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2nd Circuit Court of Appeals Revives Religious Adoption Agency's Challenge to New York Anti-Discrimination Rule



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The U.S. Court of Appeals for the 2nd Circuit, based in New York, has revived a Syracuse religious adoption agency's constitutional challenge to the New York Office of Children and Family Service (OCFS) regulation prohibiting discrimination because of marital status or sexual orientation by adoption agencies. New Hope insists, based on its religious principles, that it cannot provide adoption services to unmarried people or same-sex couples. OCFS threatened to terminate New Hope's status as an approved agency if it does not comply. *New Hope Family Services, Inc. v. Poole*, 2020 WL 4118201, 2020 U.S. App. LEXIS 22630 (2nd Cir., July 21, 2020).

New Hope Family Services has been an approved adoption service provider for more than fifty years and estimates that it has placed more than 1,000 children for adoption. Although it is not affiliated with any church or formal religious movement, it identifies as a Christian agency, requires its employees to subscribe to articles of faith, and will not, consistent with its belief that children are best served in a "Biblical" family constructed of a husband, wife and child, screen potential adoptive parents who do not conform with this model. New Hope alleges that if single people or same-sex couples seek its services, it would refer them to another agency that is willing to provide the services. Thus, it claims, nobody is ultimately denied the ability to adopt a child based on their marital status or sexual orientation, and it has not received inquiries from same-sex couples seeking its services.

Under New York law, only agencies "authorized" by the state may provide adoption services, which include evaluating potential adoptive parents, matching them with children needing placements, supervising placements, and preparing reports to the court that will ultimately decide whether to approve an adoption. State law and regulations set out detailed criteria concerning who may adopt a child and the factors that an approved agency, such as New Hope, are supposed to consider in determining whether it would be in the best interest of a child to be adopted by a particular person or couple.

Although adoption was traditionally limited to married couples, over the years the legislature amended the law to widen the scope of individuals who are permitted to adopt. In 2010, the adoption law was amended to state that an "adult unmarried person, an adult married couple together, or any two unmarried adult intimate partners together may adopt another person." The amendment was intended to reflect court decisions that had allowed the same-sex partners of parents to adopt their children, some going the next step by allowing same-sex couples to adopt. As of 2010, same-sex couples could not legally marry in New York, but the courts had begun to recognize same-sex marriages performed in other jurisdictions, including Canada and several states. When Governor David Paterson signed the bill into law, he stated that the law would not require any agency to change its current practices, since it was "permissive," not mandatory.

The adoption statute authorizes OCFS to adopt regulations to implement the law. In 2011, after the new statutory provision went into effect, OCFS adopted a regulation providing that an applicant to adopt children could not be rejected "solely on the basis of homosexuality." OCFS sent an informational letter to the adoption agencies stating that the purpose of the regulation "is to prohibit discrimination based on sexual orientation in the adoption study assessment process," and that "OCFS cannot contemplate any case where the issue of sexual orientation would be a legitimate basis, whether in whole or in part, to deny the application of a person to be an adoptive parent."

Two years later, OCFS issued a new regulation which requires authorized adoption agencies to "prohibit discrimination and harassment against applicants for adoption services on the basis of race, creed, color, national origin, age, sex, sexual orientation, gender identity or expression, marital status, religion, or disability, and to take reasonable steps to prevent such discrimination or harassment by staff and volunteers, promptly investigate incidents of discrimination and harassment, and take reasonable and appropriate corrective or disciplinary action when such incidents occur."

In 2018, OCFS undertook an audit of every adoption agency's policies and practices. New Hope passed the on-site audit with ease, but when their written policies were reviewed, OCFS took note of the policy of declining services to single people and same-sex couples, and advised OCFS that it needed to change its policy to comply with the non-discrimination policy. New Hope dug in its heels, and eventually OCFS warned New Hope that it would have to close its operation if it would not comply with the non-discrimination policy. Significantly, this did not occur as a result of anybody having been turned away or filed a complaint.

New Hope filed this lawsuit in the U.S. District Court for the Northern District of New York, claiming a violation of its constitutional rights, but the district court dismissed the lawsuit and denied New Hope's request for a preliminary injunction to stop the state from ending their authorized status while the case was pending. The judge, Mae D'Agostino, found that under the U.S. Supreme Court's 1990 decision, *Employment Division v. Smith*, 494 U.S. 872, New Hope was not entitled to claim an exemption from compliance with the law based on its religious beliefs. Justice Scalia's opinion for the Court in that case said that there is no free exercise of religion exemption from complying with state laws of "general application" that are "neutral" regarding religion.

New Hope appealed to the 2nd Circuit, which reversed the district court on July 21. The three-judge panel found, in an opinion by Circuit Judge Reena Raggi, that the complaint filed for New Hope by Alliance Defending Freedom contained sufficient factual allegations to at least raise an issue of whether New Hope had been targeted due to hostility by OCFS

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Arthur S. Leonard, a professor at New York Law School since 1982, edits the monthly newsletter *Lesbian/Gay Law Notes*, and is co-author of *Sexuality Law* (Carolina Academic Press) and *AIDS Law in a Nutshell* (West Publishing Co.). He writes on legal issues for *Gay City News* (New York), and serves as a trustee of the Jewish Board of Family & Children's Services of New York.

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to its religious beliefs. The court's opinion notes that the adoption statute itself does not ban discrimination based on sexual orientation, but rather broadens the previous categories of individuals who are legally authorized to adopt children, leaving some question whether OCFS could adopt a non-discrimination requirement through a regulation. Furthermore, the court noted Governor Paterson's statement when the law was amended to allow unmarried couples to adopt that it was not intended to require any agencies to change their policies, because the statute was merely "permissive." The court also noted in quotations from the correspondence between OCFS and New Hope various statements that could be construed as hostile to or disapproving of New Hope's religious beliefs.

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In light of these and other factors, the court concluded that it was "premature" for the district court to dismiss the case outright. In deciding a motion to dismiss, the trial court is supposed to treat as hypothetically true all the facts alleged by the plaintiff and to decide whether those facts, if proven, might provide the basis for a valid legal claim. And, since the court found dismissal to be premature, it directed the trial court to reinstate the lawsuit on the active docket and to analyze whether New Hope is entitled to a preliminary injunction to allow it to carry on its operations while the case is being litigated.

AUTHOR LOGIN

The court was careful to make clear that was not deciding the merits of the case. The opinion provides a detailed and searching discussion of the concepts of "neutral state laws" (meaning "neutral" regarding religion) and laws that are "generally applicable." The court noted that the Supreme Court has ruled that the rule of *Employment Division v. Smith* does not necessarily apply to situations where a law that looks neutral and generally applicable on its face is shown to have been motivated by government animus towards a particular group or, in the case of religion, animus towards particular religious practices. The court also took note of the Supreme Court's 2018 decision in *Masterpiece Cakeshop*, 138 S. Ct. 1719, in which it reversed a state court ruling that *Masterpiece* violated a public accommodations law by refusing to make a custom wedding cake for a same-sex couple. The reversal was based on the Court's conclusion that the state's civil rights agency had displayed hostility to the baker's religious views in the administrative hearing process.

Government discrimination against religious organizations was also targeted by the Supreme Court this Term when it held that the state of Montana's scholarship program for students attending private schools could not exclude religious schools from participating, since this would be "discrimination" against religion.

The court also rejected the trial court's analysis of New Hope's argument that requiring it to evaluate and endorse same-sex couples as adoptive parents was a form of compelled speech. Judge D'Agostino found that this would be "government speech," because by authorizing New Hope to evaluate applicants the government was delegating to New Hope a governmental function. Judge Raggi's opinion questioned this conclusion, pointing out that New Hope was not a government contractor and was not paid by the government to undertake this activity. Rather, it is an independent agency supported by fees for its services and charitable contributions. New Hope has always avoided taking government money because it wanted to preserve its freedom to operate consistently with its religious beliefs.

The court also took note of the U.S. Supreme Court's decision to review the 3rd Circuit Court of Appeals' decision in *Fulton v. City of Philadelphia*, a case similar in many respects to this case. The 3rd Circuit held that the City did not violate Catholic Social Services' constitutional rights when it dropped that agency from participating in the City's foster care system because of its refusal to deal with same-sex couples. That case also relied on *Employment Division v. Smith*. Judge Raggi observed that at least four justices of the Supreme Court have expressed the view in various dissenting or concurring opinions that the Court should "revisit" the holding of *Smith*, which was a controversial case when it was decided and which provoked Congress into passing the Religious Freedom Restoration Act, which was then imitated by many states (although not New York). If the Supreme Court reverses the *Fulton* decision or modifies *Employment Division v. Smith*, the rules governing the New Hope case will be changed. Judge Raggi also pointed out key distinctions between the two cases. In *Fulton*, the Catholic agency was a city contractor and relied heavily on compensation from the city to perform its services, while New Hope, as noted above, is an independent operator that is "authorized" by the state to perform services but is not a contractor or funding recipient.

The case now goes back to District Judge D'Agostino to consider New Hope's request for a preliminary injunction and to conduct discovery which may culminate in a summary judgment or a trial on the merits if the parties don't settle the case first through some compromise. In light of the pace at which such proceedings take place, it is likely that the Supreme Court will have ruled in *Fulton v. City of Philadelphia* before Judge D'Agostino has to render a final decision on the merits in New Hope's case.

Judge Raggi was appointed to the Court of Appeals by President George W. Bush. She previously served on the District Court, having been appointed by President Ronald Reagan.

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