdens pregnant employees and cannot be supported by a significantly strong justification (citing *Young*). (1(B)(1)

The EEOC guidance on *proof of discrimination* was altered as follows:

- According to the Supreme Court's decision in *Young v. United Parcel Serv., Inc.*, a PDA plaintiff may make a prima facie case if discrimination by showing "that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others 'similar in their ability or inability to work.'" As the Court noted, "[t]he burden of making this showing is not 'onerous.'" For purposes of the prima facie case, the plaintiff does not need to point to an employee that is "similar in all but the protected ways." For example, the plaintiff could satisfy her prima facie burden by identifying an employee who was similar in his or her ability or inability to work due to an impairment (e.g., an employee with a lifting restriction) and who was provided an accommodation that the pregnant employee sought.

* * * *

- An employer's policy of accommodating a large percentage of non-pregnant employees with limitations while denying accommodations to a large percentage of pregnant employees may result in a significant burden on pregnant employees. (1(C))

**Illegal Drug Use/Medical Marijuana**

Individuals who currently are engaged in the illegal use of drugs are specifically excluded from the ADA's protections. 42 U.S.C. § 12114(a). The exclusion does not apply to individuals who have a record of illegal drug use and have been successfully rehabilitated, or are participating in a supervised rehabilitation drug program, and are no longer engaged in such use. *Id.* § 12114(b).

*EEOC v. Pines of Clarkston*, 2015 WL 1951945, 2015 LEXIS 55926 (E.D. Mich. Apr. 29, 2015): The Court denied defendant assisted living facility, the Pines of Clarkston's motion for summary judgment, finding that a genuine issue of material fact existed as to whether the defendant had a legitimate reason for terminating intervener Jamie Holden. After offer of employment, Ms. Holden was required to undergo a medical exam and take a drug test which came back positive because Ms. Holden uses medical marijuana for her epilepsy. Ms. Holden presented evidence on pre-termination conversation with hiring managers about her epilepsy (but not her marijuana use). In addition, the EEOC's investigation found that hiring staff questioned Holden about her epilepsy and not her marijuana use.

Finally, the defendant's rationale for Holden's termination allegedly shifted meaningfully over the course of the investigation and litigation. The hiring staff told the EEOC during the investigation that Holden was terminated due to her medical issues (seizures) while later they issued a position paper alleging that she was terminated for dishonesty in not disclosing her medications. Only during the motion for summary judgment did they raise the justification that she was terminated for failing the test for illegal drug use.

The court clarified that although Holden's use of medical marijuana constituted "illegal use of drugs" under the ADA, the exclusion only applies when the defendant acts on the basis of such use. Ms. Holden did not allege that defendant discriminated against her on the basis of her use of medical marijuana but rather she was terminated because of her epilepsy. Based on the evidence Ms. Holden presented, in addition to findings of the EEOC investigation, and the shifting rationales presented by the defendant, the court ruled that a genuine issue of material fact remained as to the defendant's nondiscriminatory justification.

*Curry v. MillerCoors., Inc., 2013 WL 4494307* 2013 LEXIS 118730 (D. Colo. Aug. 21, 2013).

Plaintiff was fired after testing positive for medical marijuana. Plaintiff suffered from hepatitis C, osteoarthritis, and pain, was licensed by the State of Colorado to use marijuana pursuant to the Medical Marijuana Amendment. Plaintiff alleged that he "used medical marijuana within the limits of the license, never used marijuana on MillerCoors' premises, and was never under the influence of marijuana at work." Nevertheless, MillerCoors fired him for testing positive for marijuana in violation of its drug policy.

The Court dismissed Plaintiff's claim holding that "[d]espite concern for Curry's medical condition, anti-discrimination law does not extend so far as to shield a disabled employee from the implementation of his employer's standard policies against employee misconduct." Furthermore, the court indicated that, because the use of marijuana continues to be illegal under federal law, employees have no protection under the ADA. Specifically, under that statute, "for an activity to be lawful in Colorado, it must be permitted by, and not contrary to, both state and federal law."

*James v. City of Cost Mesa*, 684 F.3d 825 (9th Cir. 2012). The Ninth Circuit held that the ADA does not protect against discrimination on the basis of medical marijuana use because marijuana is an illegal substance under federal law. The plaintiffs, four California residents with disabilities, were prescribed medical marijuana as permitted under California law. The plaintiffs picked up the medical marijuana at dispensaries located in various California cities until the cities moved to shut the dispensaries down.

Plaintiffs sued under Title II of the ADA, claiming that the cities were discriminating in their provision of public services and sought injunctive relief. The trial court denied the request and the Ninth Circuit affirmed.

The court examined whether the ADA's exclusion of coverage for an individual engaged in the illegal use of drugs applies to users of medical marijuana when state law sanctions such use. The court held that Congress explicitly linked the ADA's definition of "illegal use of drugs" to the Controlled Substances Act (CSA) and that therefore, the ADA's protections do not apply to medical marijuana use, even though it may be sanctioned by state law. Although arising in a Title II claim, there is Title III significant in cases involving applicants or employees who use medical marijuana under state law in violation of employer substance abuse policies.

*Lopez v. Pacific Maritime Ass'n.*, 657 F.3d 762 (9th Cir. 2011).

In 1997 plaintiff applied to work as a longshoreman, at a port in Long Beach California. The plaintiff tested positive for marijuana when the defendant-employer administered its standard drug test and was therefore disqualified from further consideration under the employer's one-strike policy. After the plaintiff stopped using marijuana, he reapplied to be a longshoreman; because of the one-strike policy, the employer rejected him.

The court granted summary judgment in favor of the defendant because the plaintiff failed to establish that the defendant intentionally discriminated against him on the basis of his protected status or that the one-strike rule disparately affected recovered drug addicts