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Court Says Business With Religious Objections May Discriminate

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Court says business with religious objections may discriminate

BY ARTHUR S. LEONARD

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The John Minor Wisdom US Courthouse, home of the Fifth Circuit Court of Appeals in New Orleans.

The US Court of Appeals for the Fifth Circuit, with jurisdiction over the states of Texas, Louisiana and Mississippi, ruled on June 20 that a Texas company whose owner has religious objections to Equal Employment Opportunity Commission (EEOC) guidance about the federal non-discrimination rights of LGBTQ applicants and employees under Title VII of the Civil Rights Act of 1964 is entitled to a statutory exemption under the federal Religious Freedom Restoration Act (RFRA), as protection from EEOC enforcement activity (investigations and lawsuits) on behalf of such individuals.

The ruling in Braidwood Management Inc. v EEOC affirmed part of a decision by US District Judge Reed O'Connor, while reversing some other parts in a way that significantly narrowed the scope of Judge O'Connor's ruling, particularly by vacating his certification of the case as a class action. Thus, the Fifth Circuit approves a religious exemption only for three businesses owned by Braidwood Management, which employs approximately 70 individuals. Under Judge O'Connor's class certification ruling, the EEOC would have been barred from enforcement activity against any employer in the country holding religious objections to employing LGBTQ people, despite the Supreme Court's determination in 2020 that employers subject to Title VII may not discriminate because of sexual orientation or transgender status. The appeals court found that the description of the plaintiff classes that Judge O'Connor had certified was too broad, subjective, and vague, and needed to be reconsidered by the trial court.

Despite this limitation, however, the ruling establishes a precedent for the federal district courts within the Fifth Circuit, and might be cited as a persuasive precedent by other federal courts in cases brought by the EEOC against other employers with religious objections.

In his opinion for the three-judge Fifth Circuit panel, Circuit Judge Jerry E. Smith observed that the Supreme Court's 2020 ruling in Bostock v. Clayton County, which held that claims of employment discrimination because of sexual orientation and transgender status could be covered as sex discrimination claims under Title VII, had not directly addressed how the Supreme Court's ruling would affect employers with religious objections. As a result, wrote Judge Smith, the question of reconciling religious free exercise claims by employers with the non-discrimination rights of employees were "issues of first impression" for the court of appeals.

In Bostock, Supreme Court Justice Neil Gorsuch identified "three potential avenues of legal recourse for religious and faith-based employers to shield themselves from any potential infringement of their religious rights," wrote Judge Smith. These "avenues" are Title VII's "religious exception," the "ministerial exception" developed by the Supreme Court under the First Amendment's Free Exercise Clause, and RFRA, which Gorsuch characterizes as a "super statute" that may supersede the requirements of other federal statutes "in appropriate cases" by limiting the enforcement power of the federal government. Justice Gorsuch did not identify what would be "appropriate cases."

The express "religious exception" in Title VII appears rather narrow. It says that a religious institution may refer co-religionists in its employment practices, thus carving out an exception to Title VII's ban on employment discrimination because of an individual's religion. The First Amendment "ministerial exception," not mentioned in the constitution but developed by the Supreme Court as an "interpretation," shields religious institutional employers from any Title VII liability regarding individuals who can be considered "ministerial employees," those employed specifically to advance the religious mission of the institution. The Supreme Court has interpreted this broadly in recent years.

Finally, RFRA states that the federal government may not impose a substantial burden on a person's free exercise of religion unless the government has a compelling purpose for doing so and uses the least intrusive method of achieving that purpose. The Supreme Court has yet to announce whether RFRA applies to private litigation between individual plaintiffs and employers, but most federal courts have interpreted the language to apply only to enforcement activity (including lawsuits) by the government. In the context of the Braidwood case, issuing a guidance that fails to account for religious objects is considered by the Fifth Circuit panel to be such a "substantial" burden, since it could "chill" an employer from enforcing its protected religiously-based policies.

After the Supreme Court decided the Bostock case, the EEOC issued a "guidance" document spelling out employers' non-discrimination obligations regarding sexual orientation and gender identity under Title VII. Braidwood Management and Bear Creek Bible Church filed their lawsuit claiming to be exempt from the Title VII requirements spelled out in the EEOC's guidance because of their religious beliefs. Steven Hotze, who owns Braidwood, claims that he runs its businesses as "Christian" businesses, in conformity with his religious beliefs. According to Judge Smith's summary of the complaint, Hotze "does not permit Braidwood to employ individuals who engage in behavior he considers sexually immoral or gender non-conforming, nor does he allow Braidwood to recognize homosexual marriage," which he says would "lend approval to homosexual behavior and make him complicit in sin." Bear Creek Bible Church, a non-denominational church with both ministerial and non-ministerial employees, claims exemption from Title VII for similar policies.

Read more about this case at gaycitynews.com.