BoardmanClark

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Court Upholds Negotiated Consideration in Exchange for Agreement to Provide Extraterritorial Wastewater Service

In *Mary Lane Area Sanitary District, et. al. v. City of Oconomowoc, Appeal No. 2022AP1649* (decided August 31, 2023, publication recommended), the Wisconsin Court of Appeals held that the City of Oconomowoc has the authority to negotiate a license fee (in addition to sewerage service charges) as consideration for its agreement to provide wastewater treatment service to extraterritorial customers.

In the 1980's, the City entered into agreements with several neighboring municipalities and affiliated sanitary districts to treat their wastewater at the City's wastewater treatment plant. The agreements required these extraterritorial customers to pay certain charges for sewerage treatment and capital costs. The agreements also required the extraterritorial customers to pay an annual "license fee." Each agreement provided that the annual license fee was to be calculated by multiplying the number of residential equivalent connections (RECs) in the extraterritorial customer by a negotiated dollar amount which escalated by 4% per year.

Three of the extraterritorial customers challenged the enforceability of the license fee. The extraterritorial customers' primary argument was that the City could only charge them "sewerage service charges" as described in Wis. Stat. § 66.0821(4)(a) and that the license fees did not comply with the requirements in § 66.0821(4)(c).

The Court closely examined the language of the agreements to determine whether the license fees should be construed to be sewerage service charges subject to Wis. Stat. § 66.0821(4)(a) and concluded that they should not. Instead, the Court determined that the license fees should be construed to be consideration for the City's agreement to extend wastewater treatment services to customers located outside the City's borders.

The Court stated that nothing in Wis. Stat. § 66.0821 expressly or by inference precludes a municipality from receiving compensation connected to its provision of sewage treatment services in addition to sewerage service charges.

The extraterritorial customers also challenged the license fees under Wis. Stat. § 66.0628, which requires any fee imposed by a political subdivision to bear a reasonable relationship to the service for which the fee is imposed. The Court rejected this challenge because it concluded that the license fee was not a fee imposed for service but rather constituted consideration for the City's agreement to extend its wastewater treatment service beyond its borders. The Court noted that the parties' description of this consideration as a "fee" was misleading because it was not imposed in exchange for a service or to regulate or supervise an activity.

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Recent U.S. Supreme Court Cases – Potential Impact on Workplaces

The U.S. Supreme Court recently issued decisions that may impact workplace practices in significant ways.

Religious Accommodations in the Workplace

In the first case, *Groff v. DeJoy*, the Supreme Court increased the legal burden an employer must meet to deny a reasonable accommodation request based on an employee's sincerely held religious belief. However, the Court expressly declined to go so far as to adopt the employer's higher burden for denying reasonable accommodations based on an employee disability imposed by the Americans with Disabilities Act.

In *Groff*, the plaintiff was a United States Postal Service delivery driver who requested not to work on Sundays due to his sincerely held religious beliefs. The employer insisted that Groff report to work on his scheduled Sundays or find a replacement. When Groff could not find replacements and began to be disciplined for his ongoing absences, he eventually quit and claimed he was effectively terminated.

Under Title VII, if an employee can show that a requirement of their job conflicts with their sincerely held religious beliefs, the employee may request an accommodation to resolve that conflict. Examples of common accommodation issues are an employee requesting not to be scheduled on their day of worship or being excused from an employer's no hat/headwear policy to allow the wearing of a religious head covering.

Employers must grant such accommodations unless they cause undue hardship. Prior to the *Groff* case, employers could show undue hardship if the accommodation would cause "de minimus" (minor or insignificant) cost or burden to their operations. In other words, the law made it relatively easy for employers to lawfully reject religious accommodations.

The Supreme Court in *Groff* changed the de minimus standard, ruling that an employer must show that the burden of granting an accommodation would result in "substantial increased costs" in relation to the conduct of its particular business in order to deny a requested accommodation. To determine whether an accommodation will cause substantial increased costs, courts must consider all relevant factors, including the particular accommodations at issue and their practical impact in light of the nature, size, and operating cost of the employer.

The Court stressed that the "substantial increased costs" standard can take into consideration the effect of the accommodation on the conduct of the employer's business (not just a financial cost). In a case like Groff's, where an employee's requested accommodation will have likely unwelcome impacts on other employees (increased overtime or coverage of undesirable shifts), the employer must carefully analyze the circumstances to determine whether granting the accommodation is reasonable and cannot automatically default to a conclusion that undue hardship will result. In most situations, mere complaints from other employees about the impact of the accommodation will not be sufficient to meet the employer's burden of showing undue hardship.

The Court left it to future courts to determine the exact parameters around this increased legal burden on employers. Additionally, the Court suggested that the Equal Employment Opportunities Commission (EEOC) should review and revise its existing guidance on religious accommodations. In the meantime, employers should exercise due diligence and analyze religious accommodation requests thoroughly before deciding whether to grant or deny a given religious accommodation.

Affirmative Action in College Admissions Struck Down

The Court also struck down decades-long law in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* in ruling that universities' consideration of race as a factor in college admissions violates the Equal Protection Clause of the 14th Amendment to the U.S. Constitution. Affirmative action programs had been used by universities and colleges for over 40 years to attempt to address the impacts of systemic racism and underrepresentation in higher education.

While the Court's decision only expressly applies to the admissions process of colleges and universities, it may indirectly impact employer recruiting and hiring practices, as well as diversity, equity, and inclusion (DE&I) programs aimed at increasing workplace diversity. Anti-affirmative action watchdog groups have already publicly commented that the Supreme Court's decision should send a clear message to employers to temper their efforts on increasing

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Court Upholds Negotiated Consideration

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The extraterritorial customers' third argument was that the City did not have the authority to negotiate for compensation in exchange for its agreement to extend wastewater service to extraterritorial customers. This argument was rejected by the Court as Wis. Stat. §§ 62.11(5) and 62.04 provide municipalities with broad authority to negotiate contracts.

Boardman Clark represented the City of Oconomowoc in this litigation.

— Lawrie Kobza

Federal Funding Opportunities for Energy Projects

Over the last few years, the federal government has set aside unprecedented funding for energy infrastructure projects. The Inflation Reduction Act (IRA) and the Bipartisan Infrastructure Law (BIL) contain provisions that provide grants, loans, and tax credits that may help municipally owned electric utilities fund their next clean energy or grid reliability project.

These new laws fund the following programs and more:

- Energizing Rural America (ERA) focuses on small and rural communities. Find more information at https://www.energy.gov/oced/energy-improvements-rural-or-remote-areas-0;
- Grid Resilience and Innovation Partnerships (GRIP) focuses on energy grid resilience and innovation, particularly in response to extreme weather conditions. Find more information at https://www.energy.gov/gdo/grid-resilience-and-innovation-partnerships-grip-program; and
- Powering Affordable Clean Energy (PACE) focuses on clean energy infrastructure. Find more information at https://www.rd.usda.gov/programs-services/electric-programs/powering-affordable-clean-energy-pace-program.

The funding is designed to support everything from small, isolated projects to large, multi-state projects.

Although most of the projects are administered at the federal level, some of the grant funding has been allocated to the states to administer. The Public Service Commission of Wisconsin (PSCW) recently met to determine how it would prioritize project applications for the funds allocated to Wisconsin for the first two years of a BIL program (see PSC docket number 9713-FG-2022). The almost 10 million dollars of grant funding is meant to support projects that reduce the length or scope of outages due to extreme weather events. The PSCW decided that it will set aside a full 75% of the funds for small utilities, a larger percentage than the federal guidelines require, and will prioritize applications for projects involving weatherization, implementation of microgrids, adaptive protection technologies, and hardening of power systems, among other projects. The PSCW has not yet released other details about the timing or content of the upcoming grant applications. Wisconsin will receive additional rounds of funding for this program over the next three years.

In addition, the next round of energy innovation grants administered by the PSCW through the Office of Energy Innovation will soon be initiated. These grants are available to local governments and municipal utilities and support projects related to energy efficiency, renewable energy, microgrids and energy planning. Approximately $7.5 billion in BIL funding will be used to fund these grants.

As for the federally administered programs, each program has different criteria, funding amounts, application processes, and timelines. Most programs have closed their 2023 funding opportunities and have not yet opened their 2024 applications, so now is a great time to plan and prepare for future funding opportunities. In doing so, however, keep in mind that these funding programs are highly competitive and many have a rolling window of availability, so it is important to give yourselves plenty of runway to prepare the application and to seek technical assistance when needed.

The bottom line is, if you are planning for an energy infrastructure project in the near future, particularly a clean energy project, a project that enhances resilience or grid reliability, or a project that serves a small or rural municipality, you should consider investigating these funding program opportunities, or you may be leaving money on the table.

— Liz Leonard

Recent U.S. Supreme Cases

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diversity in the workplace. However, to be clear, properly designed DE&I initiatives are still legal, even in the wake of this Court decision.

Employers need to be attuned to these developments as they continue to navigate these sensitive and challenging issues. The Boardman Clark Labor & Employment Practice Group is available to assist employers in these efforts.

— Jennifer S. Mirus

Welcome Liz Leonard!

Boardman Clark is excited to announce that Liz Leonard has joined the firm as an associate. Liz graduated *magna cum laude* from the University of Wisconsin Law School in 2021. Upon graduation, Liz spent two years clerking for the Honorable Jill Karofsky at the Wisconsin Supreme Court. Prior to law school, Liz worked in the construction industry and the healthcare technology industry for Epic Systems. She graduated from the University of Wisconsin-Madison in 2008. In her free time, she likes to stay involved with her local community theater.

Liz will be working primarily in the municipal law and litigation practice groups, as well as a number of other areas in the firm.

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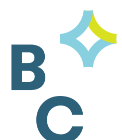

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