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Lawyer Insights

Fifth Circuit Carves Out Religious Exemption to LGBTQ+ Discrimination Claims

By Holly Williamson and Veronica Torrejon
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In what could be a potentially significant carve out, the U.S. Court of Appeals for the Fifth Circuit has held that areligious employer is not bound by the same anti-discrimination laws that apply to others who employ LGBTQ+ workers.

In the case titled Braidwood Mgmt., Inc. v. EEOC, which was handed down on June 20, the Fifth Circuit held that Braidwood Management Inc. ("Braidwood"), a faith-based for-profit management company, cannot be sued by the EEOC over its policy prohibiting employees from engaging in homosexual or gender non-conforming conduct.

The policy in Braidwood would otherwise violate the anti-discrimination laws as interpreted in the landmark U.S. Supreme Court decision titled Bostock v. Clayton County, Ga., which granted anti-discrimination protections to LGBTQ+ workers. However, the Fifth Circuit noted that in Bostock the Supreme Court specifically left room for future challenges by religious employers and even provided a roadmap for such challenges by way of the Religious Freedom Restoration Act of 1993 ("RFRA").

Landmark Supreme Court Holding in Bostock

In Bostock, the Supreme Court held that Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on an employee's sexual orientation and/or transgender status. Though Title VII does not expressly mention "sexual orientation" or "transgender," the Supreme Court held that "homosexuality and transgender status are inextricably bound up with sex" and that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." For that reason, the Court held that discrimination based on gender identity or sexual orientation is sex discrimination under Title VII.

The case, which was handed down on June 15, 2020, did leave the unanswered question regarding the intersection of Title VII and "religious liberties." The Supreme Court acknowledged, albeit in dicta, the tension between these principles—namely, an employee's right to be free from discrimination at work and an employer's right to the free exercise of religion. The Court, however, noted other avenues for religious employers to seek redress, including the RFRA.

The Supreme Court explained that the "RFRA operates as a kind of super statute, displacing the normal operation of other federal laws" and opined that the RFRA "might supersede Title VII's commands in appropriate cases." Ultimately, however, the Court concluded that the intersection between religious liberty and Title VII was a question for "future cases."

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Fifth Circuit Fills the Gaps Left by SCOTUS in Bostock

Approximately three years after the Bostock decision, the Fifth Circuit Court has now attempted to answer the questions left by the Supreme Court in Bostock with a ruling that carves out an exemption to Title VII for religious and faith-based employers.

The Braidwood case was prompted by guidance issued by the U.S. Equal Employment Opportunity Commission("EEOC") on the scope of the Bostock decision. Notably, the agency did not carve out a specific exemption for religious employers. Braidwood and Bear Creek Bible Church, a nondenominational church that also brought the case, argued that Title VII as interpreted by Bostock and the EEOC guidance violates their religious liberty by preventing them from operating in accordance with their Christian beliefs.

The threshold issue in the case was standing. Generally, the EEOC has not enforced Title VII's prohibitions against religious employers. For this reason, the EEOC argued that because it had not initiated any enforcement action against the plaintiffs, there was no legal standing for the plaintiffs to pursue their claims. The Fifth Circuit, however, disagreed, finding a "credible threat" that the plaintiffs will face enforcement actions for their policies.

The policies in question were a sex-specific dress code that strictly forbids "cross-dressing," and a requirement that employees must use a restroom that corresponds to their biological sex, regardless of any asserted gender identity. Bear Creek also has a no-hire policy for "practicing homosexuals, bisexuals, crossdressers, or transgender or gender non-conforming individuals." Also, the church has stated that employees who enter "homosexual marriage" will be fired.

Under Bostock and the corresponding EEOC guidance, such policies and practices would be unlawful. However, the Fifth Circuit held that that the EEOC's failure to provide the plaintiffs an exemption from Bostock violates the RFRA. The RFRA provides that the federal government "shall not substantially burden a person's exercise of religion" unless the burden furthers a "compelling governmental interest" and is "the least restrictive means of furthering" that interest.

On the burden question, the Fifth Circuit concluded that "[b]eing forced to employ someone to represent the company who behaves in a manner directly violative of the company's convictions is a substantial burden and inhibits the practice of [the plaintiffs'] beliefs."

On the government's interest, the Fifth Circuit concluded that, "[a]lthough the Supreme Court may someday determine that preventing commercial businesses from discriminating on factors specific to sexual orientation or gender identity is such a compelling government interest that it overrides religious liberty in all cases, it has never so far held that."

Religious Employers Should Proceed with Caution

Religious and faith-based employers should not take the Braidwood decision as a blanket permission to ignore the anti-discrimination laws that conflict with their religious principles. This is particularly true for employers outside of the Fifth Circuit jurisdiction in Texas, Mississippi and Louisiana.

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It should also be noted that, in Braidwood, the Fifth Circuit reversed the lower court's ruling granting class action certification, which would have otherwise applied the holding to a broad group of for-profit businesses. It remains to be seen whether other circuit courts will follow the Fifth Circuit's carve out to Title VII for religious employers or if the Supreme Court will ultimately weigh in on the issue.

If followed by other circuit courts or, ultimately, blessed by the Supreme Court, the reasoning in Braidwood could prove to be a significant carveout to the anti-discrimination laws—exempting not just religious organizations but for-profit businesses owned by religious employers. Notably, Braidwood is a for-profit business, not a religious organization. Braidwood's owner is a self-described Christian who runs a Christian business.

For now, however, religious employers should proceed with caution.

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