

Race, Religion, and Rickety Rules: The U.S. Supreme Court and Employment Law

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Today's Topics

- Race
- Religion
- Rickety Rules
 - also known as administrative law, or who has the power?
- ... and one more thing.

- Let's have a conversation!

RACE:

*Students for Fair Admission v.
Harvard College (2023)*

SFA v. Harvard (2023)

- U.S. Supreme Court: race-conscious admissions practices at Harvard and the University of North Carolina violate the Fourteenth Amendment's Equal Protection Clause of the U.S. Constitution.
- Decision was limited to college admissions policies — what is the impact on employers with voluntary DEI (diversity, equity, and inclusion) initiatives in place?

What does this mean for you?

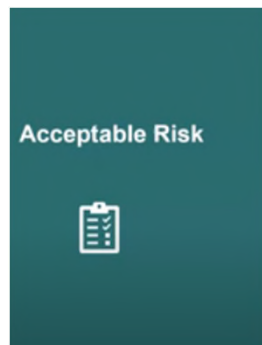
- The law incorporating *SFA* with employment law is developing...
- Does this kill the 'D' and 'E' of DEI? (or IE&D?)
- Employment decisions v. non-employment decisions...
- Looking at individuals / performing holistic analysis
 - In *SFA*, SCOTUS held that universities can still consider an applicant's discussion of how race affected their life, but cannot use race itself as a factor.

What is okay?



- Analytics
- Pay Equity
- Anti-Harassment and Anti-Discrimination Training
- ***Implicit Bias Training***
- Inclusive Leadership Training
- Inclusive Job Postings and Descriptions
- Targeted Job Postings
- Partnership and Collaboration

What is likely okay?



- DEI Workforce Aspirational Goals
- Employee Resource Groups
- Leveraging ERGS for Employee Referral Programs
- ***Scholarship Programs***
- Pipeline Programs
- ***Cultural Competency Workshops***
- Affinity Days and Events
- Employee Surveys and Feedback
- Community Engagement and Social Responsibility
- Equity Audits and Assessments
- Accessibility Initiatives
- Diversity Recruitment Initiatives

What is probably not okay?

Heightened Risk



- ! Rigid or Precise DEI "Aspirational" Goals
- ! Diverse Slate Requirements
- ! Mentorship and Sponsorship Programs
- ! Internship Programs
- ! Supplier Diversity Programs
- ! Leadership Development Initiatives
- ! Tying compensation to DEI Hiring or Promotional Goals

What is definitely not okay?

Unacceptable Risk



- X Quotas or Numerical Goals Based on Race or Gender
- X Making Race or Gender Conscious Employment Decisions
- X Exclusion of Certain Groups
- X Racial or Gender Stereotyping
- X Selective Training or Development Programs
- X Stereotyping in Hiring or Promotion Decisions
- X Ignoring Merit-Based Criteria

Two specific ways we can help

1. Disparate impact testing
 - Hiring, terminations, promotions, performance evaluations
2. Pay equity analysis

RELIGION:

Groff v. DeJoy (2023)

Groff v. DeJoy (2023) - Background

- A postal worker, Gerald Groff, sued the Postal Service for failing to provide him a religious accommodation that would exempt him from working on Sundays.
- Groff is an evangelical Christian who believes Sunday should be devoted to worship and rest, not work.

Groff v. DeJoy (2023) - Background

- USPS had arranged schedules so that Groff wouldn't have to work on Sundays, including having other carriers cover his Sunday shifts.
- Sometimes those efforts failed due to a shortage of available carriers, but Groff still refused to work Sundays.
- Groff eventually resigned after being disciplined for not working Sundays, and then sued his employer, claiming they failed to reasonably accommodate his religious beliefs about Sundays in violation of Title VII.

Groff v. DeJoy (2023) – The Law

- The Law Says: Must grant employees a religious accommodation unless it would pose an “undue hardship.”
- Since the 1970s, the legal standard for showing “undue hardship” was whether the accommodation posed more than a “de minimis cost” on the employer.
- (By comparison, the “undue hardship” standard under the ADA is “significant difficulty or expense.”)

Groff v. DeJoy (2023) – The Law

- SCOTUS struck down the former “de minimis” standard for undue hardship.
- New standard: undue hardship requires substantial increased costs in relation to employer’s conduct of its particular business
- In determining what is “substantial,” employers must take into account “all relevant factors in the case at hand, including the particular accommodation at issue and their practical impact in light of the nature, size, and operating cost of an employer.”
- In other words, the standard is context-dependent.
- But the Court did not decide whether Groff should actually have been accommodated...

Groff v. DeJoy (2023)

- Some hints from the Court re: “substantial” —
 - a coworker’s dislike of a certain religious expression is not substantial
 - impacts on coworkers are not substantial unless there are corresponding effects on the “conduct of the business” that are sufficiently disruptive
 - In situations like Groff’s, employers may not deny the accommodation solely because it would require other workers to work overtime. Employers are instead obligated to evaluate other options, such as voluntary shift-swapping — mutual problem-solving.

What does this mean for you?

- Higher burden on employers when deciding whether to reject an employer’s religious accommodation request.
- Be more careful, use more documentation.
- Looking ahead, employee requests for religious accommodations will need to be more carefully considered and documented, regardless of whether those requests are for exemption from a vaccine mandate or for break, shift, or job duty modifications.

Two More Things:

1. Religious accommodation and LGBT/DEI issues
2. Healthcare / conscience protection laws

RICKETY RULES:

*Loper Bright Enterprises
v. Raimondo (2024)*

Loper Bright v. Raimondo (2024)

- In *Loper Bright*, SCOTUS overturned the 40-year-old *Chevron* doctrine, which required courts to defer to federal agencies' reasonable interpretations of ambiguous statutes
- This is huge in lawyer-world – and could also be huge for any business that's regulated by a federal agency (which is all of you!) ...

Loper Bright v. Raimondo (2024) – The old ways...

- Under the *Chevron* doctrine, when a reviewing court determined that a law passed by Congress was ambiguous, or that Congress had not directly addressed the precise question at issue, the court would defer to the agency's interpretation so long as the interpretation was based on a permissible (reasonable) construction of the statute. (“*Chevron*” deference)
- The *Chevron* doctrine had long been controversial among those who think agencies often behave unreasonably or exceed the powers they've been given by Congress...
- The Core Question: WHO GETS TO DECIDE?
 - *The administrative state? Or the courts?*

Loper Bright v. Raimondo (2024) – This is the way...

- **SCOTUS says:** *The courts get to decide! No more deference!*
 - It “remains the responsibility of the court to decide whether the law means what the agency says.”
 - *Agencies only deserve* “due respect” – the weight of their opinions depend on “all those factors which give [agencies] power to persuade, if lacking power to control...”
- In other words, agencies will have to convince courts that theirs is the best interpretation of the relevant statute—not only that their interpretation is reasonable.
- *Loper* reflects a shift in power and responsibility from the executive branch to the judiciary.
- Under *Chevron*, federal agencies were charged with interpreting federal statutes, but *Loper* commands that only courts are entrusted with this task.

What does this mean for you?

- Consequences of *Chevron*’s demise were seen almost immediately.
 - DOL: tip credit rule struck down in August
 - FTC: non-compete ban struck down
 - DOL ESG rule test case: Oral argument held just 10 days after *Loper* released

What does this mean for you?

- In the near term: more legal uncertainty because federal courts will now take a more active role in scrutinizing agency actions.
- In medium to long term: more stability? underlying administrative law will not be so readily subject to political reversal.
- Defense / Offense
- Recent example from wage and hour litigation

...and one more thing

Muldrow v. St. Louis (2024)

- Sergeant Muldrow worked for the St. Louis Police Department as a plainclothes officer. In 2017 a new supervisor asked, against Muldrow's wishes, that she be transferred out of the department.
- Muldrow went from a plainclothes officer with a take-home car, FBI credentials, and the authority to pursue investigations outside of St. Louis, to a uniformed officer with none of the same perks and who was required to work weekends.
- However, her rank and pay stayed the same.
- Muldrow filed a lawsuit for sex discrimination under Title VII. The harm she alleged she experienced included less opportunity to work on important investigations and network with commanding officers (prestige), and her weekday work schedule.
- Question: Was this enough to state a claim under Title VII?

Muldrow v. St. Louis (2024)

- Before her case reached SCOTUS, the courts had held that Muldrow needed to show significant change in working conditions and material employment disadvantage, which she had not done.
- The lower courts noted that Muldrow's transfer to a new position "did not result in a diminution to her title, salary, or benefits" and had caused "only minor changes in working conditions."

Muldrow v. St. Louis (2024)

- But the Supreme Court disagreed with the lower courts, finding that Muldrow did not need to show harm was “significant” to state a claim under Title VII.
- Instead, she only had to show some injury regarding her employment terms or conditions, which was sufficiently shown.
 - “Although an employee must show some harm from a forced transfer to prevail in a Title VII suit, she need not show that the injury satisfies a significance test.”
 - “Title VII’s text nowhere establishes that high bar.”
 - “To demand ‘significance’ is to add words . . . to the statute Congress enacted.”

What does this mean for you?

- It’s easier for employees (or former employees) to state claims under Title VII
- Claimed harms need not be limited to “economic or tangible” changes in the terms or conditions of a potential plaintiff’s employment.
- New standard is “some harm with respect to an identifiable term or condition of employment, but that harm need not be significant.”
- This lower standard for actionable harm expands the universe of potential discrimination claims based on transfers (or other minimal changes in the workplace).
- *How much difference will this make?* Unclear.

What does this mean for you?

- More challenges to certain kinds of employer DEI programs?
- Before *Muldrow*, plaintiffs had difficulty making out a prima facie case against DEI programs – an employer’s offering of such opportunities to some employees did not constitute a material or significantly adverse action against other employees.
- But now plaintiffs will have a stronger argument that DEI programs constitute a “term, condition, or privilege” of employment and that employees excluded from participation in such programs suffered actionable harm under Title VII.

COMING
ATTRACTIONS?

Challenges to Biden Regulations— SCOTUS-bound?

- **DOL Overtime Rule**
 - Legal challenges pending...will the courts rule before 1/1/25 increase in minimum salary threshold for white-collar employees to \$1,128/week (\$58,656/year)?
- **FTC Non-Compete Rule**
 - Enjoined nationwide in August, but case on appeal in 5th Circuit
- **Pregnant Workers Fairness Act regulations**
 - Pending challenges to coverage of abortion



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