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Religious Freedom and Expression in Employment

I. The First Amendment, the RFRA, and Title VII

As the legal rights of those in the lesbian, gay, bisexual, and transgender ("LGBT") community have begun to gain recognition in recent years, and as the federal government has begun involving itself in healthcare through the passage of the Patient Protection and Affordable Care Act ("the PPACA"), there have been a variety of reactions across the country to those changes. These reactions have come not only from the individuals directly affected by these developments, but by employers and their employees, state and local governments and legislative bodies, and elected officials. Those expressing opinions against the expansion of these rights rely primarily on their right to religious freedom under the First Amendment to the United States Constitution. Many also claim religious protection under the Religious Freedom Restoration Act of 1993, as well as Title VII of the Civil Rights Act of 1964, which is the same vehicle under which many in the LGBT community have recently obtained their rights. This paper addresses the intersection of these three laws and how courts have recently been addressing this issue with respect to employers.

The First Amendment

First, the First Amendment, adopted on December 15, 1791, states as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The RFRA

Somewhat less well-known is the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb to § 2000bb-4 ("the RFRA"). The RFRA is a 1993 federal law passed to "provide a claim or defense to persons whose religious exercise is substantially burdened by government," and to ensure that only compelling state interests may substantially infringe on an individual's First Amendment rights, where the action is also the least

restrictive means of furthering that interest. 42 U.S.C. § 2000bb-1; *see generally Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014). Notably, the bill was introduced in both the U.S. House of Representatives and the U.S. Senate by Democratic Congressmen, it was passed unanimously in the House and nearly unanimously in the Senate, and President Bill Clinton signed it into law.

As initially passed, the RFRA's mandate applied to any branch of federal or state government, to all officials, and to other persons acting under color of law. § 2000bb-2(1). However, just four years after Congress passed the RFRA, in *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court held it unconstitutional as improper exercise of Congress' enforcement power, because "it contradicts vital principals necessary to maintain separation of powers and the federal-state balance." Nevertheless, the RFRA continues to be applied to the federal government. *Burwell*, 134 S.C. at 2761. Following the *City of Boerne* holding, around 20 states have passed their own religious freedom acts that apply to their individual state and local governments. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE chap. 110; § 761.01, *et seq.*, Fla. Stat. (2015).

Title VII

Separately, Title VII of the Civil Rights Act of 1964 ("Title VII") protects employees and applicants from discrimination and retaliation based both on the individual's religion and gender, among other things. Under Title VII, it is "an unlawful employment practice 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 of 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). The question that remains largely unanswered for employers—and which for the foreseeable future may depend in large part on the jurisdiction at issue—is how to strike a balance between protecting employees' religious freedoms and protecting other employees from gender discrimination as recently defined by the courts.

Early Case Law Addressing LGBT Issues Under Title VII

While there is no protection explicitly set out in Title VII for discrimination based on sexual orientation or for transgendered individuals, over the course of the last two decades, rights for the LGBT community have slowly begun to be recognized as part of the protections afforded to individuals based on their gender. First, in 1989, the U.S.

Supreme Court held that a plaintiff may rely on gender-stereotyping evidence to show that discrimination occurred "because of . . . sex" in accordance with Title VII. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989).

Following this announcement, the appellate courts began to recognize that a plaintiff can satisfy Title VII's because-of-sex requirement with evidence of a plaintiff's perceived failure to conform to traditional gender stereotypes. *See, e.g., E.E.O.C. v. Boh Bros. Const. Co.*, 731 F.3d 444, 454 (5th Cir. 2013) (en banc); *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011); *Lewis v. Heartland Inns of Am., L.L.C.*, 591 F.3d 1033, 1038 (8th Cir. 2010); *Chadwick v. WellPoint, Inc.*, 561 F.3d 38, 44 (1st Cir. 2009); *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004); *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 120 (2d Cir. 2004); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874–75 (9th Cir. 2001); *Bibby v. Phila. Coca-Cola Bottling Co.*, 260 F.3d 257, 263–64 (3d Cir. 2001); *Doe v. City of Belleville*, 119 F.3d 563, 580 (7th Cir. 1997), *vacated*, 523 U.S. 1001, 118 S.Ct. 1183, 140 L.Ed.2d 313 (1998).

Nine years after *Price Waterhouse*, the line was moved a little further when a unanimous Supreme Court held that "nothing in Title VII necessarily bars a claim of discrimination 'because of ... sex' merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998). In *Oncale*, the Court found that while "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII, . . . statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id.*[1]

II. Recent Notable Decisions

Federal Benefits for Same-Sex Married Individuals

There have been several cases of significance before the U.S. Supreme Court in

[1] The *Oncale* court set out three evidentiary paths for plaintiffs to make this showing in the context of a same-sex harassment claim: (1) a plaintiff may show that the harasser was homosexual and motivated by sexual desire; (2) a plaintiff may show that the harassment was framed "in such sex-specific and derogatory terms . . . as to make it clear that the harasser [was] motivated by general hostility to the presence" of a particular gender in the workplace; and (3) a plaintiff may "offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace." *Id.* at 80-81. Since *Oncale*, several Courts of Appeal have found that this list is illustrative rather than exhaustive. *See, e.g., Wasek v. Arrow Energy Servs., Inc.*, 682 F.3d 463, 467–68 (6th Cir. 2012) (noting that *Oncale* offered "guidance" regarding the manner in which a plaintiff can prove same-sex harassment); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 763–65 (6th Cir. 2006) (acknowledging the availability of an evidentiary route not articulated in *Oncale*); *Medina v. Income Support Div., N.M.*, 413 F.3d 1131, 1135 (10th Cir. 2005) (stating that the *Oncale* "routes, however, are not exhaustive"); *Pedroza v. Cintas Corp.*, 397 F.3d 1063, 1068 (8th Cir. 2005) (describing *Oncale's* list as "non-exhaustive"); *Bibby*, 260 F.3d at 264; *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1009 (7th Cir. 1999) (noting the evidentiary routes stated in *Oncale* and stating: "[b]ased on the facts of a particular case and the creativity of the parties, other ways in which to prove that harassment occurred because of sex may be available").

the past few years either directly or indirectly involving claims of religious freedom infringements. One ruling resulted from Congress' passage in 1996 of the Defense of Marriage Act ("DOMA"), which defined marriage as a legal union only between one man and one woman as husband and wife for all federal purposes. Pub. L. No. 104-199, 110 Stat. 2419 (1996). Section Three of DOMA mandated that only opposite-sex married individuals were entitled to a broad range of federal benefits accorded on the basis of marital status. In *United States v. Windsor*, 570 U.S. __, 133 S. Ct. 2675 (2013), the Court struck down DOMA as unconstitutionally discriminating against individuals in state-recognized same-sex marriages, in violation of the due process clause of the Fifth Amendment.

Shortly after *Windsor* was decided, the Department of Labor issued guidance stating that the definition of the term "spouse" found in the Family and Medical Leave Act includes same-sex partners from a marriage recognized in any state, even if the employer and employee reside in a state that did not recognize same-sex marriage. When the *Windsor* opinion was issued, there were eleven states plus the District of Columbia recognizing same-sex marriages.

Employers and Contraceptive Coverage

Additionally, as a result of the passage of the PPACA in early 2010, the U.S. Supreme Court issued a ruling in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014). Leading up to the *Burwell* opinion were two separate actions in which the owners of three closely held for-profit corporations sued Kathleen Sebelius, the Secretary of Health and Human Services, and other federal officials and agencies (collectively "HHS"). The business-owners claimed HHS had violated their rights under the First Amendment and the RFRA. The owners had explicitly expressed the desire to run the companies according to their Christian beliefs—specifically, that life begins at conception and that it would violate their religion to facilitate access to contraceptives. As such, they sought to enjoin application of the contraceptive requirement of the PPACA insofar as it required them to provide health coverage to their employees for contraceptives.

In the first case, the district court denied Conestoga Wood Specialties' preliminary injunction, which was reversed and remanded by the Tenth Circuit. The second case had a slightly different result; the district court denied Hobby Lobby Stores and Mardel's injunction and the Third Circuit affirmed. The Supreme Court granted certiorari and consolidated the cases. Ultimately, the Court held that the contraceptive requirement of the HHS regulations, as applied to closely held corporations, violated the RFRA.

Same-Sex Marriage and Public Servants

Shortly after *Burwell*, the Supreme Court spoke on the issue of the rights of same-sex couples to marry in *Obergefell v. Hodges*, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015). Leading up to the *Obergefell* decision were individual suits by 14 same-sex couples and

two men whose same-sex partners weree deceased. Those individuals sued state agencies in their respective states on the grounds that the defendants violated the Fourteenth Amendment by denying them the right to marry and refusing to recognize their same-sex marriages that were lawfully performed in another State. Although the district courts ruled in the plaintiffs' favor, the Sixth Circuit consolidated the cases and reversed. On certiorari—in a landmark ruling—the U.S. Supreme Court held that marriage is fundamental under the Constitution and, thus, the Fourteenth Amendment requires States to issue marriage licenses to same-sex couples and recognize same-sex marriages validly performed out of State.

This opinion in theory sets the stage for further protections of same-sex partners in the employment context, though perhaps not in such a major a way as in *Windsor*. Possibly most notably for employers, *Obergefell* resulted in a few well-publicized displays by public officials in opposition to the ruling. This included the eventual jailing of a Kentucky county clerk, Kim Davis, who refused to follow a federal court order to issue marriage licenses to same-sex couples.

Employer Knowledge of Need for a Religious Accommodation

Also in 2015, the Supreme Court issued its ruling in *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S.Ct. 2028, 192 L.Ed.2d 35 (2015). This case came about in 2008 when Samantha Elauf, a practicing Muslim who wore a hijab daily, applied for a position at an Abercrombie & Fitch store. Elauf's interviewer, Heather Cooke, evaluated Elauf with a rating that qualified her to be hired; however, she was concerned that Elauf's hijab violated Abercrombie's Look Policy, which prohibited "caps" although the term was undefined in the Policy. While the store manager was unable to provide any clarification, the district manager, Randall Johnson, claimed that the Look Policy prohibited all headwear, religious or otherwise. Johnson instructed Cooke not to hire Elauf and told her that Elauf's hijab violated the policy.

After Abercrombie refused to hire Elauf, she filed a Charge of Discrimination with the EEOC on the grounds of religious discrimination. The EEOC then sued Abercrombie on Elauf's behalf claiming Abercrombie violated Title VII of the Civil Rights Act of 1964 by refusing to hire Elauf due to her religion and failing to accommodate her religious beliefs. The Oklahoma district court granted summary judgment for the EEOC, which was overturned by the U.S. Court of Appeals for Tenth Circuit. The Tenth Circuit also held that an employer generally cannot be liable for failing to accommodate a religious practice until the applicant provides the employer with actual knowledge of his need for an accommodation. Accordingly, the Tenth Circuit granted summary judgment in favor of Abercrombie since it was indisputable that Elauf did not notify Cooke that she would need an accommodation from the Look Policy.

In its June 1, 2015 decision, the Supreme Court reversed the Tenth Circuit's decision and ruled in favor of EEOC. The Court held that to prevail in a disparate-treatment claim under Title VII of the Civil Rights Act of 1964, an applicant must only show that the employer's decision was motivated by her need for an accommodation, not

that the employer actually knew of the need.

Upcoming Noteworthy Case

Finally, one noteworthy case involving religious accommodations in employment is pending with the EEOC. In *Stanley v. ExpressJet Airlines*, flight attendant Charee Stanley converted to Islam three years after beginning work for ExpressJet. In June 2015, after she discovered that her religious beliefs prohibited her from serving alcohol, Stanley asked her supervisor for a religious accommodation. ExpressJet agreed and provided her with a religious accommodation excluding her from serving alcohol. At her supervisor's direction, Stanley began coordinating with the other flight attendant on duty to fulfill a passenger's request for alcohol. According to Stanley, the accommodation worked seamlessly until August 2nd when one of her co-workers filed a complaint against her claiming that she was not fulfilling her duties. The co-worker also referenced Stanley's "headdress" and a book she carried with "foreign writings." On August 25th, ExpressJet revoked Stanley's religious accommodation and placed her on administrative leave.

Although Stanley is still technically an ExpressJet employee, the company informed her that she could be terminated after 12 months. After the August 25th letter, Stanley filed a Charge of Discrimination against ExpressJet with the EEOC. Allegedly, there was no change in circumstances to justify ExpressJet's actions. Further, Stanley's attorney maintains that by granting the religious accommodation in the first place, ExpressJet acknowledged that serving alcohol was not an essential duty or function of Stanley's employment as a flight attendant. Accordingly to Stanley, the requested accommodation does not interfere with her performance, is a reasonable religious accommodation, and has not caused any undue hardship upon ExpressJet. The EEOC's six-month period to review the Charge is nearing an end but a ruling has not been issued yet.

Recent State Reactions to Expanded LGBT Rights

North Carolina's House Bill 2, the Public Facilities Privacy & Security Act

In 2016, the City of Charlotte, North Carolina passed a local ordinance expanding the city's existing nondiscrimination ordinance to prohibit discrimination against gay, lesbian, and transgender city residents. Most controversially, the ordinance allowed transgender Charlotte residents to use the bathroom for the gender with which they identify.

In direct response to Charlotte's city ordinance, in April 2016, shortly before the writing of this article, the State of North Carolina passed a bill barring transgender people from bathrooms and locker rooms that do not match the gender on their birth certificates. The law explicitly supersedes, preempts, and voids any ordinance, resolution, regulation, or policy adopted prior to the law's effective date that purports to regulate the subject matter of the law. North Carolina Senate Democrats walked out of the legislative session

in protest, but the law passed in both the House and Senate, and North Carolina's governor signed the bill into law on April 21, 2016.

Mississippi's House Bill 1523, the Protecting Freedom of Conscience from Government Discrimination Act

Finally, in direct response to *Obergefell*, the State of Mississippi has passed House Bill 1523, the Protecting Freedom of Conscience from Government Discrimination Act ("PFCGDA"). As enacted, the PFCGDA allows Mississippi clerks to deny same-sex marriage licenses to gay couples because of their religious beliefs and not face any repercussions, and private businesses and faith-based organizations to refuse services based on those same beliefs without retribution.

Georgia Governor Nathan Deal, under pressure from several large companies as well as the NFL and the NCAA, vetoed a similar measure introduced in his state earlier in the year. The State of Indiana passed a Religious Freedom Restoration Act in early 2015, allowing individuals and companies to assert that their exercise of religion has been, or is likely to be, substantially burdened as a defense of legal proceedings. A study conducted by Indianapolis' convention and tourism organization estimates that Indiana has lost at least $60 million in revenue as a result of the passage of its law. However, over twenty states have religious freedom restoration laws as of the writing of this article, and several more have religious freedom restoration-type case law on the books.