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A Discussion of Recent Supreme Court Decisions and Circuit Caselaw.

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Part I – Religion – *Hobby Lobby v. Abercrombie and Fitch*

***Burwell et. al. v. Hobby Lobby*, 134 S.Ct. 2751 (2014)** – The religious freedom of a closely held corporation wins against government regulation. The court held that for-profit corporations are entitled to protection under the Religious Freedom Restoration Act just like individuals. The Court found the regulations requiring that employers provide coverage for contraception, including the "morning after pill," were a substantial burden upon their free exercise of religion. The Court then found that the regulations were not the least restrictive means of furthering a compelling government interest because the government already enacted regulations to accommodate religious employers (i.e. churches) and religious non-profits. Note that this case was decided under RFRA and RLUIPA, not the First Amendment. The dissent raised "the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction," but the Court noted that prohibitions on race discrimination already meet the strict scrutiny standard.

***EEOC v. Abercrombie and Fitch*, 135 S.C.t 2028 (2015)** – An employee's statutory religious non-discrimination rights prevail against employer dress code. A job applicant at Abercrombie & Fitch was not hired because, as a practicing Muslim, she wore a headscarf which would violate Abercrombie's policy against caps. In evaluating her "disparate treatment" claim, the Court first held that actual knowledge of the need for accommodation of a religious belief was unnecessary. Plaintiff can make a claim if the need for accommodation was a "motivating factor" in the decision. An employer who has even an "unsubstantiated suspicion" that an accommodation will be necessary and uses that as a "motivating factor" in the decision violates Title VII. Even though Abercrombie's cap policy was neutral on its face, the plaintiff could prevail because it resulted in disparate treatment of Muslim women. "When an applicant requires an accommodation as an aspect of religious practice, it is no response that the subsequent failure to hire was due to an otherwise-neutral policy."

In *Hobby Lobby*, the employer was entitled to religious accommodation where the ACA mandate conflicted with the employer's religious beliefs and practices. In *Abercrombie*, the employee was entitled to accommodation where the employer's policy violated Title VII. What happens when those rights collide? Who wins if employer's religious beliefs conflict with employee's religious beliefs? Title VII is a government regulation that can conflict with religious beliefs. The EEOC guidance from 2011 is less than illuminating. In "Questions and Answers: Religious Discrimination in the Workplace," the EEOC acknowledged that "The First Amendment, however, does protect private sector employers from government interference with their free exercise and speech rights." http://www.eeoc.gov/policy/docs/qanda_religion.html (Question 17). It did not suggest any resolution for that potential conflict.

I did not find any caselaw directly addressing the potential conflict between employer free exercise rights versus employee free exercise rights after *Hobby Lobby*. The Seventh Circuit did address a case where a co-employee dispute over religious expression at work led to a wrongful discharge claim. *Ervington v. LTD Commodities, LLC*, 555 Fed.Appx. 615 (7th Cir. 2014). Ervington objected to office Halloween parties and handed out candy with "gospel tracts" negatively depicting Muslims and Catholics, stating that they would go to hell. A Muslim employee took offense. Ervington was terminated in part for distributing the gospel tracts in violation of the company's anti-harassment policy. The Court upheld summary judgment for the employer, despite Ervington's contention that proselytizing was part of her religious practice. The company "was not required to accommodate Ervington's religion by permitting her to distribute pamphlets offensive to other employees." *Id.* at 618.

Hobby Lobby recognized that private corporations can have religious free exercise rights, but did little to explain how far those rights will extend. Can a private employer begin each workday with a Christian prayer if its employees include Jews, Muslim, or Voodoo practitioners who object to the prayer? Can a Catholic employer – not a church – terminate employees who divorce? Have abortions?

Can an employer require that a nursing home activities aid read a rosary with a resident at their request? Kelsey Nobach was terminated because she refused to read the rosary to a nursing home resident as she requested. Nobach was a "disfellowshipped" Jehovah's witness who still followed their beliefs and practices, which included not praying repetitive prayers like the rosary. She did not advise any of her supervisors that her refusal was based upon her religious beliefs, nor was there any evidence that they were motivated by any suspicion regarding her religious beliefs. They employer was entitled to judgment as a matter of law because Nobach could not show that her religious beliefs were a motivating factor in the decision. However, if Nobach "had presented any evidence that Woodland knew, suspected, or reasonably should have known the cause for her refusing this task was her conflicting religious belief" and was

motivated by that, the jury could have found in her favor. *Nobach v. Woodland Village Nursing Center, Inc.*, 799 F.3d 374 (5th Cir. 2015). Would the result be different if the nursing home was run by a private, closely held corporation owned by a group of Catholics?

Part II – Pregnancy and the *McDonnell Douglas* framework

***Young v. UPS*, 135 S.C.t 1338 (2015) --** An individual pregnant worker who seeks to show disparate treatment through indirect evidence may do so through application of the familiar *McDonnell Dou*glas framework by producing evidence "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.'" *Id.* at 1354. The employer may attempt to avoid liability by setting forth a legitimate, non-discriminatory reason for failing to accommodate the pregnant employee, and the employee can avoid summary judgment by producing evidence that the reason is pretextual. The non-discriminatory reason cannot be that it is more expensive or less convenient to accommodate pregnant workers than other employees who are similar in their ability to work. *Id.* Evidence "that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers" is sufficient to avoid summary judgment. This is limited to the pregnancy discrimination context based upon the statutory language: "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same... as other persons not so affected but similar in their ability or inability to work." The focus should be on whether the plaintiff's evidence is sufficient to support a claim of intentional discrimination based upon pregnancy. *Id.* at 1355.

Young received a brief mention in *Smith v. Chicago Transit Authority*, 806 F.3d 900 (2015), a race discrimination case in which the 7th Circuit acknowledged its prior criticism of the rigid *McDonnell Douglas* framework, but stated that it would continue to use it in light of Supreme Court precedent.

Part III – Putting the EEOC in its place. Sort of.

***Mach Mining LLC . v. EEOC*, 135 S.Ct. 1645 (2015).** Courts have the authority to review whether the EEOC fulfilled its Title VII duty to attempt conciliation. The EEOC received a complaint regarding gender discrimination at Mach Mining and concluded that it was well founded. The EEOC sent two letters stating (1) that they would contact Mach regarding conciliation and (2) that it had concluded conciliation unsuccessfully. EEOC then sued Mach, who complained that EEOC failed to engage in conciliation as required

by EEOC, who in turn contended that the courts could not review whether it complied with the conciliation requirement. The Supreme Court disagreed, imposing two requirements: (1) "the EEOC must inform the employer about the specific allegation, as the Commission typically does in a letter announcing its determination of 'reasonable cause.' *Ibid*. Such notice properly describes both what the employer has done and which employees (or what class of employees) have suffered as a result" and (2) "the EEOC must try to engage the employer in some form of discussion (whether written or oral), so as to give the employer an opportunity to remedy the allegedly discriminatory practice. Judicial review of those requirements (and nothing else) ensures that the Commission complies with the statute." *Id.* at 1655-1656.

Mach Mining was cited in a 7th Circuit decision in which EEOC attacked CVS Pharmacy's policy of conditioning severance payments upon execution of a release of claims, including employment claims. *E.E.O.C. v. CVS Pharmacy, Inc.*, - F.3d -, 2015 WL 9239388 (7th Cir. 2015). A discharged employee filed a discrimination charge and disclosed the severance agreement to EEOC. The charge was later dismissed, but EEOC went after CVS anyway, contending that the use of the release was "a pattern or practice of resistance to the full enjoyment of the rights secured by Title VII." EEOC also contended that it was not required to engage in conciliation and would only resolve the issue by consent decree. It eventually sued CVS over the practice. The 7th Circuit held that the case failed to state a cause of action because EEOC did not contend that CVS actually discriminated or retaliated against anyone in violation of Title VII. "Conditioning benefits on promises not to file charges with the EEOC is not enough, in itself, to constitute 'retaliation'." *Id.* at *6. The Court next held that the EEOC was required to engage in conciliation and that it could only proceed based upon a charge, which may be filed by the EEOC or affected individual.

Part IV – Employer's Liability for the acts of supervisors.

The next two cases, *Woods* and *Vance* were decided after *Staub v. Proctor Hosp.*, 562 U.S. 411 (2011), in which the Supreme Court first recognized cat's paw liability. In *Staub*, the Supreme Court held in a USERRA case (which the court noted was very similar to Title VII) that "if a supervisor performs an act motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable." *Id.* at 422.

***Vance. v. Ball State University*, 133 S.Ct. 2434 (2013).** Vance made a hostile work environment claim against Ball State based upon misconduct by her supervisor. The supervisor made Vance miserable, but "did not have the power to hire, fire, demote, promote, transfer, or discipline Vance." While not a proximate cause case like *Staub,* the

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Supreme Court held that "an employee is a 'supervisor' for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim." *Vance v. Ball State University*, 133 S.Ct. 2434, 2439 (2013).Vicarious employer liability applies only when the harassment is committed by a manager who can fire or reduce the pay or grade of the victim, not when it is committed by a supervisor who does not have that power but does control the day-to-day schedules, assignments, and working environment of the victim. Ball State responded reasonably to the harassment, so it was not liable for co-employee harassment. Although the allegations concerned misconduct by a Ball State employee, the university was not liable under Title VII for the allegedly hostile work environment.

Woods v. City of Berwyn, No. 13–3766 (7th Circuit 2015). This is the 7th Circuit's take on cat's paw liability under Title VII. Woods was a firefighter who returned to work after an on-duty back injury. The Chief allegedly wanted him to take disability or retire rather than return to work and made several statements about firing him. The statements and harassment caused Woods stress. He eventually told Lt. Hamilton that he wanted "to kill somebody" and that his kids would go over and "tune them up." He also made statements about possibly harming himself. The Chief filed a complaint to terminate him with the Board of Police and Fire Commissioners, who conducted a full evidentiary trial and ultimately terminated him. The Board relied largely upon the testimony of Lt. Hamilton. Woods sued, asserting FMLA, ADA, ADEA and Worker's Compensation retaliation claims. Woods conceded that the Board members did not have retaliatory animus, but argued that the Board was the "cat's paw" for the Chief's retaliatory animus. The Seventh Circuit upheld summary judgment for the City because the independent trial by the Board relied almost entirely upon the testimony of Lt. Hamilton, breaking any causal connection with the discriminatory animus of the Chief.

Note the difference between *Staub*, where the employer could be held liable for the discriminatory acts of the employer and *Vance* and *Woods*, where it could not. *Vance* did not involve a termination or a manager who could take adverse action, so the university's reasonable response to the employee's complaints enabled it to avoid liability. In *Woods,* the decisionmaker made its decision independently of the biased employee, which let the city escape liability. But in *Staub*, the employer relied in part upon statements of the biased employees, potentially exposing the employer to liability. A truly independent investigation and decision by the employer and a reasonable response to any issues found should insulate the employer from liability.

Part V – Dodging the ADA – or failing to.

Dunderdale v. United Airlines, No. 14-2911 (7th Cir. 2015). An employer does not need to modify or create an exception to a seniority system to accommodate an employee

under the ADA. Moreover, an employer can modify a seniority system even if it has an adverse effect on the accommodation of a disabled employee. United employed Dunderdale as a "ramp serviceman." Due to a back injury, Dunderdale could not perform the baggage handling tasks performed by most ramp servicemen. He was able to work in the "Matrix position," scanning tags and processing them on a computer. At the time of his injury, "United's policy was that all ramp servicemen with permanent work restrictions could bid for positions in the Product Sort work area, and then United would assign them to the Matrix position." Dunderdale was able to and did work in the Matrix position. United later changed the policy to allow all ramp servicemen to bid for the Matrix position. The change was made in response to complaints that the system did not comply with the collective bargaining agreement. Dunderdale did not have the seniority to retain the position after the change in policy. He was placed on Extended Illness Status ("EIS") for approximately two years until his seniority was sufficient to return to the Matrix position. Dunderdale filed an ADA failure to accommodate claim while he was on EIS leave. The Court held that United properly changed the bidding policy for the Matrix position without violating the ADA. It was a seniority system that did not violate the ADA and there were no "special circumstances" which required deviation from the seniority system.

Spurling v. C & M Fine Pack, Inc., 739 F.3d 1055 (7th Cir. 2014). Plaintiff, a night-shift Forming Inspector/Packer, started falling asleep on the job often. She received discipline for her failures to keep alert, but did not improve. After a final warning, she was suspended until a termination decision could be made. The employer's human resources manager advised plaintiff to get ADA paperwork completed by her doctor. Her doctor marked that she was suffering from a disability covered by the ADA and she provided the information to Fine Pak. Her employer ignored that information and terminated her. Subsequent to her termination, plaintiff's doctor diagnosed her with narcolepsy. Plaintiff sued for discriminatory failure to provide her with reasonable accommodations, and the court held she succeeded in avoiding summary judgment on her claim, since her employer failed to engage in the interactive process that helps identify possible reasonable accommodations for the employee. As soon as it received information regarding her disability, it chose to take the aggressive but precarious action of terminating her. Note the difference between this and *Nobach v. Woodland Village*. Fine Pak was liable because they gave the employee time to identify her disability and request accommodation before terminating her. Nobach's employer was not liable because they terminated her before learning of her religious beliefs.

Part VI – An upcoming case in the Supreme Court

***Green v. Brennan*:** Does a constructive discharge claim accrue and the statute of limitations begin to run (a) on the date of the last discriminatory act or retaliation by the employer or (b) when the employee decides to quit? The Tenth Circuit held that it runs from the date of the last act by the employer, otherwise, it would put the running of the statute of limitations solely in the hands of the plaintiff: "Green does not claim that the Postal Service did anything more to him after December 16, 2009, the day he signed the settlement agreement. He first initiated EEO counseling on his constructive-discharge claim on March 22, 2010, well beyond 45 days later. That was too late." *Green v. Donahoe*, 760 F.3d 1135, 1145 (10th Cir. 2014). The Supreme Court granted certiorari to decide when a constructive discharge claim accrues.