20-P-188 Appeals Court

EMERALD HOME CARE, INC. vs. DEPARTMENT OF UNEMPLOYMENT ASSISTANCE.

No. 20-P-188.

Middlesex. November 12, 2020. - February 2, 2021.

Present: Green, C.J., Desmond, & Lemire, JJ.

Massachusetts Medical Assistance Program. Due Process of Law, Notice, Hearing. Constitutional Law, Freedom of speech and press, Federal preemption. Federal Preemption.

Civil action commenced in the Superior Court Department on June 8, 2018.

The case was heard by Michael D. Ricciuti, J., on motions for judgment on the pleadings.

Arthur R. Cormier for the plaintiff.
Andrew J. Haile, Assistant Attorney General, for the defendant.

DESMOND, J. In 2017, the Massachusetts Legislature enacted a two-year program, known as the Employer Medical Assistance Contribution Supplement (EMAC Supplement or program), whereby Massachusetts employers with six or more employees were required

to pay a contribution for their employees who received publicly subsidized health insurance during that period. See G. L. c. 149, § 189A.[1] On April 11, 2018, Emerald Home Care, Inc. (Emerald), was notified that it was liable for a contribution for twenty-eight employees under the EMAC Supplement.[2] Emerald filed an appeal of this liability determination with the Department of Unemployment Assistance (DUA), arguing that the EMAC Supplement was unconstitutional. The appeal was dismissed for "fail[ure] to cite cognizable grounds for a hearing," and Emerald sought judicial review in the Superior Court. On cross motions for judgment on the pleadings, a judge of the Superior Court entered judgment for DUA. We affirm.

Background. The EMAC Supplement went into effect on January 1, 2018, and was administered until its end date on December 31, 2019. G. L. c. 149, § 189A. Under the program, Massachusetts employers with six or more employees were required to pay a quarterly contribution for each of their employees who

[1] The statute was repealed effective December 31, 2019, by St. 2017, c. 63, § 10.

[2] Throughout its brief, Emerald refers to the quarterly contribution as a tax on employers. We, however, use the language included in the EMAC Supplement statute and regulations and refer to the amount assessed to employers as the liability determination, and the payment made as a contribution. See G. L. c. 149, § 189A; 430 Code Mass. Regs. §§ 21.00 (2018). In the end, the language used to describe the payment makes no difference to the analysis of this case.

received publicly subsidized health insurance for at least fifty-six days. See G. L. c. 149, § 189A; 430 Code Mass. Regs. § 21.03 (2018). DUA was tasked with promulgating regulations to implement the EMAC Supplement, as well as the collection of the contributions from Massachusetts employers. G. L. c. 149, § 189A.

To calculate the amount owed by each employer, DUA obtained a list of individuals who received publicly subsidized health insurance from the Executive Office of Health and Human Resources, which administers MassHealth, and the Commonwealth Health Insurance Connector Authority, which provides access to subsidized health insurance plans from private carriers. See G. L. c. 149, § 189A (a); 430 Code Mass. Regs. §§ 21.02, 21.03 (2018). Information about individuals who receive publicly subsidized health insurance is protected by Federal and State law.[3] Accordingly, DUA was required by law to keep such information confidential, and it enacted EMAC Supplement regulations to do so. See 430 Code Mass. Regs. § 21.10 (2018).

[3] See 42 U.S.C. § 1396a(a)(7)(A)(i) (requiring State medical assistance plan to provide "safeguards which restrict the use or disclosure of information concerning applicants and recipients to purposes directly connected with . . . the administration of the plan"); G. L. c. 118E, § 49 ("The use or disclosure of information concerning applicants and recipients shall be limited to purposes directly connected with the administration of the medical assistance programs . . . and the names of applicants and recipients shall not be published").

The regulations provide that DUA must protect the confidentiality of the information about the individuals with publicly subsidized health insurance, including the names and Social Security numbers of those individuals, and that Massachusetts employers could receive this information only for the purpose "of reviewing and/or appealing" their liability under the EMAC Supplement. 430 Code Mass. Regs. § 21.10(2)(b). In order to receive the list of employees, employers were required to agree to maintain the confidentiality of that information. Id.

On April 11, 2018, DUA sent notice to Emerald that its EMAC Supplement liability for the first quarter of 2018 was $6,117.13 for twenty-eight employees. The notice explained how the liability amount was calculated, and informed Emerald of its right to request a hearing to appeal the determination within ten days of receipt of the notice. Pursuant to the regulations regarding confidentiality, the notice did not include the list of the relevant employees, but notified Emerald that it could obtain the list of the employees' names "by logging on to" the DUA website.

When Emerald accessed its account on the DUA website, it was prompted to sign a privacy certification (certification) before it could access the list of employees. In accordance with the regulations, the certification stated, inter alia, (1)

that the employer was requesting the information for the purpose of "review[ing] and/or appeal[ing] its" liability under the EMAC Supplement, (2) that the employer would maintain the confidentiality of the information and would not disclose the "information except as necessary to review and/or appeal the amount of" its liability, and (3) that the employer would not use or disclose the "information to disparage or retaliate against any employee or other individual to whom it pertains."

Emerald refused to sign the certification and agree to the conditions enumerated, and was thus not provided with the list of employees. Emerald filed an appeal with DUA, arguing that the EMAC Supplement was unconstitutional because it failed to provide an employer with the names of the employees, and would not do so unless the employer agreed to maintain the confidentiality of the employees' names and Social Security numbers. DUA dismissed the appeal because it "fail[ed] to cite cognizable ground for a hearing" under G. L. c. 149, § 189A. Emerald sought judicial review in the Superior Court, arguing that the EMAC Supplement violated its rights to due process and free speech and was preempted by Federal law. DUA and Emerald filed cross motions for judgment on the pleadings. Following a hearing, a judge of the Superior Court denied Emerald's motion and granted DUA's motion for judgment on the pleadings.

Discussion. 1. Due process claim. Emerald argues that DUA's failure to provide it with an unconditioned right to the names of its employees who received publicly subsidized health insurance, while requiring Emerald to pay a contribution for those employees, violated due process. We disagree.

"The fundamental requirement of due process is notice and the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Gillespie v. Northampton, 460 Mass. 148, 156 (2011), quoting Matter of Angela, 445 Mass. 55, 62 (2005). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." Mathews v. Eldridge, 424 U.S. 319, 334 (1976), quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

The requisite notice need only "be of such nature as reasonably to convey the required information." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). Here, the notice provided to Emerald by DUA informed it of the amount of its EMAC Supplement liability, the general reasoning for the EMAC Supplement, the number of employees that the liability determination was based on, and the manner in which Emerald could obtain the names of those employees. It also notified Emerald that it had the right to request a hearing within ten days to appeal the liability determination and the manner in which to do so, and that the determination would be

final if Emerald did not request the hearing. The letter further provided that a request for a hearing must raise grounds cognizable under G. L. c. 149, § 189A, and included examples of such grounds.[4] This notice was sufficient to furnish Emerald with the necessary information and afford it the "opportunity to present [its] objections." Mullane, supra.

Emerald did request a hearing to present its objections, and was informed that it had the right to testify, be represented by counsel, introduce evidence, and present witnesses at the hearing. When Emerald's request for a hearing was dismissed because it failed to cite any of the cognizable grounds, Emerald had the opportunity to and did seek judicial review. These procedures were more than sufficient to provide Emerald with notice of its EMAC Supplement liability, the basis for that liability, and a meaningful opportunity to be heard to challenge that liability.

Emerald nevertheless argues that the procedure set out in the EMAC Supplement and followed by DUA is violative of due process because the government may not impose conditions or

[4] Some examples of grounds cognizable under G. L. c. 149, § 189A, include (1) that the employer did not have six or more employees, (2) that the employer's employees were independent contractors, (3) that the employer's reported employees' wages were not for unemployment insurance purposes, and (4) that the employees had "not been on qualifying health care for a continuous period of [fifty-six] days."

limitations on the right to a meaningful opportunity to be heard, and by requiring Emerald to sign the privacy certification before providing access to the list of employees, DUA did just that. The claim is without merit. This assertion does not accurately characterize the procedure followed by DUA, nor do we find support for this proposition in the law.

To begin with, Emerald was not required to sign the certification and access the list of names prior to receiving a hearing. DUA merely permits employers to gain access to this information, if they so choose, as long as the employers agree to protect its confidentiality. Thus, the conditions contained in the privacy certification are not conditions requisite to Emerald's opportunity to be heard, but rather are conditions on Emerald's ability to access additional information that may be useful to it at a hearing. In any event, Emerald was provided full opportunity to obtain information it might need to participate fully and meaningfully in a hearing, and the conditions imposed by DUA on Emerald's access to that information do not derogate in any way from Emerald's ability to use the information in formulating its prosecution of its rights at the hearing. Contrary to Emerald's contentions, due process does not mandate DUA to unconditionally turn over any and all information that would be helpful to Emerald at a hearing. See LaPointe v. License Bd. of Worcester, 389 Mass. 454, 458 (1983).

Further, due process is "not a technical conception with a fixed content" as Emerald seems to suggest. Commonwealth v. Torres, 441 Mass. 499, 502 (2004), quoting Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895 (1961). The mandates of due process vary with context, see Torres, supra, and due regard must be afforded to the "practicalities and peculiarities" of a particular case, Mullane, 339 U.S. at 314. We are satisfied that, in the context of this case, the fundamental requirements of due process were met, despite the conditions imposed by DUA on the release of the information concerning the employees who received publicly subsidized health insurance.[5]

[5] Emerald also suggests that Speiser v. Randall, 357 U.S. 513 (1958), supports its position that the procedure followed by DUA violated due process. We are not convinced. In Speiser, the United States Supreme Court found that a State tax program violated due process because it placed the burden on taxpayers to show that they qualified for a specific tax exemption, and as part of that burden, the taxpayers had to show that they did not advocate for the overthrow of the government. See id. at 516-517, 528-529. The Court found that, in such a case, due process mandates the State to bear the burden of justifying the suppression of speech. Id. at 528-529. Here, we have quite a different scenario. The EMAC Supplement does not place any burden on Emerald, or other Massachusetts employers, to show that they will suppress their speech as a requirement to receiving notice of its EMAC Supplement liability or a hearing to challenge that liability. It further does not require Emerald to show that it will not advocate or protest against the EMAC Supplement; DUA merely requires Emerald to agree not to disclose its employees' names and Social Security numbers, and the fact that they receive publicly subsidized health insurance, as a prerequisite to receiving this private information. The concerns present in Speiser are not present in this case.

2. Free speech claim. Emerald further argues that conditioning its right to obtain the list of employees on Emerald's agreement not to disclose this information, for any purpose other than reviewing or appealing its EMAC Supplement liability, is a violation of the First Amendment to the United States Constitution. It argues that the First Amendment provides the right to speak freely about the identity of the employees for whom it has been assessed a fee. However, the freedom to speak "does not comprehend the right to speak on any subject at any time." Seattle Times Co. v. Rhinehart, 467 U.S. 20, 31 (1984), quoting American Communications Ass'n v. Douds, 339 U.S. 382, 394-395 (1950).

The names and Social Security numbers of those who receive publicly subsidized health insurance is private government information held by DUA and is not public record. See G. L. c. 149, § 189A (e). The First Amendment does not provide a general "right of access to government information or sources of information within the government's control," Houchins v. KQED, Inc., 438 U.S. 1, 15 (1978) (plurality opinion), and thus Emerald had no First Amendment right to access this information.[6]

[6] While the United States Supreme Court has recognized that the First Amendment provides a qualified right of access to certain criminal judicial proceedings, see Press-Enterprise Co. v. Superior Court of Cal., County of Riverside, 478 U.S. 1, 10 (1986); Globe Newspaper Co. v. Superior Court of Norfolk County, 457 U.S. 596, 602 (1982); Richmond Newspapers, Inc. v. Virginia,

While the government may not impose restrictions on the access to and dissemination of information in "private hands," Sorrell v. IMS Health Inc., 564 U.S. 552, 568 (2011), "[t]his is not a case in which the government is prohibiting a speaker from conveying information that the speaker already possesses." Los Angeles Police Dep't v. United Reporting Publ. Corp., 528 U.S. 32, 40 (1999) (United Reporting). Rather, this case, like United Reporting, concerns the restriction of access to government information based on certain conditions.[7] Here, DUA offers to provide this information to employers to assist them in reviewing, and potentially appealing, their EMAC Supplement liability, but on the condition that the private government information will be used for that purpose alone and not disseminated for other reasons.

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448 U.S. 555, 580 (1980), and the lower courts have extended this right to various records relating to such criminal proceedings, see Globe Newspaper Co. v. Pokaski, 868 F.2d 497, 505 (1st Cir. 1989); Globe Newspaper Co. v. Fenton, 819 F. Supp. 89, 91 (D. Mass. 1993), this right has not been extended to other types of documents. See In re Boston Herald, Inc., 321 F.3d 174, 183, 188-189 (1st Cir. 2003) (citing cases rejecting First Amendment right of access to other government documents).

[7] In United Reporting, 528 U.S. at 34-35, a California statute required persons requesting an arrestee's address to agree not to use the information to sell a product or service as a condition to receiving the requested address. The Court held that the statute could not be facially attacked under the First Amendment, but specifically noted that the statute was "nothing more than a governmental denial of access to information in its possession." Id. at 40.

In Seattle Times Co., a similar restriction was found not to offend the First Amendment. The restriction imposed in that case prohibited the dissemination of information obtained through the discovery process, unless such dissemination was for the purpose of preparing and trying the case. See Seattle Times Co., 467 U.S. at 32. The Court considered that the litigants gained access to the information they wished to disseminate only through the court-ordered discovery process (a process created by the Legislature), that the litigants had no First Amendment right of access to that information, and that information gained through the discovery process was not traditionally accessible to the public. Id. at 32-33.

Similarly here, the information Emerald wishes to disseminate can be accessed only through the process created by the EMAC Supplement (a program created by the Legislature), Emerald has no First Amendment right to this information, and this information is not public record. With this backdrop, we apply the same standard used in Seattle Times Co., and ask "whether the 'practice in question [furthers] an important or substantial governmental interest unrelated to the suppression of expression' and whether 'the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the

protection of the particular governmental interest involved.'"[8] Seattle Times Co., 467 U.S. at 32, quoting Procunier v. Martinez, 416 U.S. 396, 413 (1974).

We believe that the practice of using the privacy certification, a procedure implemented to satisfy the privacy mandates of G. L. c. 149, § 189A, and 430 Code Mass. Regs. § 21.10, furthers the government's substantial interest in maintaining the confidentiality of private health care information of Massachusetts citizens. Indeed, both Massachusetts and Federal law require such safeguards to be implemented to protect the confidentiality of this type of information. See note 3, supra. Further, the restrictions on the use of this information are no greater than necessary to protect the information's confidentiality. Although Emerald

[8] We reject Emerald's argument that the privacy certification amounts to a content-based restriction, subject to strict scrutiny, under AIDS Action Comm. of Mass., Inc. v. Massachusetts Bay Transp. Auth., 42 F.3d 1, 8 (1st Cir. 1994) ("a regulation which permits an idea to be expressed but disallows the use of certain words in expressing that idea is content-based"). While the certification requires Emerald to agree not to disclose the names and Social Security numbers of its employees as a condition to receiving this information, it does not restrict Emerald from using this information to review, assess, or appeal its EMAC Supplement liability. The certification is better characterized as a limitation on the manner in which the names and Social Security numbers may be utilized, and not a total restriction on the disclosure. As such, we believe this case to be more analogous to Seattle Times Co., which permitted the dissemination of the information within the context of trying and preparing the case, but limited the disclosure elsewhere. See Seattle Times Co., 467 U.S. at 27.

does not have free reign to disclose the names and Social Security numbers of its employees with publicly subsidized health insurance, it is free to use and disclose this information to the extent necessary to review or appeal its EMAC Supplement liability. Emerald further may openly criticize the EMAC Supplement as a program, it may use pseudonyms or characteristics to describe the individual employees if it chooses to, and if Emerald were to receive this information from a source other than DUA, the privacy certification would not govern its dissemination. See Seattle Times Co., 467 U.S. at 37. In sum, we discern no free speech violation.

3. Preemption. Lastly, Emerald argues that the EMAC Supplement is in conflict with Federal law and is therefore preempted by the supremacy clause.[9] Federal law provides that a "State plan for medical assistance must . . . provide . . . safeguards which restrict the use or disclosure of information concerning applicants and recipients to purposes directly

[9] DUA asserts that this claim should be rejected because the supremacy clause does not create a private cause of action. See Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 324-326 (2015). While we acknowledge that the supremacy clause does not create a cause of action, Emerald did not file suit to enforce a Federal law over a State law. Rather, it sought judicial review of its EMAC Supplement liability determination, pursuant to G. L. c. 30A, § 14 (7), which permits a court to set aside an agency decision that is "[i]n violation of constitutional provisions" or "[b]ased upon an error of law." We therefore address the merits of this claim.

connected with . . . the administration of the plan." 42 U.S.C. § 1396a(a)(7)(A)(i). Emerald contends that the EMAC Supplement fails to accord with Federal law because it discloses information about individuals who receive publicly subsidized insurance to a wide range of Massachusetts employers who have no role in the administration of such health insurance plans. We, however, fail to see the conflict.

The EMAC Supplement undoubtedly implements safeguards to restrict the use and disclosure of information about employees who receive publicly subsidized health insurance. As discussed at length above, no Massachusetts employer can access this type of information without first signing the privacy certification and agreeing to maintain the information's confidentiality. Once an employer gains access to the information, the employer is not authorized to use or disclose the information, except for the limited purpose of reviewing or appealing the EMAC Supplement liability determination. This permitted disclosure is directly connected with administering the publicly subsidized health insurance plans in Massachusetts because, once all appellate rights have been exhausted by an employer and the liability determination has been finalized, the EMAC Supplement contributions are used to fund these health insurance plans.[10]

[10] The EMAC Supplement was created to temporarily offset the growing costs of publicly subsidized health insurance in the

See 42 U.S.C. § 1396a(a)(7)(A)(i). Accordingly, because the EMAC Supplement does not conflict with Federal law, but rather is consistent with 42 U.S.C. § 1396a(a)(7)(A)(i), Emerald's preemption claim must fail.

Judgment affirmed.

Commonwealth while more permanent measures were being considered by the Legislature. See Department of Unemployment Assistance, Unemployment Insurance (UI) for Employers, Guide to employer contributions to DUA, Learn about the Employer Medical Assistance Contribution (EMAC) Supplement, http://www.mass.gov/info-details/learn-about-the-employer-medical-assistance-contribution-supplement [https://perma.cc/B9KH-UF8J], for a detailed explanation of the EMAC Supplement and the context from which it was born.