Diversity, Days Off, and Design:

What SCOTUS's Decisions on Affirmative Action in Education, Religious Accommodation, and Corporate First Amendment Rights Mean for Employers

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***SFFA v. Harvard & UNC* (6-3)**

Legal Background:

- Consideration of an applicant's race had been permitted since 1978 under 2 theories: either to deliver the educational benefits of a diverse student body as a constitutionally permissible goal *for an institution of higher education* as part of its academic freedom or to remedy past societal discrimination.
- In 2003, the Supreme Court affirmed the first rationale, adding that since race preferences were inherently suspect, continuing oversight was necessary, and continuing such programs in perpetuity was not appropriate.

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***SFFA v. Harvard & UNC* (6-3)**

Key Facts:

- Both Harvard and UNC explicitly considered an applicant's race, among other factors, throughout the admissions process.
- The consideration of race appeared to have negative consequences for White and Asian applicants. Ex:
  - At UNC, in the second highest academic decile, 83% of Black applicants were admitted, while only 58% of White and 47% of Asian applicants were admitted.
  - At Harvard, Black applicants in the top four academic deciles were 4-10 times as likely to be admitted as Asian applicants.

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***SFFA v. Harvard & UNC* (6-3)**

Ruling: race-conscious decisions in admissions were unconstitutional

- The educational benefits were subjective and not measurable.
- Selecting students based on six racial categories wasn't sufficiently related to the stated educational benefits.
- The practice had a negative effect on others, Asians especially.
- The Court rejected that an applicant's race alone provided diversity of outlook or student background.
- The schools had no end point in sight for the practice.

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***SFFA v. Harvard & UNC* (6-3)**

Immediate Employment Impact

- Should be none, *even for affirmative action employers*.
  - E.O. 11246 *prohibits* race and other protected-status-based actions.
  - E.O. 11246 requires mathematical assessments of employment practices to see if race or gender has an unexplained impact.
- Majority opinion provides talking points for a broad(er) concept of diversity.

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On the Horizon: DEIB Programs

- DEIB programs gone wrong or done wrong will *continue* to generate discrimination litigation.
  - *Ex: Duvall v. Novant Health, Inc.* (on appeal to 4th Cir.): $4.6 million to White male former SVP who introduced evidence that his termination and replacement with two women, one Black, coordinated with Novant's explicit Strategic Plan to increase diversity.
  - Shareholder suits

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***Groff v. DeJoy* (9-0)**

Legal Background

- Title VII requires that employers must accommodate employees' religious practices unless doing so imposed an *undue hardship.*
- In 1977, the Supreme Court held that *undue hardship* meant anything more than a *de minimis* cost.
  - Spoiler alert: even though virtually everyone interpreted the 1977 decision to set a standard of minimal cost = undue hardship, the *Groff* case would "clarify" that that wasn't actually what the 1977 case meant.

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***Groff v. DeJoy* (9-0)**

Facts

- Groff, an evangelical Christian, was a Rural Carrier Associate for USPS.
- When Groff took the position, it didn't require Sunday work.
- In 2013, USPS agreed with Amazon to facilitate its Sunday deliveries.
- In 2016, USPS and Groff's union agreed on how Sunday and holiday deliveries would be handled.

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***Groff v. DeJoy* (9-0)**

Facts

- Though pursuant to the CBA Groff was in line for some Sunday work, he never actually worked Sundays. His post office co-workers and other regional co-workers were assigned his Sunday work.
- Those co-workers complained, and at least one filed a contractual grievance which USPS settled.
- Groff was continually disciplined for his failure to work Sundays, until he resigned, allegedly out of anticipation of termination.

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***Groff v. DeJoy* (9-0)**

Ruling: "Undue hardship" requires a substantial increased cost in relation to the conducting of the employer's overall business, not just anything more than a *de minimis* cost.

- May include impact on co-workers, if those impacts affect business operations.
- Employers must consider all viable options, not just the one the employee requests.
- Court rejected Groff's request to make Title VII's religious accommodation standard synonymous with ADA.

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***Groff v. DeJoy* (9-0)**

Outcome for Groff: Remand.

- Applying the incorrect standard "may have led the court to dismiss a number of possible accommodations, including those involving the cost of incentive pay, or the administrative costs of coordination with other nearby stations with a broader set of employees."

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***Groff v. DeJoy* (9-0)**

On the Horizon: The clash of armchair constitutional scholars and theologians to test the new standard.

EEOC Charge Filing Statistics				
	FY 2019	**FY 2020**	**FY 2021**	**FY 2022**
Total	72,675	67,448	61,331	73,485
Religion	2,725	2,404	2,111	13,814
	3.7%	3.6%	3.4%	18.8%

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***303 Creative LLC v. Elenis* (6-3)**

Legal Background

- Colorado Anti-Discrimination Act (CADA) required businesses of public accommodation to provide full and equal enjoyment of their services/products to any customer without regard to protected classes, including sexual orientation.
- The First Amendment Free Speech clause includes the right to express opinion or refuse to adopt viewpoints of others.
  - Even though the web designer's opinions were religiously-based, this is not a Free Exercise/RFRA case.

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***303 Creative LLC v. Elenis* (6-3)**

Facts

- Lorie Smith was the sole owner and employee of a graphic and website design business.
- She has never created a business webpage which contradicted her personal beliefs, such as by encouraging violence.
- She wanted to expand to designing wedding websites.
- She planned to use fully custom designs and to include her company name on all wedding websites.

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***303 Creative LLC v. Elenis* (6-3)**

Facts

- She didn't go through with her business plan due to fear she'd be found in violation of CADA if she refused to design a website for a same-sex couple.
- Other than this, Ms. Smith was willing to work with clients regardless of sexual orientation (such as to design a website for a business owned by a lesbian).
- Rather than open this line of business and wait to be sued, she sued for preemptive relief.

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***303 Creative LLC v. Elenis* (6-3)**

Ruling

- The wedding websites would be "pure speech."
- The wedding websites would be Ms. Smith's speech.
  - Ms. Smith's relationship to her web designs were compared to a speechwriter who may select his clients, a film director's selecting a movie, a muralist refusing a commission, and other visual artists.
- Ms. Smith couldn't be compelled to repurpose a design she'd make for a heterosexual couple into one for a same-sex couple.

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Ruling

- There are many goods and services which don't implicate the First Amendment and those businesses must serve gay individuals under CADA (and other similar laws).

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***303 Creative LLC v. Elenis* (6-3)**

On the Horizon: *Braidwood Mgmt, Inc. and Bear Creek Bible Church v. EEOC* (5th Cir. June 20, 2023)

- Braidwood manages three entities owned by Steven Hotze, who runs them as "Christian businesses." The businesses together employ about 70 people.
- Mr. Hotze refuses to employ individuals engaged in behavior he finds sexually immoral or gender non-conforming, including gay marriage; he enforces a sex-specific dress code based on an employee's sex at birth.

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- Braidwood sued the EEOC seeking preemptive judgment that it was entitled to exemptions under post-*Bostock* Title VII enforcement under the RFRA, the Free Exercise clause, the Expressive Association clause, and that two of its policies didn't actually violate Title VII.
- Fifth Circuit affirmed Braidwood was due an exemption under RFRA.

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- Fifth Circuit did not decide the two First Amendment justifications since Braidwood entitled to victory under RFRA.

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- It also vacated on technical grounds the lower court's Title VII decisions that
  - employers couldn't discriminate against bisexuals or prohibit employees from taking hormone therapy or undergoing sex-reassignment surgery;
  - but that the employers could enforce sexual ethic policies applied equally to heterosexual and same-sex behavior and that employers could have sex-specific dress codes and sex-specific restrooms.

QUESTIONS & ANSWERS

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