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Labor Department Directive Co-Signs Discrimination

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A new directive from the US Department of Labor is construing three recent Supreme Court rulings as well as two executive orders from President Donald Trump to allow contractors doing business with the federal government to discriminate based on their religious beliefs.

The August 10 directive, which came from Craig E. Leen, the acting director of the Office of Federal Contract Compliance Programs (OFCCP), a Labor Department unit, could undermine the protections based on sexual orientation and gender identity that former President Barack Obama had added to the federal government’s contracting guidelines.

The first court decision Leen cited is Masterpiece Cakeshop v. Colorado Civil Rights Commission, the Supreme Court’s June 4 ruling that reversed a lower court decision against a Denver-area baker who refused to make a wedding cake for a same-sex couple.

Significantly, the high court in that decision did not rule that businesses have a general right to deny services to gay couples based on the owners’ religious beliefs. Instead, finessing that issue, the majority found that the lower court’s ruling had to be reversed because the Colorado Civil Rights Commission had exhibited overt hostility to religion in its treatment of baker Jack Phillips, whose refusal to provide his services to the man who complained that several bakeries refused his request to make cakes decorated with religiously-based anti-gay scriptural quotes and slogans. The majority clearly believed the Commission was insufficiently evenhanded in dealing with cases involving religious views.

But Leen’s directive, consistent with the two Trump executive orders and a memorandum issued last fall by Attorney General Jeff Sessions, reorients the Masterpiece Cakeshop issue as “discrimination” against religious individuals when they are required to comply with non-discrimination requirements that conflict with their religious beliefs.

“Recent court decisions have addressed the broad freedoms and anti-discrimination protections that must be afforded religion-exercising organizations and individuals under the United States Constitution and federal law,” Leen wrote, painting individuals and businesses who want their religious beliefs to take priority over any contrary legal obligations as “victims.”

Twisting recent Supreme Court opinions to support this assertion, Leen summarized Masterpiece Cakeshop as holding that “the government violates the Free Exercise clause when its decisions are based on hostility to religion or a religious viewpoint.”

Leen summarized the 2017 Trinity Lutheran Church of Columbia, Inc., v. Comer decision, where the Supreme Court held that a state could not categorically disqualify religious organizations from receiving state funds for non-religious purposes, as meaning that “the government violates the Free Exercise clause when it conditions a generally available public benefit on an entity’s giving up its religious character, unless that condition withstands the strictest scrutiny.”

That case involved Missouri’s denial of funds to a religious school for repaving its playground, based on a state constitutional provision against providing taxpayer money to religious institutions.

Finally, Leen summarized the Supreme Court’s notorious 2014 5-4 ruling in Burwell v. Hobby Lobby as holding that “the Religious Freedom Restoration Act (RFRA) applies to federal regulation of the activities of for-profit closely held corporations.”

Hobby Lobby involved a demand by a business corporation owned by a small group of devout Catholics that it not be required to provide contraception coverage for their employees as required by the Affordable Care Act.

Very few federal contractors subject to federal anti-discrimination rules, which apply only to substantial federal contracts, are “closely held corporations,” so that characterization of RFRA does not seem particularly relevant to the cases where Leen’s directive is likely to be implicated.

Leen also cited Trump’s Executive Order 13831, which states, “The executive branch wants faith-based and community organizations, to the fullest opportunity permitted by law, to compete on a level playing field for grants, contracts, programs, and other federal funding opportunities,” and Trump’s Executive Order 13798, which says, “It shall be the policy of the executive branch to vigorously enforce Federal law’s robust protections for religious freedom. The Founders envisioned a Nation in which religious voices and views were integral to a vibrant public square, and in which religious people and institutions were free to practice their faith without fear of discrimination or retaliation by the Federal Government. Federal law protects the freedom of Americans and their organizations to exercise religion and participate fully in civic life without undue interference by the Federal Government.”

Sessions’ memorandum ran with these themes, asserting that the government should generally
Restaurant Chain Slammed for Trans Discrimination

Five charge Harlem’s Texas Chicken & Burgers with refusing service, claiming “no chicken”

BY DUNCAN OSBORNE

Five transgender and gender non-conforming people have sued Texas Chicken & Burgers charging they were effectively refused service at one of the chain’s Manhattan locations this past spring because, they believe, they are transgender and gender non-conforming.

“These folks are demanding to be heard,” said Gennaro Savastano, an associate in the appellate unit at Weitz & Luxenberg, a law firm, and president of the LGBT Bar Association of Greater New York. “This sort of bravery is exactly what we need at this moment… New York has zero tolerance for transphobia and homophobia.”

The group visited the chain’s outlet on Frederick Douglass Boulevard in Harlem on May 27. Daniele Marino first attempted to order for the group and was ignored, then Deja Smith tried to order and received the same response. Eventually, an employee told the group that there was “no chicken” in the restaurant despite cooked chicken being visible behind the counter.

“We were told that there was no chicken,” Smith said during an August 9 press conference that was held across the street from the Stonewall Inn, the site of the 1969 riots that mark the start of the modern LGBTQ rights movement. “We were told that there were no chicken tenders.”

A white cisgender man then stepped to the counter and ordered chicken and was served chicken. While he told the group that he had been served chicken, he also told them he did not want to get involved. At that point, Smith used her phone to record a two-minute video in which the white cisgender man confirmed that he had been served chicken and a young Asian woman appeared to be volunteering to assist the group.

“I don’t know why it is that when we went to the register there was no chicken, but when that young man right there went to the register there was chicken,” Smith can be heard saying in the video.

A man behind the counter waved his hand and said, “No video” when asked if he had just told the group there was no chicken in the restaurant.

On May 29, the company posted a statement on Instagram.

“We take all concerns raised by our customers very seriously, just as we take our obligation to treat our customers, employees, and other stakeholders with the utmost degree of respect in an environment free of any form of discrimination,” the company said.

The statement added, “While we regret that our customer did not receive the level of service we would expect from all employees… after a thorough and swift review of the situation, we are confident that the situation was caused by an honest mistake made by the employee when stating that particular food items were sold out, and not the product of any intentional discriminatory treatment as it is portrayed in the video.”

The lawsuit was filed in state court in Manhattan on August 9. Reached by phone, Waheed Khosdral, the chief operating officer at Texas Chicken & Burgers, said, “We haven’t been served with anything so I can’t make any comment.”

The suit alleges that Texas Chicken & Burgers violated the city and state human rights laws when it refused to serve the group because they are transgender and gender non-conforming. The city human rights law has barred discrimination based on gender identity since 2002. In 2015, Governor Andrew Cuomo used an executive directive adding gender identity as a protected class to the state law.

Jahmila Adderley, Jonovia Chase, and Valerie Spencer are the other plaintiffs in the lawsuit. Spencer lives in Los Angeles and did not attend the August 9 press conference.

Civil rights attorney Ben Crump is working on the lawsuit with Weitz & Luxenberg. He flew from his office in Florida to attend the August 9 press conference. Referring to the May 29 statement by Texas Chicken & Burgers, Crump said, “It really was a very poor excuse.”

Recalling past scenes of civil rights activists who have prompted action to promote or defend civil rights, Crump added, “We’re going to see if the transgender community can get justice when it’s on video.”

Religious opt-outs from p.4

Refrain from enforcing federal laws against people and businesses that have religious objections to complying with them.

Leen’s directive, in turn, instructs the OFCCP staff and notifies federal contractors that, in essence, they can discriminate in employing people or providing services under federal contracts if they are doing so based on their religious beliefs.

The Supreme Court arguably opened the door to this kind of thinking in the Hobby Lobby and Trinity Lutheran cases, but it is a stretch to cite Masterpiece Cakeshop for this purpose in light of the mention Justice Kennedy made in his majority opinion of

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two other cases: Newman v. Piggie Park Enterprises, a 1968 decision holding that a Southern barbecue restaurant chain could not refuse to serve black customers based on the owner’s religious belief in racial segregation, and Employment Division v. Smith, a 1990 decision holding that people do not enjoy a Free Exercise right to refuse to comply with state laws of general application that are on their face neutral with respect to religion.

Writing for the Supreme Court in the Employment Division case, Justice Antonin Scalia suggested that allowing individuals to claim exemptions from the law based on their individual religious beliefs unless the government could prove that it had a compelling interest was not required by the First Amendment.

"Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society’s diversity of religious beliefs, and its determination to coerce or suppress none of them," Scalia wrote.

Although the court’s decision in Employment Division was unanimous, it is worth noting that four of the justices concurred in an opinion arguing Scalia had gone too far in his majority opinion in contending the government need not show there was an important government interest that justified burdening an individual’s free exercise of religion — in that case, a Native American denied unemployment benefits when he was fired after flunking his employer’s drug test due to his religious ritual use of peyote.

Enforcing religiously neutral anti-discrimination rules is not “hostility to religion” by the government. It is undertaken to prevent categorical discrimination based on personal characteristics, such as race, national origin, sex, sexual orientation, or gender identity.

Notably, the federal laws and regulations that OFCCP is supposed to enforce already do not apply to government contractors that are religious corporations or associations or religious educational institutions, “with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.”

It should also be noted that Justice Samuel Alito’s opinion for the court in the Hobby Lobby case responded to concerns raised by Justice Ruth Bader Ginsburg’s dissent by denying that the Religious Freedom Restoration Act could be invoked as a defense in an employment discrimination case.

How this will all play out if OFCCP refuses to hold contractors to their non-discrimination requirements in situations involving LGBTQ victims of religiously-motivated discrimination is yet to be seen, but the portents are not good in light of Trump’s nomination of Brett Kavanaugh to the Supreme Court, where, if confirmed, he would join the conservative majority in place of Justice Kennedy.

In this context, it is particularly troubling that Justice Neil Gorsuch, Trump’s first Supreme Court nominee, in his concurring opinion in the Masterpiece Cake-shop case, implied that the court should reconsider its holding in Employment Division v. Smith.

In response to Leen’s directive, the National Center for Transgender Equality warned of a “broad license to discriminate,” while noting that the Department of Labor, at the same time, removed language from its website about non-discrimination protections for LG-BTQ people and the limited scope of allowable religious exemptions.

“This is an attempt to encourage businesses to take taxpayer dollars and then fire people for being transgender,” Harper Jean Tobin, the group’s director of policy, said in a written release. “Religious organizations have ample protections under federal law, but they are not allowed to use federal money to discriminate against people. The language of this directive is so broad and so vague because it is part of a long line of attempts by this administration to sow confusion and encourage any employer to act on their worst prejudices. No employer should be allowed to use taxpayer dollars to fire someone because of who they are.”