IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

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KRISTYN COULTER, Plaintiff/Appellant, vs. MARY FALLIN, as Governor of the State of Oklahoma, and STATE OF OKLAHOMA, ex rel., OKLAHOMA HUMAN RIGHTS COMMISSION, Defendants/Appellees.	)	Case No. 110,041

AMICUS CURIAE BRIEF OF THE
TULSA AREA HUMAN RESOURCES ASSOCIATION

July 16, 2012

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INDEX

I. DISCUSSION 1

42 U.S.C. § 2000e(b) 2

29 U.S.C. § 630(b) 2

Okla. Const. Art. 2, § 7 1

OKLA. STAT. tit. 25, § 1101 1

McCain v. United States,
2007 U.S. Dist. LEXIS 27839 (D.D.C. Apr. 16, 2007) 2

Oklahoma Quarterly Census of Employment and Wages 2010,
http://www.ok.gov/oesc_web/Services/Find_Labor_Market_Statistics/QCEW/ 2

SHRM Mission and History,
http://www.shrm.org/about/history/Pages/default.aspx 1

TAHRA Chapter History,
http://www.tahra.org/chapter-history_id34.html 1

A. General Constitutionality of the OADA and the Due Process Challenge 2

Duke Power Company v. Carolina Environmental Study Group,
438 U.S. 59 (1978) 3

Gladstone v. Bartlesville Independent School District,
66 P.3d 30 (2003) 3

Glasco v. State of Oklahoma,
188 P.3d 177 (2008) 2, 3

Nebbia v. New York,
291 U.S. 502 (1934) 3

Reynolds v. Porter,
760 P.2d 816 (1988) 2

Tucker v. Mullendore,
69 P.2d 35 (Okla. 1937) 3

Way v. Grand Lake Ass'n, Inc.,
635 P.2d 1010 (1981) 3

INDEX
(CONTINUED)

B. The History of Anti-Discrimination Legislation and the Protection Of Small Business 4

29 U.S.C. § 630(b) 4

42 U.S.C. § 2000e(b) 4

42 U.S.C. § 12101 5

Clackamas v. Wells, 538 U.S. 440 (2003) 5, 6

McCain v. United States, 2007 U.S. Dist. LEXIS 27839 (D.D.C. Apr. 16, 2007) 4-5

Miller v. Maxwell's International, Inc., 991 F.2d 583 (9th Cir. 1993) 4

Papa v. Katy Indus., Inc., 166 F.3d 937 (7th Cir. 1999) 5, 6

Tomka v. Seiler Corp., 66 F.3d 1295 (2d Cir. 1995) 4

II. CONCLUSION

CERTIFICATE OF SERVICE 8

Pursuant to this Court's Order filed on June 25, 2012, the Tulsa Area Human Resources Association ("TAHRA") hereby submits the following as a supplement to other briefs presented to the Court in support of the position of Defendants/Appellees.

I. DISCUSSION

TAHRA is a non-profit professional association and is Northeastern Oklahoma's preeminent human resources professional association. The organization's over 500 members (*See* TAHRA Chapter History, http://www.tahra.org/chapter-history_id34.html), consisting of human resources executives and professionals, work with employers of all sizes who conduct operations throughout the State of Oklahoma (and beyond). TAHRA is also the local chapter of the Society for Human Resource Management ("SHRM"), universally recognized as the world's largest and leading professional association dedicated to serving the human resources profession and human resources related needs of employers worldwide (*See* SHRM Mission and History, http://www.shrm.org/about/history/Pages/default.aspx.).

Plaintiff Coulter argues in this case that the amendments to the Oklahoma Anti-Discrimination Act, Okla. Stat. tit. 25, § 1101 *et seq.* ("OADA") are unconstitutional and a violation of her due process rights as set forth in Article 2, Section 7 of the Oklahoma Constitution ("*No person shall be deprived of life, liberty or property without due process of law.*"). Of most immediate interest to TAHRA (and the primary motivation for its participation in this matter), is Coulter's claim that the due process violation is in part because "the limitation on damages is arbitrary and irrational and has no relationship to a legitimate public interest (but is rather contrary to Oklahoma's public interests) and has no relationship to the actual harm suffered by any citizen." Plaintiff's Petition, ¶ 15(C).

In fact, the limited remedies set forth in the OADA do not violate due process because they are reasonably related to the dramatic expansion of OADA's scope, an expansion of coverage that now reaches to every employer in the State, no matter how small, and which reaches far beyond the federal laws that the OADA is intended to mirror. The OADA now covers an employer with as few as one employee as compared to the 15 employee minimum for coverage under federal Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e(b)) and the 20 employee minimum for coverage under the federal Age Discrimination in Employment Act (29 U.S.C. §630(b)). Based on the most recent quarterly census of employment and wages published by the Oklahoma Employment Security Commission,[1] over seventy percent (70 percent) of businesses in Oklahoma have between 1 and 15 employees and thus are now covered by the OADA.

Because the OADA now exposes every business in Oklahoma, no matter how small the business or the employee complement, to the crushing expense and liability of "mastering the intricacies of the anti-discrimination laws, establishing procedures to assure compliance and defending against suits when efforts at compliance fail," *McCain v. United States*, 2007 U.S. Dist. LEXIS 27839 (D.D.C. Apr. 16, 2007) at 5-6, the limitation on the liability of such small employers is reasonable and not arbitrary or capricious.

A. General Constitutionality of the OADA and The Due Process Challenge

As a general, initial matter when assessing the constitutionality of a statute, the Court must presume that every statute is constitutional. *Glasco v. State of Oklahoma*, 188 P. 3d 177, 186 (2008), *citing Reynolds v. Porter*, 760 P. 2d 816, 819 (1988). This is because "constitutional restriction on the Legislature will be strictly construed, and a statute will be

[1]Oklahoma Quarterly Census of Employment and Wages 2010, http://www.ok.gov/oesc_web/Services/Find_Labor_Market_Statistics/QCEW/.

upheld against a constitutional attack unless it is clearly and overtly inconsistent will be upheld against a constitutional attack unless it is clearly and overtly inconsistent with the constitution." *Glasco,* at 186, *citing Way v. Grand Lake Ass'n, Inc.*, 635 P. 2d 1010, 1017 (1981).

This same presumption of constitutionality applies in the face of a due process challenge such as that brought by Plaintiff in the instant case. "In the area of economic legislation, due process challenges on substantive law grounds . . . are assessed against a rational-basis standard of review." *Gladstone v. Bartlesville Independent School District,* 66 P. 3d 30, 32 (2003), *citing Duke Power Company v. Carolina Environmental Study Group,* 438 U.S. 59, 82-84 (1978) ("economic legislation also comes to the Court with a presumption of constitutionality and that to demonstrate a due process violation, the complaining party must "establish that the legislature has acted in an arbitrary and irrational way" (citations omitted)"). Therefore, "if the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied." *Tucker v. Mullendore*, 69 P. 2d 35, 37-38 (Okla. 1937) *quoting Nebbia v. New York,* 291 U.S. 502 (1934).

In this case, the limit on damages now provided by the OADA and about which Plaintiff complains as a due process violation, is reasonably related to an historic and ongoing legislative and judicial purpose, especially when balanced against the OADA's expanded reach to the very smallest of employers. Certainly, the protection of small businesses in Oklahoma from economic catastrophe is a historic and continuing legislative and judicial purpose.

B. The History of Anti-Discrimination Legislation and the Protection of Small Business

The history of legislation prohibiting and preventing discrimination in the employment context indicates an initial and ongoing concern for the burdens that any enforcement scheme might visit upon a small employer.

> The relevant legislative history of Title VII is consistent with this conclusion. First the floor debate over §2000e(b) indicates that the costs associated with defending against discrimination claims was a factor in the decision to implement a minimum employee requirement. In discussions over a proposed change to the minimum employee threshold, the burdens placed upon a small business forced to comply with federal regulations and defend against a Title VII suit were explicitly discussed. See 110 Cong. Rec. S. 13092 (1964) (Remarks of Sen. Cotton); 110 Cong. Rec. S. 13088 (1964) (Remarks of Sen. Humphrey); 110 Cong. Rec. S. 13092-93 (Remarks of Sen. Morse).

Tomka v. Seiler Corp., 66 F. 3d 1295, 1314 (2d Cir. 1995).

Similarly, in discussing the restrictions on suing an individual defendant in a Title VII case, the Ninth Circuit noted that "Title VII limits liability to employers with fifteen or more employees, 42 U.S.C. § 2000e(b), and the ADEA limits liability to employer with twenty or more employees, 29 U.S.C. § 630(b), in part because Congress did not want to burden small entities with the costs associated with litigating discrimination claims." *Miller v. Maxwell's International, Inc.*, 991 F. 2d 583, 587 (9th Cir. 1993).

In another due process challenge, in this case to the "small employer exclusion" of Title VII, brought against, in part, the Oklahoma Human Rights Commission, the United States District Court for the District of Columbia examined the many burdens placed upon a small employer attempting to comply with Title VII beyond just the costs of litigation. In

McCain v. United States, 2007 U.S. Dist. LEXIS 27839, the plaintiff (in a manner analogous to the arguments brought by Plaintiff Coulter in the instant case) argued that by immunizing small employers from liability for status-based discrimination, Congress created a special law that violated both the Equal Protection and the Due Process clauses of the U.S. Constitution.

The District Court disagreed and, citing U.S. Supreme Court and other judicial decisions, noted that:

> The legislative history of Title VII reveals that Congress enacted the employee-numerosity requirement to spare very small businesses from liability. The purpose is to spare very small firms from the potentially crushing expense of mastering the intricacies of the anti-discrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail.

McCain v. United States, 2007 U.S. Dist. LEXIS 27839 at ** 5-6, quoting *Papa v. Katy Indus., Inc.*, 166 F.3d 937, 940 (7th Cir. 1999). The court proceeded to conclude that, in the face of a due process challenge, "the distinction between sizes of businesses under Title VII has a rational basis." *Id.* at 6.

Similarly, the cost to a small business of even entering the competitive market of which it is a part, was noted by the U.S. Supreme Court. In reviewing the 15 employee threshold that was made a part of the Americans with Disabilities Act (42 U.S.C. § 12101 *et seq.*) the Court noted "the congressional decision to limit the coverage of the legislation to firms with 15 or more employees has its own justification – namely, easing entry into the market and preserving the competitive position of smaller firms." *Clackamas v. Wells*, 538 U.S. 440 (2003).

Thus, from the very early implementation of the various laws prohibiting and preventing discrimination in the workplace, an overriding concern of the U.S. Congress, the

U.S. Supreme Court and numerous courts of appeal has been that while discrimination must be prevented, small businesses must not be crippled or even eliminated due to enforcement and other issues. At the federal level this has always been accomplished primarily through the variously applicable employee complement thresholds. Their very size protected smaller employers from crushing liability and expense in these matters.

Now, in Oklahoma, that employee complement threshold and the protection that it provided to small employers has been removed. Census figures indicate that over 70% of Oklahoma employers have 15 or fewer employees, and those employers must now join every other employer in the state and be faced with the numerous problems that the potential liability and the "potentially crushing expense" of compliance in this area might bring, including (according to the courts in *Papa v. Katy*, 166 F. 3d 937, 940 (7th Cir. 1999) and *Clackamas v. Wells*, 538 U.S. 440, 447 (2003):

- mastering the intricacies of anti-discrimination laws;
- establishing procedures to assure compliance;
- defending suits when efforts at compliance fail;
- more difficult entry into their potential market; and
- loss or lessening of competitive position.

In enacting the OADA, the Oklahoma legislature recognized the difficulties that smaller employers would face in these areas and thus, to avoid some of these potentially crippling or even fatal (to the small business) events, recognized that a level playing field should be maintained and thus limited the damages that could ultimately be assessed against such an employer. In essence, to a potential plaintiff's advantage, every employer of any size whatsoever in the State of Oklahoma can now be sued for various types of status-based

employment discrimination, harassment and retaliation. Under these circumstances, the new limitations on damages (financial risk exposure) that will face particularly the newly potentially liable small business (the vast majority of businesses operating in the State of Oklahoma) are neither arbitrary or capricious nor a constitutional due process violation.

II. CONCLUSION

For all of the foregoing reasons, Plaintiff's appeal and her request for declaratory relief should be denied. In addition, this Court should specifically find that there was no violation of Plaintiff's (or anyone else's) due process rights (as set forth in Article 2, Section 7 of the Oklahoma Constitution) by the recently enacted legislative amendments to the Oklahoma Anti-Discrimination Act, OKLA. STAT. tit. 25, § 1101 *et seq.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 16th day of July, 2012, a true and correct copy of the above and foregoing instrument was:

_X_ mailed with postage prepaid thereon;
___ mailed by certified mail, Return Receipt No. ______;
___ transmitted via facsimile;
___ transmitted via email; or
___ hand-delivered;

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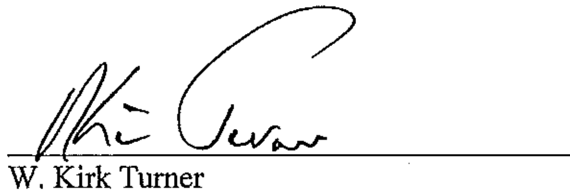

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