Handling Religious Objections To Abortion-Related Job Duties

By **Jennifer Barna, Susan Sholinsky and Frank Morris Jr.** (November 2, 2023)

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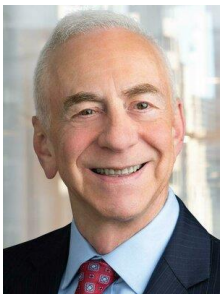

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More than a year ago, on June 24, 2022, the U.S. Supreme Court issued a landmark ruling in Dobbs v. Jackson Women's Health Organization, holding that there is no constitutional right to abortion and overruling 1973's Roe v. Wade and 1992's Planned Parenthood of Southeastern Pennsylvania v. Casey.[1]

Since that time, employers have had to consider a variety of resulting issues related to human resources, including corporate messaging,[2] travel benefits[3] and abortion-related leave.[4]

Further, a particular concern for health care providers, including retail pharmacy employers, has been the potential for increased employee requests to be exempt from performing abortion-related medical procedures or from being involved in dispensing abortion-related medication.

Adding to this concern, employers must now take another significant Supreme Court decision into consideration. Issued on June 29, Groff v. DeJoy requires employers to demonstrate a substantial cost — that is, more than a de minimis expense — to claim an undue hardship when denying a request for religious accommodations under Title VII of the Civil Rights Act.[5]

While employee requests for exemptions in the abortion context are certainly not new — and are not limited to health care providers — it is important to remember that these requests directly implicate a number of federal, state and potentially local laws governing the employer-employee relationship.

Title VII and Similar State and Local Laws

Once an employee advises an employer about their sincerely held religious belief, practice or observance that conflicts with a work duty, Title VII requires the employer — other than those exempted as religiously affiliated organizations — to consider whether a reasonable accommodation exists that can be provided to the employee. Title VII does not, however, require an employer to accommodate the employee if it would pose an undue hardship to the business.

In Trans World Airlines Inc. v. Hardison, a case focused on employees' seniority rights, the 1977 Supreme Court decision included the phrase "de minimis cost" in its discussion of the undue hardship analysis, and this statement undergirded subsequent interpretations of Title VII for 45 years.[6]

However, in Groff, a unanimous Supreme Court declared that it had not intended for Hardison to create a de minimis cost standard for all such analyses, holding that a higher threshold is appropriate. Rather, according to the Supreme Court, whether a denial of a religious accommodation request is justified due to substantial increased costs must be evaluated case by case.[7]

Many states, and some cities and counties, have anti-discrimination laws that, similar to Title VII, require an employer to reasonably accommodate an employee whose sincerely held religious belief, practice or observance conflicts with a work requirement, unless doing so would pose an undue hardship.

In some cases, state or local law may differ from Title VII's "substantial increased cost" standard set forth in Groff. For example, the standard in New York state for demonstrating whether a religious accommodation will cause an undue hardship requires a "significant" expense or difficulty.

In the context of a hospital or medical practice, an employer faced with an employee's request to be exempt from performing abortion-related procedures might consider whether this type of accommodation would lead to disruption of patient care and, if so, whether that amounts to an undue hardship.

Ultimately, reasonable accommodation analyses are fact-specific, and the employer and employee are required to engage in a good faith interactive process to determine what accommodation is appropriate, and whether the employer can provide it absent undue hardship.

In the pharmacy setting, employers must consider whether the inability of one employee to dispense medication will create a denial of customer access to prescribed abortion-related medication, and if so, whether that is so disruptive as to qualify as an undue hardship.

In this context, since Dobbs, several former employees have filed lawsuits against retail pharmacies asserting claims under Title VII and/or state law that their pharmacy employers wrongfully refused their religious-based requests for exemption from dispensing what the employees defined as abortion-related medications.

For example, in Strader v. CVS Health Corp., pending in the U.S. District Court for the Northern District of Texas, the plaintiff — formerly employed by CVS as a nurse practitioner — claimed that she was wrongfully terminated in violation of Title VII and Texas law after CVS revoked a prior religious accommodation that allowed her to refuse to prescribe contraceptive or abortifacient drugs. CVS has denied the claims. The case is in the discovery stage.

Additionally, in Schuler v. CVS Pharmacy Inc., a single Title VII claim was filed in the U.S. District Court for the District of Kansas on similar grounds, a matter that settled and was administratively closed on Oct. 17.[8]

Federal Statutes With Conscience Protections

Provisions of the Public Health Services Act, or PHS Act, known as the Church Amendments, codified at Title 42 of the U.S. Code, Section 300a-7,[9] were enacted after the issuance of Roe v. Wade.

They provide that entities that receive a grant, contract, loan or loan guarantee under the PHS Act and other statutes are prohibited from discriminating against any physician or other health care personnel who refused to perform or assist in the performance of certain lawful procedures, including abortion, on moral or religious grounds.

Another amendment to the PHS Act, enacted in 1996, prohibits government entities from

discriminating against any health care entity that refuses to obtain or undergo training in the performance of abortions.[10]

Additionally, while not an amendment to the PHS Act, the so-called Weldon Amendment was originally attached to a congressional appropriations act in 2009, and has been perennially readopted ever since.[11] The Weldon Amendment prohibits discrimination against any health care entity, including individual health care professionals, hospitals, health maintenance organizations, or other plans or networks, because the entity does not provide, pay for, cover or refer for abortion care.

Finally, the Affordable Care Act contains conscience protections for health care providers within the ACA's exchange programs.[12]

All of these statutory provisions are collectively referred to as the federal health care provider conscience protections. They are addressed by U.S. Department of Health and Human Services regulations[13] that, despite not being required, were first promulgated in 2008, have been revised several times, and are again the subject of a new proposed rule.[14]

Notably, and in contrast to Title VII and similar state laws, the federal health care provider conscience protections do not confer a private right of action. Instead, the Office for Civil Rights within HHS possesses broad enforcement tools, such as making enforcement referrals to the U.S. Department of Justice and remediating the effects of discrimination through funding components within HHS.

State Conscience Clause Laws

Most states have conscience clause laws that allow health care professionals to refuse to provide care related to abortion services based on religious or moral objections, while other states have broader conscience clauses that allow professionals to object to providing a wider band of services that could extend to prescribing or dispensing contraception, as outlined in a 2021 report published by the National Library of Medicine's National Center for Biotechnology Information.[15]

However, some conscience clause laws safeguard patients' rights to receive continuing health care services, as in Delaware,[16] Maryland[17] and Pennsylvania,[18] or expressly exempt medical emergencies, as in California[19] and Nevada.[20] New Jersey law emphasizes the need for practice sites to effectively distribute legal prescriptions without undue delay in spite of staff conscience objections with duty-to-dispense requirements.

A recent case provides an example of how claims invoking these conscience clause laws work.

In Casey v. MinuteClinic Diagnostic of Virginia LLC., pending in the U.S. District Court for the Eastern District of Virginia, a former MinuteClinic nurse practitioner brought several claims alleging she was wrongfully terminated after the employer stopped honoring her written objection that she could not "participate in providing abortion or abortion-causing drugs," which she defined to include "hormonal contraceptives and any drugs or devices that prevent implantation of embryos."[21]

In her initial complaint, and a recently filed amended complaint, Paige Casey brought claims under Title VII, the Virginia Human Rights Act[22] and Virginia's freedom of conscience law,[23] which, among other provisions, allows any person who objects in writing to

abortions on ethical, moral or religious grounds to not be required to participate in procedures that will result in an abortion.

The law also provides that the refusal of a person, hospital or other medical facility to participate "shall not form the basis of any claim for damages on account of such refusal or for any disciplinary or recriminatory action against such person, nor shall any such person be denied employment because of such objection or refusal."

The extent to which such claims are viable under Title VII and similar state laws remains a question and, of course, will always be fact-driven.

In a bench order issued on Sept. 28, the court partially granted MinuteClinic's motion to dismiss the failure to accommodate and disparate treatment Title VII claims on statute of limitations grounds, along with a failure to accommodate claim under the Virginia Human Rights Act.

However, the court permitted a Virginia Human Rights Act disparate treatment claim to stand, along with the unchallenged Virginia freedom of conscience claim. Although MinuteClinic filed an answer denying these claims on Oct. 12, the parties advised the court on Oct. 18 that they had agreed to settle. On Oct. 23, the parties filed a stipulation of dismissal, which the court entered on the same day.

Conclusion

Ultimately, employee requests to be exempt from certain job duties in the abortion context will necessarily be fact-specific. Employers faced with such requests should consider not just the standard set forth in Groff — to the extent Title VII applies to them — but all applicable federal, state and local laws.

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[1] https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf.

[2] https://www.workforcebulletin.com/2022/06/24/preparing-corporate-messaging-in-the-wake-of-dobbs/.

[3] https://www.workforcebulletin.com/2022/06/17/employers-are-you-ready-for-a-possible-post-roe-workplace/.

[4] https://www.ebglaw.com/insights/abortion-related-time-off-after-dobbs-how-the-fmla-and-other-laws-might-apply/.

[5] https://www.supremecourt.gov/opinions/22pdf/22-174_k536.pdf.

[6] Trans World Airlines v. Hardison, 432 U.S. 63 (1977), https://www.loc.gov/item/usrep432063/.

[7] We explained this further here: https://www.workforcebulletin.com/2023/06/30/the-supreme-court-has-weighed-in-employers-considering-title-vii-religious-accommodation-requests-now-face-a-heightened-standard/.

[8] https://unicourt.com/case/pc-db5-schuler-v-cvs-pharmacy-et-al-1312908.

[9] https://www.hhs.gov/sites/default/files/ocr/civilrights/understanding/ConscienceProtect/42usc300a7.pdf.

[10] https://www.hhs.gov/sites/default/files/ocr/civilrights/understanding/ConscienceProtect/42usc238n.pdf.

[11] https://www.hhs.gov/sites/default/files/ocr/civilrights/understanding/ConscienceProtect/publaw111_117_123_stat_3034.pdf.

[12] https://www.govinfo.gov/app/details/PLAW-111publ148.

[13] https://www.federalregister.gov/documents/2019/05/21/2019-09667/protecting-statutory-conscience-rights-in-health-care-delegations-of-authority.

[14] https://www.federalregister.gov/documents/2023/01/05/2022-28505/safeguarding-the-rights-of-conscience-as-protected-by-federal-statutes.

[15] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9117776/.

[16] https://delcode.delaware.gov/title16/c025/ (see Section 2508).

[17] https://codes.findlaw.com/md/health-general/md-code-health-gen-sect-20-214/.

[18] https://www.pacodeandbulletin.gov/Display/pacode?file=/secure/pacode/data/049/chapter27/s27.103.html&d=reduce.

[19] https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=HSC§ionNum=123420.

[20] https://www.leg.state.nv.us/nrs/nrs-632.html#NRS632Sec475 (see Section 632.475).

[21] https://www.pacermonitor.com/public/case/46369739/Casey_v_MinuteClinic_Diagnostic_of_Virginia,_LLC_et_al.

[22] https://law.lis.virginia.gov/vacode/title2.2/chapter39/section2.2-3905/.

[23] https://law.lis.virginia.gov/vacode/title18.2/chapter4/section18.2-75/#:~:text=In%20addition%2C%20any%20person%20who,other%20medical%20facility%20to%20participate.