LEGAL BULLETIN
June 11, 2024

CONSTANGY BROOKS, SMITH & PROPHETE LLP

Legal Bulletin #1102

CO-CHAIRS, EMPLOYMENT LITIGATION PREVENTION & DEFENSE

David Kurtz
Boston, MA
New York, NY
Los Angeles, CA
Orange County, CA

Sarah Robertson
San Francisco, CA

EDITOR IN CHIEF

Robin Shea
Winston-Salem, NC

What lies beneath the "substantial increased costs" needed to reject a request for a religious accommodation?

By Frank Shuster
Atlanta Office

Complete answers may be several years in the making.

A year ago this month, in *Groff v. DeJoy*, the Supreme Court of the United States held that an employer who rejects a request for a religious accommodation "must show that the burden of granting [the] accommodation would result in substantial increased costs to the conduct of its particular business."

The Court provided few specifics about the type of "costs" included in the analysis or when they can be deemed "substantial." That is left for the lower courts to resolve on a case-by-case basis.

In one of those cases, *Carter v. Southwest Airlines*, the U.S. Court of Appeals for the Fifth Circuit heard oral arguments on June 3. In the remand of *Groff v. DeJoy*, a federal district court in Pennsylvania will hear oral arguments on the Postal Service's renewed motion for summary judgment on June 28.

Both cases involve the alleged failure to accommodate an employee's religious beliefs or practices, but they rely on different evidence to show that the accommodation would have resulted in substantial increased costs to each business. Hopefully, the decisions in each case will provide some guidance as to the evidence relevant to proving substantial increased costs.

Both cases also provide more than enough reason to take the five easy steps listed below for getting your house in order on requests for religious accommodations.

Considering the potentially divisive nature of the sincerely held religious beliefs at the heart of these cases, I recite the facts as stated in the employers' court filings, without judgment or attempts at levity, and with the caveat they are disputed in the employees' court filings.

LEGAL BULLETIN
June 11, 2024

CONSTANGY BROOKS, SMITH & PROPHETE LLP

Legal Bulletin #1102

***Groff v. DeJoy* and sincerely held religious beliefs about the Sabbath**

Gerald Groff, an Evangelical Christian postal worker in Pennsylvania, requested not to work at all on Sundays for religious reasons.

Mr. Groff's absences on Sunday meant other employees had to work more Sundays than otherwise required. Some were upset and complained. One filed a grievance pursuant to the union contract. One resigned, and another transferred to a different station, rather than being forced to work on numerous Sundays.

Mr. Groff's supervisors tried to accommodate his needs by seeking replacements, but those efforts often failed. When none could be found, Mr. Groff was disciplined for not working.

Mr. Groff eventually resigned and filed suit. The district court granted the Postal Service's motion for summary judgment and dismissed the lawsuit. The dismissal was affirmed on appeal, and Mr. Groff sought review by the United States Supreme Court.

The Court reversed the dismissal and, in doing so, held that the "undue hardship" required to reject a requested religious accommodation must "result in substantial increased costs in relation to the conduct of the particular business." No longer is a mere inconvenience or minor cost sufficient to justify rejecting a religious accommodation request.

The Court also made clear that impact on co-workers is not an "undue hardship" if it is based on their objections to the principle of religious accommodations or their religious prejudices. But the Court did recognize that certain other impacts on co-workers could affect "the conduct of the par-ticular business" and create an undue hardship.

The case then returned to the district court, and the Postal Service renewed its motion for summary judgment, which has been set for oral argument on June 28.

Other than a passing reference to staggering financial losses in the years leading up to the decision to implement Sunday deliveries, the Postal Service's summary judgment motion made no mention of any increased financial costs related to Mr. Groff's requested accommodation.

Instead, it focused on increased costs to the business in terms of impaired efficiency, delays in de-liveries, violations of the union contract and detrimental impact on other employees, including burnout and the increased dangers of delayed night-time deliveries.

Time will tell whether this is enough to satisfy the reinvigorated undue hardship standard.

***Carter v. Southwest* and sincerely held religious beliefs about abortion**

Charlene Carter was a flight attendant for Southwest. In February 2017, she learned that members of the union representing Southwest's flight attendants had attended the Women's March in Washington, and she believed her union dues had been used to pay for their trip.

Shortly after learning of the trip, Ms. Carter sent Audrey Stone, her local union President, several Facebook

messages with images of aborted fetuses. They included messages accusing Ms. Stone of supporting murder, calling her despicable and saying she couldn't wait to see her at work.

Ms. Carter posted similar graphic messages on her public Facebook page. According to Southwest, but disputed by Carter, one showed her in her Southwest uniform, with her employee badge and Southwest pilots.

Ms. Stone reported Ms. Carter's conduct to Southwest and complained that she found the messages disturbing, obscene, violent, and threatening.

After investigating the complaint, Southwest terminated Ms. Carter because her posts were in direct violation of Southwest's Mission Statement, its Workplace Bullying and Hazing Policy, its Social Media Policy and potentially violated its Policy Concerning Harassment.

Ms. Carter filed a grievance under her union contract. After a two-day hearing, the arbitrator concluded that it was "clear beyond a reasonable doubt that [Southwest] had just cause to terminate Carter because [she] violated the Social Media Policy, the Workplace Bullying and Hazing Policy and the Harassment Policy."

Ms. Carter then filed suit accusing Southwest of, among other things, terminating her (1) because of her religious beliefs; (2) because she engaged in her religious practice; and (3) in retaliation for engaging in protected activities.

After what no doubt were lengthy and costly legal proceedings, the case went to trial. A jury found for Ms. Carter and awarded her $4.15 million, which the judge later reduced to $800,000.

Southwest appealed the verdict, and other issues, to the United States Court of Appeals for the Fifth Circuit. At the June 3rd oral argument, Southwest argued that the evidence offered at trial proved that Ms. Carter was not terminated for her religious beliefs, but rather for her alleged religious practice (of posting graphic images), which could not be reasonably accommodated without an undue hardship.

According to its court filings, Southwest claimed that, if it accommodated Ms. Carter's conduct, it would have had an adverse effect on its employee culture and that employees were "horrified" by Ms. Carter's posts and "felt physically ill" viewing them.

For a variety of reasons, no evidence was presented at trial regarding any economic impact that providing Ms. Carter with an accommodation would cause Southwest. However, that evidence might be presented if Southwest succeeds in getting a new trial.

Once again, time will tell whether the hardships identified by Southwest, or that it might identify at a new trial, will be sufficient to meet the reinvigorated undue burden standard.

Do I have your attention now?

At this point, the Postal Service and Southwest surely have incurred substantial expenses defending against these claims, and Southwest currently faces an $800,000 judgment.

Do you have that kind of money? Would you want to spend it on claims like these?

While few bright-line rules currently exist for determining when a religious accommodation will result in "substantial increased costs in relation to the conduct of the particular business," here are five things (stated in terms consistent with the subject matter of this article) that you can do right now to start dealing with the uncertainty:

- THOU SHALT amend your EEO and accommodation policies to specifically include religious accommodations and a generalized reference to the exception for undue hardships. Many accommodation policies only reference disabilities. Some EEO policies mention prohibitions against religious discrimination but are silent about accommodations. Such policies could result in uncomfortable cross examinations of employer witnesses on the topic of good faith efforts to comply with the law.

- THOU SHALT develop religious accommodation procedures that require accommodation requests to be in writing, with information sufficient to determine (or begin evaluating) the religious nature of the belief and how an employment policy or practice conflicts with those beliefs.

- THOU SHALT train all supervisors on how to handle requests for religious accommodations and require that all be referred to HR for review and determination.

- THOU SHALT handle all requests for religious accommodations in a manner consistent with the interactive disability accommodation process, including internal documentation of all the "hardships" on the business from granting the request. Hardships with respect to other employees should be evaluated from the perspective of how they create a hardship on the business as opposed to the employees. This documentation should be retained to ensure records are available to defend any challenges and assist in ensuring consistency in your decisions.

- THOU SHALT get help. Case law regarding the type of evidence sufficient to prove an undue hardship will be developing over the course of the next few years. An employment attorney can help you assess whether the information you have gathered (or can gather) gives you more than a "puncher's chance" of knocking out a failure to accommodate claim before things get out of hand.

Even though they are not etched on stone tablets, adhering to these commandments will help put you on solid footing for the uncertain road ahead.

LEGAL BULLETIN

June 11, 2024

CONSTANGY BROOKS, SMITH & PROPHETE LLP

Legal Bulletin #1102

www.constangy.com
Toll free 866.843.9555

Constangy, Brooks, Smith & Prophete, LLP

Constangy, Brooks, Smith & Prophete offers a wider lens on workplace law. We have counseled employers exclusively since 1946. With offices in 21 states, we are one of the largest labor and employment law practices in the U.S., with a growing Cybersecurity & Data Privacy practice group to match. Constangy has been named as a top firm for women and minorities by organizations including Law360, the National Law Journal and **Vault.com**. Many of our more than 225 attorneys have been recognized by leading authorities such as Chambers USA®, The Best Lawyers in America® and Martindale-Hubbell. Find out more about us online at **www.constangy.com**.

Office Locations

Alabama, California, Colorado, District of Columbia, Florida, Georgia, Illinois, Indiana, Maryland, Massachusetts, Missouri, Minnesota, New Jersey, New York, North Carolina, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Virginia and Washington.