CUTTING EDGE ISSUES IN EMPLOYMENT LAW

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STATE MEDICAL MARIJUANA LAWS AND THE ONGOING CONFLICT WITH THE U.S. CONTROLLED SUBSTANCE ACT

As of September 2015, twenty-three states and the District of Columbia have enacted laws to legalize the production, sale, purchase and use of marijuana for medical purposes. The states that have passed medical marijuana legislation so far are:

Alaska*	*Alaska Stat. §§ 17.37.10 et seq.*
Arizona	*Ariz. Rev. Stat. §§ 36-2801 et seq.*
California	*Cal. Health & Safety Code §§ 11362.7 et seq.*
Colorado*	*Colo. Rev. Stat. §§ 18-18-406.3 and 25-1.5-106*
Connecticut	*Conn. Gen. Stat., ch. 420f, §21a-408*
Dist. of Columbia	*D.C. Code §§ 7-1671.01 et seq.*
Delaware	*Del. Code, Tit. 16, §§ 4901A et seq.*
Hawaii	*Haw. Rev. Stat. §§ 329-121 et seq.*
Illinois	*410 Ill. Comp. Stat.130, §§ 1-999*
Maine	*22 Me. Rev. Stat. §2421*
Maryland	*Md. Public Health Code §§ 13-3301 et seq.*
Massachusetts	*2012 Mass. Acts, ch. 369*
Michigan	*Mich. Comp. Laws §§333.26421 et seq.*
Minnesota	*Minn. Stat. §§ 152.22-152.37*
Montana	*Mont. Code Ann. §§ 50-46-301 et seq.*
Nevada	*Nev. Rev. Stat. 453A*
New Hampshire	*N.H. Rev. Stat. §§ 126-X: 1-11*
New Jersey	*N.J. Stat. Ann. §§ 24:6I et seq.*
New York	*N.Y. Public Health Law, §§3360 et seq.*
Oregon*	*Ore. Rev. Stat. §§ 475.300 et seq.*

* The states of Alaska, Colorado, Oregon and Washington have enacted laws that legalize marijuana for recreational purposes as well. The laws of those four states therefore also contemplate the use of marijuana for medical purposes. For purposes of this article, the laws of those states will be considered only insofar as they contemplate the use of marijuana for medical care or treatment. The District of Columbia has enacted a similar law, but the United States Congress has refused to permit it to become operational.

Rhode Island	*R.I. Gen. Laws, §§ 21-28.6 et seq.*
Vermont	*18 Vt. Stat. Ann. §§ 4471 et seq.*
Washington*	*Wash. Rev. Stat. §§ 69.51A et seq.*

Although the laws of the states listed above vary in their particulars, they all share some essential similarities. They decriminalize the growth, production, transportation, sale, purchase, or use of marijuana, or other cannabis-containing products derived from marijuana, when done in connection with a "prescription" from a physician.[1] The state laws also typically regulate the role of the "caregiver" in procuring and providing marijuana to a patient for whom it has been medically prescribed. The various state laws also contain a wide variety of licensing requirements for those individuals who are involved in producing, procuring, and providing marijuana to patients with medical needs. And finally the states' laws typically contain various restrictions and limitations on the amount of marijuana that may be cultivated, sold, purchased, or possessed at any one time. For purposes of this paper, the incremental differences among the state laws on these issues are not particularly important.

Although the medical science is not yet fully developed, there is at least some developing consensus that the use of marijuana may help to alleviate symptoms of nausea, loss of appetite, insomnia, and other painful side effects of chemotherapy or other aggressive pharmacological treatments for cancer or other serious illnesses, and may also provide relief from glaucoma, muscle spasms caused by multiple sclerosis or other neurological diseases, seizure disorders, Crohn's disease, and perhaps other illnesses. Although the typical manner of ingesting marijuana is to smoke it, it may also be eaten when baked into cookies, bread, or brownies, and can also be consumed either in liquid form as a tincture, or in candies such as gum drops, lollypops, etc. In fact, some state medical marijuana laws specifically exclude smoking marijuana from the means of ingestion that are considered to be legal under the statute. As the science develops, and as the states continue to experiment with varying degrees of legalization,

[1] Most, if not all, of the states' laws do not use the terminology of "prescription" to describe the role of the physician, perhaps because marijuana is not yet an FDA-approved pharmaceutical that is available only by prescription from a licensed medical provider, and that federal and state law may criminalize the prescription of a drug that is a Schedule I drug under the U.S. Controlled Substances Act. Instead, the states use more euphemistic terms such as "recommendation", "suggestion", or otherwise, to describe the role of the physician in identifying marijuana as a palliative therapy for patients suffering from a variety of illnesses.

it seems almost certain that the number of states to enact medical marijuana laws will only increase.

At the federal level, however, essentially nothing has changed. As a matter of law, marijuana is a Schedule I drug under the United States Controlled Substances Act ["CSA"], and the growing, selling, buying, or using of marijuana, for any purpose, is a crime. 21 U.S.C. §§ 841(a)(1), 844(a), 812(b)(1)(A)-(C). Under federal law there is no exemption or carve-out for the sale or use of marijuana for medical reasons, with or without a doctor's prescription. It is simply illegal. Thus, irrespective of whether a marijuana seller, grower, purchaser, provider, prescriber, caregiver, or other possessor or user of marijuana is compliant with a state medical marijuana law, that individual is proceeding in clear violation of the CSA.

There is currently pending before the United States Senate a bill, S. 683, entitled the "Compassionate Access, Research Expansion, and Respect States Act of 2015" [the "CARERS Act of 2015"], which is intended to reduce some of the conflict between federal criminal law and the various state medical marijuana laws on the books. (A copy of the bill in its current iteration is attached to this paper.) Whether, and to what extent, there is any likelihood that the bill can become law in this Congress, in this quadrennial election season, is an open question. In the meantime, the Department of Justice has issued a Memorandum for all United States Attorneys, entitled "Guidance Regarding Marijuana Enforcement", intended to be "a guide to the exercise of investigative and prosecutorial discretion" in the enforcement of marijuana-related activity under the U.S. Controlled Substances Act. The Memorandum states essentially that the DOJ has bigger and more important priorities than to prosecute marijuana operations that are proceeding in accordance with state medical marijuana laws:

> "In jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana, conduct in compliance with those laws and regulations is less likely to threaten federal priorities [pertaining to organized, large-scale, criminal drug trafficking operations]. . . . In those circumstances, consistent with the traditional allocation of federal-state efforts in this area, enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity. . . . [I]t likely [is] not an efficient use

> of federal resources to focus enforcement efforts on seriously ill individuals, or on their individual caregivers."

Memorandum for All United States Attorneys (Re: *Guidance Regarding Marijuana Enforcement*), from Deputy Attorney General James M. Cole, dated August 29, 2013 (copy attached).

The conflict between federal and state law in this area is illustrated in cases such as the *Barbuto v. Advantage Sales and Marketing, LLC* case that was initially commenced as a Charge of (Handicap) Discrimination in the Massachusetts Commission Against Discrimination in Boston, pursuant to *Mass. Gen. Laws,* ch. 151B. The matter is presently in litigation and may, by the time of this publication, have been re-filed in the Superior Court. (A copy of the Verified Charge of Discrimination in the *Barbuto* case is attached hereto.)

In a number of other jurisdictions, appellate courts have affirmed an employer's termination of an employee for medical marijuana use that was legal under state law, but, of course, unlawful under the CSA. *See, e.g., Coats v. Dish Network, LLC,* 2015 Co. 44 (2015)(employee's termination for use of medical marijuana, off-hours, at home, was not a "lawful" activity, and therefore could suffice as grounds for termination); *Ross v. Ringwire Telecommunications, Inc.,* 174 P.3d 200 (Cal. 2008)(California state medical marijuana law does not compel employers to accommodate the use of "illegal drugs"); *James v. City of Costa Mesa,* 700 F.3d 394 (9th Cir. 2012)(municipality's closure of medical marijuana dispensary does not violate Americans With Disabilities Act because marijuana is an illegal drug under the CSA).

***OBERGEFELL V. HODGES* AND SAME-SEX MARRIAGE**

On June 26, 2015, the United States Supreme Court held that the right to marry is a fundamental right under the Constitution, and that under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, same-sex couples may not be deprived of that right and that liberty. *Obergefell v. Hodges,* 576 U.S. _____, 135 S. Ct. 2584 (2015). The case actually involved a series of cases brought in U.S. District Courts in Michigan, Kentucky, Ohio, and Tennessee, all of which states defined marriage as a union between one man and one woman as a matter of law. There were

essentially two sets of claims asserted: (1) that the Fourteenth Amendment requires a state to issue a marriage license to two persons of the same sex, and (2) that the Fourteenth Amendment requires a state to recognize same-sex marriages licensed and performed in another state which legally recognized such a right, irrespective of whether a state recognized same-sex marriages performed within its own borders. Each plaintiff prevailed in the District Courts, and the state officials in each state responsible for enforcing its marriage laws appealed to the Sixth Circuit Court of Appeals, where all of the cases were consolidated. The Court of Appeals reversed, finding that a state has no constitutional obligation to issue marriage licenses to same-sex couples, or to recognize same-sex marriages performed elsewhere.

Following the granting of a petition for *certiorari* to the U.S. Supreme Court, the plaintiffs prevailed, in a 5-4 decision authored by Associate Justice Kennedy, and joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan. There were no concurring opinions. Each of the dissenting Justices – Chief Justice Roberts, and Associate Justices Scalia, Thomas, and Alito – wrote separate opinions, joined in varying degrees by the other dissenters. Much of Justice Kennedy's Opinion of the Court focused on the tradition of marriage as an institution of fundamental value and importance in the Nation's history, but emphasizing also the extent to which the institution has evolved and changed over the years, and the extent to which those changes have been recognized by the Supreme Court in prior cases; for example, the *Loving v. Virginia* case, in which the Court, in 1967, struck down state law bans on interracial marriage. Justice Kennedy also summarized the history of cases coming before the Court on the subject of gay rights; for example, *Lawrence v. Texas,* in which the Court invalidated state laws criminalizing acts of same-sex intimacy on both Due Process and Equal Protection grounds.

The Opinion identified four principles demonstrating why the right to marry is fundamental under the Constitution. First, the right to personal choice in a marriage partner is inherent in the concept of individual autonomy; *i.e.,* "liberty". Second, the institution of marriage supports a two-person union in a manner unlike any other, in its importance to the two persons committed to it. Third, the institution of marriage provides a protective framework for the safeguarding of children and families – even

where married couple, homosexual or otherwise, elect not to procreate or raise children. And fourth, marriage is a "keystone" of the Nation's social order. Having concluded that recognizing same-sex marriage is required in order not to deprive a person of a fundamental right, Justice Kennedy also proceeded to conclude that denying the institution of marriage also infringed the Equal Protection Clause, the implication being that to do so "abridges central precepts of equality."

The dissents were of varying levels of acrimony and hostility to the majority opinion, but all of them derived from a common theme; *i.e.,* that the Court was engaging in overreach in recognizing a "fundamental right" that was nowhere to be found in the Constitution, or that should at least be left to the states to recognize in the first instance, especially in a matter – civil marriage law – that had long been left to the states. Perhaps the most telling dissenting comment came from Chief Justice Roberts, who observed that the majority opinion failed to address the question of whether a state's infringement or burdening of even a fundamental right, or its disparate treatment of same-sex and opposite-sex couples, might be rationally related to the legitimate state interest of preserving the traditional institution of marriage, and was thus constitutionally sound.

The bottom line, of course, is that no state, or political subdivision thereof, may now decline to issue a marriage license to, or perform a marriage for, or recognize another state's marriage for a same-sex couple, irrespective of what that state's statutory, common, or constitutional law may say. Whether, and to what extent, the recognition of same-sex marriage will have any effect on the construction and application of laws such as the Family Medical Leave Act, or other state and federal laws that apply to "families" or "spouses" would seem to obvious, given the sweeping language of the Court's opinion in *Obergefell.* But given the remaining societal and cultural objections and resistance to the whole notion of same-sex marriage in some quarters, what may seem obvious in principle may turn out not to be in practice.

EEOC v. ABERCROMBIE & FITCH **AND DISCRIMINATORY "MOTIVE"**

In another case issued this past term, the U.S. Supreme Court confronted an issue that more and more employers are facing: the extent to which they must accommodate their employees' religious practices. Abercrombie & Fitch ["A&F"], a well-known, trendy clothing retailer, requires its retail sales clerks to adhere to a certain dress code, known as the Look Policy. Among other things, the Look Policy prohibits the wearing of "caps" – a term that is otherwise undefined. Samantha Elauf, a practicing Muslim, interviewed for a job as a sales clerk, wearing a headscarf. Her religion and her attire went unmentioned during her interview, but the A&F employee who interviewed her "believed" Ms. Elauf had worn the headscarf because of her religious faith. When the A&F employee informed her superior of her belief, the superior told her not to hire Ms. Elauf because wearing the headscarf would violate the Look Policy. The Equal Employment Opportunity Commission sued A&F on Ms. Elauf's behalf. Summary judgment in favor of Ms. Elauf was reversed in the 10th Circuit Court of Appeals, on the grounds that an employer cannot be held liable for discrimination under Title VII of the Civil Rights Act unless the employee (or prospective employee) provides the employer with actual knowledge of her need for a reasonable accommodation of her religious practice – in this case, the need to wear a headscarf in violation of the employer's dress code.

The U.S. Supreme Court reversed the Court of Appeals, and remanded the matter for trial. *EEOC v. Abercrombie & Fitch Stores, Inc.,* 575 U.S. _____, 135 S.Ct. 2028 (2015). Justice Scalia, writing for an 8-1 majority[2], focused on the distinction between an employer's "knowledge" of its (prospective) employee's need for a reasonable accommodation, and its "motive" in electing not to hire the person. Under Title VII, it is an employer's *motive* that is critical in determining whether the plaintiff can prove intentional discrimination; *i.e.,* disparate treatment. The statute prohibits a failure or refusal to hire "*because of* . . . religion", which means that the applicant's religion cannot be a motivating factor in the employment decision, irrespective of the employer's

[2] Justice Thomas dissented. Justice Alito concurred in the judgment, and wrote a separate concurring opinion.

actual knowledge of the that person's religion or her need for a reasonable accommodation. Thus,

> "An employer who has actual knowledge of the need for an accommodation does not violate Title VII by refusing to hire an applicant if avoiding that accommodation is not his *motive.* Conversely, an employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed."

Id.

In Ms. Elauf's case, she had not expressly requested an accommodation regarding her wearing a headscarf; nor had A&F expressly asked about it. Given that the 10th Circuit was applying an "actual knowledge" standard to the discrimination claim against A&F, and that it was essentially uncontested that A&F had no such actual knowledge, it followed that summary judgment in favor A&F was inescapable. But the correct standard of liability is "motivating factor", and by that standard, it was apparent that summary judgment in favor of A&F was not sustainable. Although Ms. Elauf had not expressly requested a reasonable accommodation, the A&F employees who reviewed her application had at least a strong suspicion that her wearing of a headscarf was an aspect of her religious practice. As the decision not to hire her was motivated, at least in part, by A&F's desire to avoid having to make an accommodation of that religious practice, the summary judgment in favor of A&F was reversed, and the matter was remanded for further proceedings; specifically, on the subject of "motivation".

The case thus stands for several important propositions. First, it is not enough for employers to wait passively for employees or potential employees to ask explicitly for religion-based reasonable accommodations. Better to ask. If, even in the absence of actual knowledge of a religion-based need for an accommodation, an employer makes an adverse employment decision under circumstances where it can reasonably be inferred that the employer was motivated by a desire not to accommodate an employee's religious beliefs or practices, a viable Title VII claim may be made out. It will at the very least survive the filing of a motion for summary judgment. Second, it is clear that accommodations required by religious practices are accorded favored treatment under the statute. "Religion" under Title VII is defined to include "all aspects

of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate . . . a religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. §2000e(j). Thus, a neutral employment policy may not require accommodations with regard to an employee's secular practices in a disparate treatment case. "But when an applicant requires an accommodation as an 'aspec[t] of religious . . . practice,' it is no response that the subsequent 'fail[ure] . . .to hire' was due to an otherwise-neutral policy. Title VII requires otherwise-neutral policies to give way to the need for an accommodation." *Id.*

The issue that was explicitly *not* reached by the Court was the question of whether a plaintiff can sufficiently prove motive in the absence of some proof that the employer at least *suspected* that the plaintiff's practice is a religion-based practice. Here, A&F plainly *did* suspect that Ms. Elauf's headscarf was worn for religious purposes, and the issue was therefore not briefed or argued before the Court. In another case, however, it may be that a defendant employer may be able to make a compelling argument that it cannot discriminate "because of a religious practice" unless it knows or at least suspects the practice to be religious in nature, especially if there is no express communication between employer and employee on the subject.

BURWELL V. HOBBY LOBBY **AND THE DEFENSE OF "RELIGIOUS LIBERTY"**

In 2014, the U.S. Supreme Court held that the contraceptive mandate contained in the Affordable Care Act [the "ACA"], as applied to closely held for-profit corporations, violates the Religious Freedom Restoration Act ["RFRA"].[3] *Burwell v. Hobby Lobby Stores, Inc.,* 573 U.S. ____, 134 S. Ct. 2751 (2014).

The ACA requires employers with more than 50 employees to offer group health insurance to its employees with "minimum essential coverage", including coverage for FDA-approved contraceptive methods. Exemptions from the contraceptive mandate are provided for religious employers, and religious non-profit organizations. The plaintiffs were closely held for-profit corporations owned by individuals who ran their businesses

[3] Because the Court's decision was based on the provisions of a federal statute, the Court found it unnecessary to reach the broader First Amendment arguments that were made by the plaintiffs.

in accordance with their religious beliefs. Included among those beliefs was the conviction that the contraceptive methods included within the ACA were considered to be abortifacients. Thus, they – the individual owners of the corporations - objected to making group health insurance available to their employees that covered such methods, on the grounds that it was "immoral and sinful for them to intentionally participate in, pay for, facilitate, or otherwise support" them. By declining to provide coverage for their employees with the mandated contraception coverage, the plaintiffs face having to pay penalties of $100 per day for each affected employee, if group health insurance is offered without the contraception coverage, or $2,000 per employee per year, if group health insurance is dropped altogether.

The plaintiffs sued the U.S. Department of Health and Human Services ["HHS"] in District Courts in the Third and Tenth Circuits, seeking injunctions against the enforcement of the contraception mandate, on the grounds that the mandate substantially burdened their exercise of religion, in violation of RFRA. The Third Circuit Court of Appeals ultimately ruled in favor of HHS, holding that a for-profit secular corporation cannot engage in religious exercise within the meaning of RFRA, and that the individual owners of the corporations could not assert their "religious exercise" claims because the ACA mandates applied to the corporations and not to the individuals. The Tenth Circuit ruled in favor of the plaintiffs, holding that the corporations subject to the ACA mandate were "persons" under RFRA, and therefore had standing to bring suit under the statute, and that the mandate substantially burdened the company's exercise of religion. The two cases were consolidated for purposes of review on petitions for certiorari to the U.S. Supreme Court, where Justice Alito delivered the opinion of a 5-4 majority.[4]

Justice Alito explained the statutory framework of RFRA. A government action may not impose a substantial burden on "a person's" exercise of religion, unless the action is shown to serve a compelling government interest, and is the least restrictive means of serving that interest. It was first necessary to answer the question of whether RFRA even applied to a closely held, for-profit corporation, and the Court concluded

[4] Justice Kennedy, who joined the majority opinion, also wrote a separate concurrence. Justice Ginsburg wrote a dissent, joined by Justices Sotomayor, Breyer, and Kagan.

that it did. Among other things, the Court noted that corporations are legal "fictions" and that corporations, separate and apart from the human beings who own, run, and are employed by them, cannot do anything at all. In addition, RFRA did not intend to put "merchants" in the difficult position of having to choose between giving up the right to seek judicial protection of their religious liberty, or foregoing the benefits of corporate existence. Thus, the Court concluded that corporations – or at least, closely held corporations – were "persons" for purposes of RFRA.

The Court also concluded that such corporations can, in fact, engage in religious exercise, rejecting arguments made by HHS, among others, that (1) distinction should be drawn between for-profit and non-profit corporations, (2) it would be impracticable to ascertain what a corporation's religious "beliefs" were, especially if the corporation were larger than the closely held corporate entities that were the plaintiffs in these cases. Reading Justice Ginsburg's dissent, it is apparent that this issue – whether a corporation can actually "exercise religion" – was the one that divided the Court most intensely. Perhaps for that reason, Justice Alito attempted to emphasize the limited nature of the Court's ultimate holding: it did not mean that corporations could opt out of any law or government program on grounds that it was incompatible with religious beliefs; it did not mean that corporate invocation of "religious liberty" required the imposition of disadvantages on numerous others, or that the general public be required to "pick up the tab" for the corporation's refusal to pay its own way; it did not mean that religious liberty claims can be successfully asserted against broad swaths of the ACA.

Having ruled that the plaintiff corporations were "persons" under RFRA, and that they could exercise religion under that statute, the remainder of the Court's analysis easily fell into place. The burden placed on the plaintiff's exercise of religion – a financial one, as described above – was plainly substantial. It could have cost the plaintiff anywhere from $800,000 to $475 million a year not to comply with the ACA contraception mandate. The Court concede the point of whether such a burden serves a compelling state interest: "[w]e will assume that the interest on guaranteeing cost-free access to . . . contraceptive methods is compelling within the meaning of RFRA." The only remaining issue therefore was whether the ACA mandate was the least restrictive

method of furthering that compelling government interest. The Court held that it plainly was not.

> "The most straightforward way of doing this would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections."

Compared to the overall cost of the entire ACA, the cost of having to provide this one benefit, to a finite, relatively small universe of beneficiaries, was not expected to be unreasonably large.

Having thus concluded that closely held for-profit corporations were "person" and were capable of "exercising religion" under RFRA, that the ACA contraception mandate imposed a substantial burden on the plaintiff corporation's religious exercise, and that the ACA mandate was not the least restrictive means of securing the government's concededly compelling interest in providing that health service to women, the Court concluded that the ACA violated the plaintiff's rights under RFRA.

The ultimate question remains, of course. What is the ultimate reach of "religious liberty" under RFRA? Is it implicated in the following circumstances:

- Providing employee benefits such as family medical leave to same sex, married couples?
- Couples re-marrying after divorce? Interracial or interfaith marriages?
- Hiring employees of various faiths and creeds? Muslims? Jews? Catholics? Mormons? Unitarians and other "progressive" Christian denominations and sects?
- Complying with other aspects of the ACA, despite Justice Alito's protest to the contrary? Blood transfusions? End-of-life palliative care?
- How far out of the mainstream can religious beliefs be in order to reap the benefits and protections of RFRA?
- How intrusive can courts be in ascertaining whether a "belief" is a sincerely held religious conviction, or a pretext for bias, prejudice, bigotry, political ideology, etc.?

TEXAS DEPT. OF HOUSING V. INCLUSIVE COMMUNITIES AND THE FUTURE OF "DISPARATE IMPACT" CLAIMS OF DISCRIMINATION

The Supreme Court, in *Texas Dept. of Housing and Community Affairs v. The Inclusive Communities Project, Inc.,* 576 U,S. _____ (2015), addressed the continuing vitality of "disparate impact" claims of discrimination in the context of housing cases.

Broadly stated, discrimination claims proceed on one of two basic theories: disparate treatment and disparate impact:

> "In contrast to a disparate-treatment case, where a 'plaintiff must establish that the defendant had a discriminatory motive,' a plaintiff bringing a disparate-impact claim challenges practices that have a 'disproportionately adverse effect on minorities' and are otherwise unjustified by a legitimate rationale."

Id., citing *Ricci v. DeStefano,* 557 U.S. 557 (2009). The genesis of disparate impact claims is *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971), in which the Court concluded that a plaintiff in an employment discrimination case brought under Title VII of the Civil Rights Act may proceed on a disparate impact theory of liability in order to challenge the legality of certain job qualifications that appeared to be facially neutral, but which the ***effect*** of reducing the number of minority employees. The Court's reasoning was based on the language of the statute that said:

> "It shall be an unlawful employer practice for an employer –
>
> . . . .
>
> to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities ***or otherwise adversely affect his status as an employee***, because of such individual's race, color, religion, sex, or national origin."

42 U.S.C. §2000e-2(a)(2)(emphasis added). The language highlighted in the excerpt above was considered by the Court to focus on the consequences of a particular employment practice, not simply its motivation, and a substantial body of disparate-impact case law has been developed in the 40+ years since *Griggs*.

The Fair Housing Act contains similar but not precisely equivalent language:

> "[It shall be unlawful to] refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, ***or otherwise make available*** or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."

42 U.S.C. §3604(a)(emphasis added).

The plaintiffs in the *Texas Dept. of Housing v. Inclusive Communities* case challenged a federal tax credit program that allocated more credits in predominantly low-income, African-American communities, as opposed to more affluent, suburban communities, with the (unintended) result that pre-existing patterns of racial segregation between the inner city and the surrounding suburbs were caused to continue to exist. They brought suit under the Fair Housing Act on a disparate impact theory of liability, which had not been previously tested in the Supreme Court. Amid some concerns that the Court might take the opportunity to effectively reverse *Griggs* and dispense with disparate impact liability in all contexts, including employment, the Court took the case on a petition for certiorari to examine as a matter of first impression whether a housing discrimination claim might proceed on a disparate impact basis.[5] The Court concluded that it could, in a 5-4 decision authored by Justice Kennedy (joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan), relying in part on the precedent created by *Griggs* and other employment-related cases:

> "The Court holds that disparate-impact claims are cognizable under the Fair Housing Act upon considering its results-oriented language, the Court's interpretation of similar language in Title VII and the [Age Discrimination in Employment Act], Congress' ratification of disparate-impact claims in 1988 against the backdrop of the unanimous view of nine Courts of Appeal, and the statutory purpose."

Id. Dissents written by Justices Thomas and Alito, written with varying degrees of hostility, argued that the language in the Fair Housing Act did not permit disparate-impact claims to be asserted, and that *Griggs* itself was wrongly decided in 1971.

[5] During the course of the underlying litigation, the Department of Housing and Urban Development promulgated a series of regulations that explicitly interpreted the Fair Housing Act to permit its enforcement on a disparate-impact theory of liability. Those regulations, of course, could have rendered irrelevant if the Supreme Court had ruled differently in the case.

So, disparate-impact liability survives for the time being, and the case law underlying the disparate impact theory of liability in the employment context has been affirmed – for the time being. But the margin (5-4) is narrow, and the minority view is fairly clear that the language of the various federal discrimination statutes does not, or should not, permit discrimination claims to proceed on anything other than a discriminatory *intent* theory of liability.

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