

TRIAL COURT HOLDS THAT TITLE VII'S RELIGIOUS EMPLOYER EXEMPTION DOES NOT BAR A SEXUAL ORIENTATION DISCRIMINATION CLAIM

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RELIGIOUS ORGANIZATIONS ADVISORY

In what appears to be the first case directly addressing the issue, a U.S. District Court judge recently ruled that Title VII's exemption for religious employers does not bar a claim of employment discrimination based on sexual orientation. In *Starkey v. Roman Catholic Archdiocese of Indianapolis*, No. 1:19-cv-03153 (S.D. Ind. October 21, 2020),¹ a guidance counselor sued her employer, a Roman Catholic high school, alleging the school declined to renew her contract after learning she was in a civil union with another woman. The school required its employees to respect the Catholic Church's religious beliefs on human sexuality by refraining from conduct at odds with the church's teachings, but it did not require the guidance counselor to be Catholic or to agree with such teachings.

The school asked the court to dismiss the counselor's lawsuit, arguing that Title VII permits a religious employer to require its employees to act in accordance with its religious beliefs. Specifically, Title VII's religious employer exemption states that Title VII "shall not apply" to a religious organization "with respect to the

employment of individuals of a particular religion. . . ."

The court rejected the school's position, holding instead that the exemption applies only to employment actions that discriminate solely on the basis of religion, not to actions that discriminate both on the basis of religion and another category protected under Title VII. The court then held that the facts asserted (but not yet proven) by the guidance counselor would support a plausible claim of discrimination based on sexual orientation, which the U.S. Supreme Court recently held to be part of the protected category of "sex" under Title VII, *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

This case will likely be the first of many to consider the extent to which Title VII's religious employer exemption protects employment actions related to religious beliefs about human sexuality and marriage. Indeed, this court's interpretation of the religious employer exemption could be reversed on appeal, as the holding seems to ignore the actual religious exemption language in Title VII and then presumes the intent of Congress based on the rest of the language (and perhaps

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the court's own policy preference), without relying upon any other authority.

We recently presented a webinar for the Evangelical Council for Financial Accountability that discusses in some detail practical responses religious employers should consider in light of these general legal developments, which you can watch here² (registration required). This particular case highlights two points:

A SHARED BELIEF STANDARD MAY BE MORE PROTECTED UNDER TITLE VII.

If the school in this case had required the guidance counselor to share its beliefs about human sexuality and marriage, then the school's employment action may more clearly have been tied not to the employee's sexual orientation but instead to the employee's lack of shared religious beliefs. Although many religious employers may not require all of their employees to share all of their beliefs, they should carefully consider exactly which beliefs they do require employees to share. They might even consider requiring a shared belief that individuals should abide by the distinct religious standards of the employer's faith community while serving within that community (perhaps relying upon Bible passages such as I Corinthians 9:19-23).

THERE MAY BE BROADER CONSTITUTIONAL PROTECTIONS.

In another recent decision, *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2066 (2020), the U.S. Supreme Court held that employment discrimination laws like Title VII do not apply at all to employees who play "a vital part in carrying out the mission of the [religious employer]." The Court further noted that "[a] religious institution's explanation of

the role of [its] employees in the life of the religion in question is important." *Id.* Religious employers should accept the Court's invitation and proactively define how their employees play a vital part in carrying out their missions.

QUESTIONS

Please contact us if you would like to discuss how your organization can implement these steps. ©2020 Sherman & Howard L.L.C. has prepared this newsletter to provide general information on recent legal developments that may be of interest. This advisory does not provide legal advice for any specific situation and does not create an attorney-client relationship between any reader and the firm. Click [HERE](#) to receive S&H Advisories and invitations to events.

NOTES:

1. See <http://media.ibj.com/Lawyer/websites/opinions/index.php?pdf=2020/october/starkey.pdf>
2. See <https://www.ecfa.org/ProductDownload.aspx?ProductID=317>