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Fifth Circuit Holds That Religious Employers May Be Entitled to Exemptions from Title VII's LGBTQ+ Requirements

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In *Braidwood Management, Inc. v. Equal Employment Opportunity Commission*, the United States Court of Appeals for the Fifth Circuit held that religious employers may be exempt from Title VII requirements concerning sexual orientation and gender identity discrimination if those requirements are found to substantially burden the employer's religious beliefs. A matter of first impression, this is the first appellate case that attempts to reconcile federal religious liberty protections with *Bostock*—the 2020 U.S. Supreme Court case which interpreted Title VII's prohibition against discrimination "on the basis of sex" to include discrimination on the basis of sexual orientation and gender identity. In *Braidwood*, the Fifth Circuit sided with the religious employer, reasoning that "a generalized interest in prohibiting all forms of sex discrimination in every potential case" is not a sufficiently compelling interest that justifies substantially burdening an employer's religious exercise.

In *Braidwood*, the plaintiff, a Christian-owned management company, filed a class action lawsuit against the Equal Employment Opportunity Commission (EEOC). The company sought a declaratory judgment that Title VII's prohibitions against sex discrimination, as applied to sexual orientation and gender identity, violated the First Amendment and the federal Religious Freedom Restoration Act (RFRA). The company also sought judgments that Title VII neither prohibits discrimination against bisexual individuals nor does it prohibit employers from establishing sex-neutral rules of conduct (regarding issues like sex-separated bathrooms, gendered dress codes, and employer policies related to transgender healthcare).

The root of this dispute lies in a 2020 Supreme Court case that interpreted Title VII's words "on the basis of sex." In *Bostock v. Clayton County*, the Supreme Court held that sex is a "but for" cause of sexual orientation and gender identity discrimination. Thus, under Bostock's reasoning, an employer violates Title VII if it discriminates against people who are transgender or have same-sex attraction. However, even in *Bostock*, the Supreme Court did not address how its decision would affect employers with religious convictions. It offered two potential routes for future litigants: the First Amendment's free exercise clause and RFRA.

RFRA was unanimously enacted in 1993 as a reaction to a Supreme Court opinion that changed the standard for determining whether the government had burdened an individual's free exercise rights. RFRA, in the words of *Bostock*, acts "as a kind of super statute, displacing the normal operations of other federal laws." It sets the standard for how much Congress can burden an individual's right to free exercise of religion: if a government action substantially burdens an individual's free exercise rights, the action is only valid if the government can prove that its action is the least restrictive means of furthering a compelling government interest. While RFRA is just a statute, and thus can be legislatively overridden at any time, Congress must explicitly choose to do so, which is not the case with Title VII.

Braidwood is one of the first cases to address the issue anticipated by the Bostock Court: how does *Bostock's* interpretation of "on the basis of sex" interact with employers' free exercise rights under RFRA?

Using RFRA's strict scrutiny test as the basis of its analysis, the district court in *Braidwood* held that religious employers are exempt from Title VII's requirements to "hire, retain, and accommodate employees who conduct themselves contrary to the employer's views regarding homosexuality and gender identity." The court found that Title VII substantially burdened the employer's religious exercise by requiring it "to choose between two untenable alternatives"—either violating Title VII or violating their religious convictions.

Regarding the other "scope of Title VII" claims, the district court decision was a mixed bag. It agreed with the plaintiff that sex-neutral policies related to sexual conduct, dress codes, and bathrooms do not violate Title VII. On the other hand, it granted summary judgment to the EEOC on two claims: first, that Title VII prohibits discrimination against people with bisexual orientation, and second, that employers may not regulate "sex-reassignment surgery and hormone treatment" therapy.

Both parties appealed. On appeal, the Fifth Circuit mostly agreed with the district court. The Fifth Circuit held that the Christian management company is exempt from Title VII, as interpreted by *Bostock*, because compliance would substantially burden its ability to operate according to the owner's religious beliefs. It also declined to find the EEOC's "generalized interest in prohibiting all

forms of sex discrimination in every potential case" to be a sufficiently compelling interest to justify burdening an employer's religious exercise rights.

The Fifth Circuit went no further, however. It vacated the district court's judgments regarding the scope of Title VII. In other words, this decision did not address whether Title VII prohibits employers from establishing sex-neutral rules of conduct (regarding issues like sex-separated bathrooms, gendered dress codes, and employer policies related to transgender healthcare). It also did not address whether Title VII prohibits discrimination against bisexual individuals.

What this means to you

Braidwood holds that religious employers may be exempt from Title VII requirements concerning sexual orientation and gender identity if those requirements are found to substantially burden the employer's religious beliefs. *Braidwood* was decided by the Fifth Circuit. For Louisiana, Mississippi, and Texas employers, this is binding precedent. For employers in other states, *Braidwood* is not binding precedent (though it may prove to be persuasive).

Colleges and universities that have religious objections to Title VII's anti-discrimination requirements are now on stronger footing in asserting a religious liberty defense to Title VII enforcement.

Contact us

For more information about the implications of this ruling for your institution, please contact your Husch Blackwell attorney, Derek Teeter, or Michael Raupp. We express our appreciation to Bernadette Shaughnessy for her commitment and assistance in researching, writing, and editing this Alert.

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