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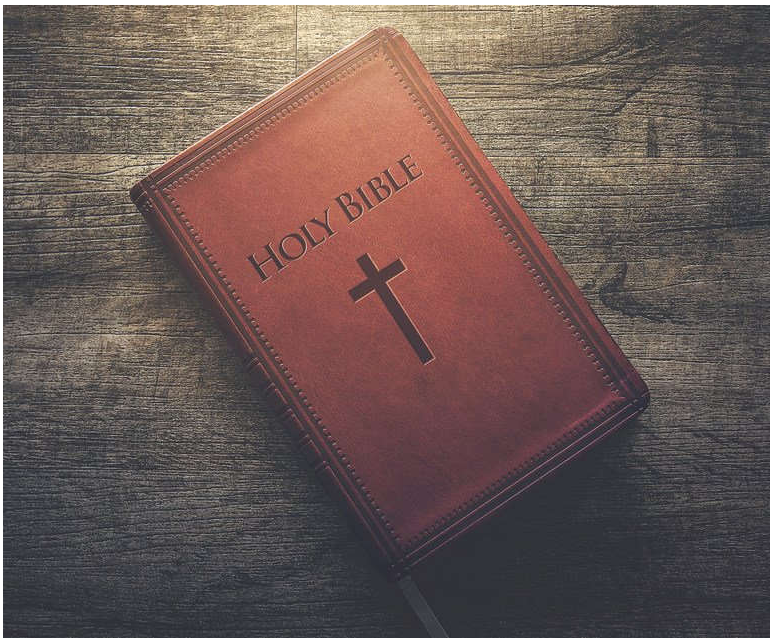

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COMMENTARY

Why a Texas District Court Ruled That Religious Employers Are Exempt From Title VII's Prohibition of Sex Discrimination Against LGBTQ Employees

Braidwood asserted that its constitutional right of free association, which includes the right to not associate, compels an exemption from Title VII.

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Constitutional Law
By Robert W. Small

Bear Creek Bible Church & Braidwood Management v. Equal Employment Opportunity Commission, Civil Action No. 4:18-cv-00824-O (U.S.D.C. N.D. Texas) (October 21, 2021), is an important case dealing with exemptions for religious institutions from the prohibition under Title VII of the Civil Rights Act of 1964 of sexual discrimination against the LGBTQ and transgender communities.

‘In the Beginning,’ There Was ’Bostock’

For many years it was debated whether Title VII’s prohibition of sex discrimination in employment applied to homosexuality and transgender status. That debate ended with *Bostock v. Clayton County,* 140 S.Ct. 1731 (2020), in which the U.S. Supreme Court resolved that issue in the affirmative. *Bostock,* however, explicitly left for another day several issues. *Bear Creek* resolves many of those issues. Although those issues are important, *Bear Creek* likely will have importance only to a narrow field of employers.

Facts

Bear Creek Church is a nondenominational church. It requires its employees to live according to biblical teachings on matters of sexuality and gender. It does not recognize same-sex marriage. Employees who enter into a same-sex marriage will not receive benefits for their same-sex partner and face dismissal. It requires employees to use the restroom designated for their biological sex. It does not consider for employment for any ministerial or non-ministerial position practicing homosexuals, bisexuals, crossdressers, transgender or gender non-conforming individuals.

Braidwood Management Inc. employees work in one of three businesses, each of which is owned or controlled by Dr. Steven Hotze. Hotze operates his businesses as Christian businesses. Braidwood does not employ individuals who engage in homosexual behavior or gender non-conforming conduct of any sort. Braidwood does not recognize same-sex marriage or extend benefits to an employee’s same-sex partner because Hotze believes that would lend approval to homosexual behavior and make him complicit in sin, violating his sincerely held religious beliefs. Braidwood does not permit employees to use restrooms designated for members of the opposite biological sex—regardless of the gender identity the employee asserts.

Braidwood enforces a sex-specific dress-and-grooming code that requires men and women to wear professional attire according to their biologically assigned sex. Crossdressing of any sort is strictly prohibited. Braidwood enforces this sex-specific dress-and-grooming code to maintain the professionalism of its businesses and to carry out Hotze’s belief that the Bible requires men to dress as men and women to dress as women.

The Plaintiffs’ Claims

The church and Braidwood commenced a declaratory judgment action asserting that under proposed enforcement guidance published by the EEOC the above-described employment policies subjected them to suit and civil penalties for violations of Title VII. They asserted five independent claims: (1) The Religious Freedom Restoration Act (RFRA) compels exemption to *Bostock’s* interpretation of Title VII; (2) the free-exercise clause of the U.S. Constitution compels exemptions to *Bostock’s* interpretation of Title VII; (3) the First Amendment right of expressive association compels exemptions to *Bostock’s* interpretation of Title VII; (4) Title VII, as interpreted in *Bostock* does not prohibit discrimination against bisexual employees; and (5) Title VII, as interpreted in *Bostock* does not prohibit employers from establishing sex-neutral rules of conduct that exclude practicing homosexuals and transgender people.

Class Certification

The plaintiffs sought to certify two classes: (1) every employer in the United States that opposes homosexual or transgender behavior for sincere religious reasons; (religious employers) and (2) every employer in the United States that opposes homosexual or transgender behavior for religious or nonreligious reasons (all opposing employers). Class certification is important because it extends the effect of the court’s ruling beyond the parties before it and, conceivable, nation-wide.

The court modified the proposed Religious Employers Class, to two religious subclasses: Church-Type Employers and Religious Business-Type Employers. It noted that Bear Creek Church and members of the Church-Type Employers Class

operate as religious nonprofits. Church-Type Employers tend to explicitly state a religious purpose in their organizational documents and carry out their mission through instruction, prayer, and worship. It ruled that members of the Church-Type Employers Class qualify as religious organizations for purposes of the express statutory religious exemption to Title VII. (That exemption is discussed below.)

As to Braidwood and members of the Religious Business-Type Employers Class, the court noted that they are for-profit entities producing a secular product. Although faith might be a motivating part of those businesses' missions, their incorporating documents generally do not include a religious purpose. It held that the Church-Type Employers Class did not satisfy the commonality requirement for class certification on any Title VII claim. It also held, however, that Church-Type Employers could qualify as "religious organizations" under the statutory exemption. The court also found that the All Opposing Employers class did not satisfy the commonality prong on its expressive association claim and denied certification on that basis except as to claims 4 and 5 above.

Resolution as to the Church

Regardless of its employees' ministerial or non-ministerial status, an employer may be exempt from Title VII entirely if it qualifies as a "religious employer." Title VII's religious accommodation exemption provides in relevant part:

"[Title VII] shall not apply to … a religious corporation, association, educational institution, or society 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."

There is disagreement among the circuits as to the scope of this exemption with some holding that it does not exempt religious educational institutions from all claims of discrimination but merely holds that they may employ members of their own faith without fear of being sued for religious discrimination. (See e.g., *Boyd v. Harding Academy of Memphis,* 88 F.3d 410, 413 (6th Cir. 1996).) Other circuits have held that the exemption is broader such that a religious school is exempt entirely from suit under Title VII for sex discrimination. (See. e.g., *EEOC v. Mississippi College,* 626 F.2d 477, 485 (5th Cir. 1980).)

The *Bear Creek* Court adopted the broader view, holding that Title VII's prohibition "'shall not apply'" to religious employers who desire to "'employ only persons whose beliefs and conduct are consistent with the employer's religious precepts.'" Under this view, a religious employer is not liable under Title VII when it refuses to employ an individual because of sexual orientation or gender expression, based on religious observance, practice, or belief. This definition made it easy for the court to categorically determine that the church was exempt from liability under Title VII in enforcing the above policies. As the church was exempt from Title VII by virtue of the statutory exemption, the court ruled that it did not require protection under RFRA and was free to enforce its policies under its exemption from Title VII.

Braidwood's RFRA Claim

The court held that, notwithstanding that Braidwood incorporated religious values into its business model, it did not qualify as a religious institution for purposes of the Title VII exemption. As to Braidwood's RFRA claim, however, the court found that statute applicable.

In *Burwell v. Hobby Lobby Stores,* 573 U.S. 682, 720 (2014), the court held that requiring individuals to "engage in conduct that seriously violates their religious beliefs" imposes a substantial burden on their exercise of religion. When an employer sincerely believes that conduct demanded by the government violates its religious belief, courts are forbidden from questioning the reasonableness of that belief. RFRA requires the EEOC to accept the sincerely held complicity-based objections of religious entities. (That is, engaging in government demanded action would make the business "complicit" in what it views as sinful conduct of others.) Similarly, the EEOC may not tell an employer that its beliefs are flawed because, the EEOC views the connection between what the objecting parties must do and the end

they find to be morally wrong is too attenuated. Furthermore, to be sincerely held and merit First Amendment protection, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others." *Thomas v. Review Board of Indiana Employment Security Division,* 450 U.S. 707, 714 (1981).

Finding that Braidwood held a sincere religious belief that conflicted with the EEOC's announced enforcement guidance, the court considered whether Title VII as so enforced would substantially burden Braidwood's ability to conduct its business in accordance with its religious beliefs. To establish a substantial burden, Braidwood was required to (1) identify the religious exercise; (2) establish that the challenged law pressured it to modify that exercise; and (3) show that the penalty for noncompliance is substantial. Citing *East Texas Baptist University v. Burwell*, 793 F.3d 449, 456 (5th Cir. 2015), vacated and remanded sub nom. *Zubik v. Burwell*, 578 U.S. 403 (2016), and cert. granted, judgment vacated sub nom. *University of Dallas v. Burwell,* 136 S. Ct. 2008 (2016). Braidwood claimed to have a "sincere and deeply held religious beliefs that marriage is limited to a man and a woman, that sex is to be reserved for marriage, and that men and women are to dress and behave in accordance with distinct and God-ordained, biological sexual identity." *Bear Creek* at. 45

The court held that Braidwood satisfied this three-prong test. First, it found no dispute that Title VII substantially burden Braidwood's religious exercise in conducting its business. Next, it concluded that Title VII placed it in the untenable position of either having to violate Title VII by obeying its religious conviction or of violating those convictions by obeying Title VII. Braidwood satisfied the third prong of the test because if it did not comply with Title VII it faced an enforcement action by the EEOC with attendant financial consequences.

The court also found that the EEOC could not overcome Braidwood's concerns by what the court found to be an overly broad articulation of a compelling government interest of irradicating workplace discrimination and assertion that RFRA provides "no protection for 'discrimination in hiring … cloaked as religious practice." The court noted that "rather than rely on "'broadly formulated interests,' courts must 'scrutinize[ ] the asserted harm of granting specific exemptions to particular religious claimants.'" Citing *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021); and *Hobby Lobby*, 573 U.S. at 726 (holding that the government's formulation of its compelling interest as "public health" and "gender equality" is overly broad). The court found that "the relevant question, rather, is whether the government has a compelling interest in denying employers like Braidwood a religious exemption. See *Fulton,* 141 S. Ct. at 1881. The court remarked that carve-outs from Title VII's application undermined the EEOC's argument that Title VII is meant to eradicate "all forms" of discrimination. *Id.* at 47 Nt. 22. For these reasons, the court granted Braidwood's motion for summary judgment on its RFRA Claim.

Braidwood's First Amendment Claim

The free exercise clause of the First Amendment does not exempt an individual or business from complying with a law that places a merely incidental burden on religious exercise so long as that law is facially neutral and generally applicable. *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 878-79 (1990), Where a law provides secular exemptions to its non-discriminatory requirements those requirement are not generally applicable, requiring courts to apply strict scrutiny where the statute does not similarly exempt cases of religious hardship. The *Braidwood* court noted that Title VII exempts businesses with fewer than 15 employees and permits employers to fire an employee if the employee is a member of the Communist Party of the United States or affiliated with a Communist-front organization. Title VII also permits employers on or near Indian reservations to discriminate on the basis of race or national origin in favor of Indians. It found that these "secular" exemptions required similar exemption based on religious objection.

Braidwood's Right of Association Claim

Braidwood asserted that its constitutional right of free association, which includes the right to not associate, compels an exemption from Title VII. In *Boy Scouts of America v. Dale,* 530 U.S. 640, (2000), the court held that the right of expressive association prevails over anti-discrimination laws, for which reason the Boy Scouts did not have to admit homosexuals to its membership. Freedom of association may be overridden, however, "by regulations adopted to serve

compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." The court found that Braidwood's employment policies constituted an expression of it religious views bringing it within the ambit of the freedom of association protection of the First Amendment. The court also found that under *Boy Scouts of America* the government did not have a sufficiently compelling reason to require Braidwood to employ homosexuals in violation of its expressive employment policies.

Plaintiff's Sex-Neutral Rules of Conduct Claim

Both the church and Braidwood claimed that even after *Bostock,* Title VII permits both religious and nonreligious employers to have sex-neutral codes of conduct that govern their employees and that they can maintain such rules notwithstanding they might have a disparate impact on homosexual or transgender behavior. The test under *Bostock* is simple to articulate: "Keeping all things the same, would the discrimination not have happened but for the employee's biological sex?" If the prohibited motive is not a "but-for" cause of an employment action then, by definition, it did not make a difference in the outcome. Application of the test is not quite so simple. The issue arises whether the test means that there merely is to be no favoritism based on sex (e.g., men and women are subjected to the same standard) or that there must be abject blindness to sex (e.g., sex is not relevant to employment decisions such that treating a male employee differently from a female employee with regard to a secondary trait will violate Title VII if the secondary trait necessarily relates to sex.) *Bostock* does not answer that question, at least not with clarity.

The *Bear Creek* Court adopted a "favoritism plus blindness" standard if a secondary trait is either homosexuality or transgenderism. The court found this to be the necessary standard because the mere favoritism test would not subject an employer to Title VII liability in the situation where it would fire both males and females who are homosexual or transgender. In that scenario the favoritism test is satisfied because neither biological men nor women would be treated worse than the other, but the employer would not be blind to sex when deciding to fire an individual due to homosexual or transgender identity. Appling a "favoritism plus" test to Braidwood's policies against bisexual conduct the court ruled that such policies target sex and violate Title VII because they affect only bisexual individuals.

Braidwood's Sexual Activities Policy

Braidwood argued that both religious and non-religious employers may terminate the employment of an employee who engages in some form of sexual conduct that is prohibited by the employer's policies. The court agreed but only to the extent that the policies regulating sexual conduct do not target solely homosexual or transgender activities. The court noted that: "*Bostock* does not protect sexual conduct; it protects employees from being treated differently based on their biological sex, which is an immutable characteristic distinct from sexual conduct itself." Accordingly, policies that require employees to refrain from sexual activities such as sodomy, premarital sex, adultery, and any other kinds of sexual activity that occur outside the context of a marriage between a man and a woman are permitted because such prohibitions do not apply exclusively to bar homosexual conduct.

Braidwood's Dress Code Policies

The All Opposing Employers Class maintained that it should be able to enforce a dress code to uphold professionalism in the workplace. Braidwood and the Religious Business-Type Employer Class asserted that they should be able to enforce a dress code in accordance with their religious beliefs about biological sex.

The court held that these rules apply evenly to those who identify with their biological sex and to transgender individuals. For example, the policy required men to wear slacks. A male employee who wore jeans and a male-to-female transgender employee who wore dresses would be equally in violation of the rule. As the dress code is enforced evenhandedly, (unlike Braidwood's policies regarding hormone treatment and genital surgery which targeted transgender individuals and were found unlawful,) the court found that the dress code policy did not violate Title VII.

Braidwood's Sex-Specific Bathroom Policy

The court noted a long judicial history of courts recognizing a need for privacy in bathrooms and locker rooms to protect individuals with anatomical differences based on biological sex. It held that, as with sex-specific dress codes, sex-specific bathrooms based on biological sex did not offend Title VII.

Conclusion

Bear Creek Church confronts head on many of the issue left open in *Bostock.* Its holdings almost certainly will be controversial but they are not without reason, nor are they unsupported by authority. Whether that reasoning and the authority the court relied on ultimately will be accepted by other District or appellate courts remains to be seen.

Robert W. Small *is a partner with Reger Rizzo & Darnall in Philadelphia. He has guided employers in dealing with commercial legal issues, especially those related to employment matters. He advises business how to avoid the expensive and distracting morass of employment-related litigation with timely and proactive advice that enables employers to avoid courtrooms and focus their assets and energy on business operations. He both counsels and sits on boards of directors thereby gaining a deep appreciation for the breadth of concerns corporate managers regularly face. He can be reached at rsmall@regerlaw.com.*